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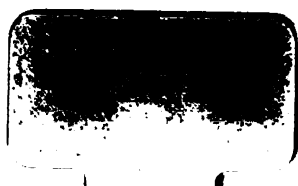
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THE  
LAW OF WATERS  
AND  
WATER RIGHTS

INTERNATIONAL, NATIONAL, STATE, MUNICIPAL, AND INDIVIDUAL  
INCLUDING  
IRRIGATION, DRAINAGE, AND MUNICIPAL WATER SUPPLY.

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By

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ASSOCIATE EDITOR OF  
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### I. POWER AND DUTY OF PUBLIC WITH RESPECT TO DRAINAGE.

**170. Of state.**—The health, prosperity, and welfare of a community is largely dependent upon its freedom from stagnant bodies of standing water, and from a soil so saturated with water as to render it unprofitable for cultivation, and deleterious to the health of persons attempting to live upon it. The creation of conditions favorable to the maintenance of a large and prosperous population is an object to which a government may rightfully direct its attention. In fact, the branch of the prerogative of the government known as the police power has for one of its objects the attainment of this very end. Since the drainage of wet and malarious districts is necessary to the creation of conditions favorable to the maintenance of a dense population, such drainage is within the proper exercise of the police power of the state.

The legislature may, therefore, direct its attention to that object, and may, for the attainment of its ends, call into exercise the right of eminent domain and the taxing power, when these powers can be used without exceeding their legitimate bounds.<sup>1</sup> The legislature may designate the means by which its object shall be accomplished, and it may authorize the proceedings to be undertaken by its direct representatives, or instituted by persons directly interested in the proceeding, and it may give existing tribunals or local subdivisions of the state jurisdiction over the proceedings, or provide for the organization of a special local subdivision to accomplish the purpose intended. And a corporation which is organized for the drainage of a tract of land is not private, but is a political subdivision of the state.<sup>2</sup> The question of house drainage is also one which is so vitally connected with the health and welfare of the inhabitants of an organized community that the municipal corporation may be given authority to provide for it and to carry the proceedings to a termination. The public responsibility with respect to drainage has been recognized from a very ancient time. In the case of the *Isle of Ely*,<sup>3</sup> involving the powers of commissioners of sewers, it was said that, by the common law, before the statute of 6 Hen. VI, chap. 5, creating the commissioners of sewers, the King ought, of right, to save and defend his realm as well against the sea as against the enemy,—that it should not be drowned or wasted; and also provided that his subjects have free passage through the realm by bridges and highways in safety; and therefore, if the sea walls be broken, or the sewers or gutters are not scoured, that the fresh waters cannot have a direct course, the King ought to grant a commission to inquire into and hear and determine these defaults. That at common law the ancient walls, gutters, and sewers might be repaired or new made, but no new walls, gutters, or sewers by force of the said commission might be made. The same power, and no greater power, was given to commissioners of sewers. No one could be taxed by the commissioners of sewers for the reparation of a sea wall or sewer but those who had prejudice, damage, or disadvantage by such nuisance or defaults, and who might have benefit and profit by the reformation or removing of them. The tax ought to be of the quantity of lands, tenements, and rents, and by the number of acres and perches. The commissioners of sewers cannot levy a tax in gross upon a town, but it must be particular, according to the express words, upon every owner or possessor of land, tenements, rents, etc.

<sup>1</sup>*Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824. <sup>2</sup>*Jer.*, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721.

<sup>3</sup>*Mound City Land & Stock Co. v. Mil-* <sup>4</sup>10 Coke, 141a.



In a later case, however, it was said that a commission of sewers to defend the Kingdom against the sea is very ancient, and even by special prescription in some cases. But sewers for amelioration of land are by act of Parliament.<sup>4</sup> The creation and supervision of drains comes properly within the police power of the state.<sup>5</sup> And drainage laws are generally upheld as constitutional and valid so far as the power to create the drain is concerned.<sup>6</sup>

The legislature may provide for, and compel the clearing out of all such water courses and drains as are not, and never were, navigable, but which are necessary for carrying off the surplus rain water, thereby promoting the public health, and enabling a considerable portion of territory otherwise uninhabitable to be brought into cultivation.<sup>7</sup>

*'Shandrigamy v. Sholedam*, 12 Mod. 331, Holt, 643.

The commission of sewers was created by statute of 6 Hen. VI. chap. 5. *Rooke's Case*, 5 Coke, 100.

The statute 23 Hen. VIII.—which was designed for the reclamation and protection of certain low and marshy parts of England, and for lands there which were subject to overflow and injury by floods and freshets, and to that end provided for the appointment of commissioners to construct and have charge of extensive systems of drainage, conferring upon them the necessary powers, and subjecting them to certain duties—was never in force in Rhode Island, as it was inapplicable to the situation of that state. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

*'Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203; *Sien v. Norman County*, 80 Minn. 58, 82 N. W. 1094; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545; *Muskego v. Drainage Comra.* 78 Wis. 40, 47 N. W. 11; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

Drainage ditches are public improvements for which the legislature has full power to provide, and may use local boards as convenient instrumentalities. *State ex rel. Holtz v. Henry County*, 41 Ohio St. 423.

And so it has been held that the exercise of the power of local taxation by way of assessment, under statutory provision for the purpose of constructing ditches, drains, and water courses, which are demanded by, or are conducive to, the public health, convenience, or wel-

fare, is for "police purposes," within the meaning of a constitutional provision that commissioners of counties and trustees of townships shall have such power of local taxation for police purposes as may be prescribed by law. *Sessions v. Crunkilton*, 20 Ohio St. 349.

*'State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216; *Tinder v. Duck Pond Ditching Asso.* 38 Ind. 555; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

The Michigan drain law of 1885, chap. 227, is not in violation of the state Constitution, art. 14, § 9, providing that the state shall not engage in works of internal improvement. *Gillett v. McLaughlin*, 69 Mich. 547, 37 N. W. 551.

There is nothing in the Illinois Constitution which prohibits local or special legislation in respect to drainage where the direct prohibition of special legislation does not enumerate "drainage" as one of the subjects included, and the general clause at the end of § 22, that "where a general law can be made applicable no special law shall be enacted," addresses itself to the general assembly alone. *Owners of Lands v. People*, 113 Ill. 296.

But a statute providing for the construction of sewers in any city of a specified class whenever the citizens thereof shall vote to adopt the provisions of the statute violates the provision of the Constitution providing that all cities of the same class shall have the same powers and be subject to the same restrictions. *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644.

<sup>7</sup>*Brown v. Keener*, 74 N. C. 714.

Drainage laws are to be liberally construed to effect the purpose for which they were intended.<sup>8</sup> But they will not be so construed as to authorize the destruction of natural bodies of water unless the intent to do so is plainly manifest.<sup>9</sup>

The courts of Massachusetts have elaborated a theory of drainage which is somewhat different from the generally received ideas upon the subject. That theory has been stated as follows: The statutes for the improvement of meadows are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are to be affected are joined as parties. The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individuals' rights to such modification as the authorities may judge to be most practicable to secure the best advantage of all. This is under the general principle that the particular right of the individual must yield to a greater right, in the same degree, of the whole. There is no exercise of the right of eminent domain, or of governmental power of taxation.<sup>10</sup>

This theory upholds drainage proceedings which are not for the general public good, and is scarcely reconcilable with the generally received ideas of the duties and prerogatives of the government. The best results are not obtained by any theory which subjects the rights of the individual to an indefinite paramount right of the public. The individual has no right to maintain a nuisance, and, as one of the public, he may be taxed for an improvement which is for the public welfare. His property may also be taken under the right of eminent domain if it is necessary to secure a right of way for a drain. But when the individual is placed at the mercy of what some public official may adjudge to be for the public welfare, the security of personal property is gone, and a doctrine which necessitates such a result is foreign to our system of government.

**171. Of municipal corporation.**—A municipal corporation, in the absence of any duty, express or implied, placed upon it by statute, is under no obligation to provide drainage. Its citizens cannot complain of the absence of a drainage system, or compel it to proceed to establish one. Under the strict rule that a municipality has only the pow-

<sup>8</sup>*Osborn v. Mazinkuckee Lake Ice Co.*  
154 Ind. 101, 56 N. E. 33.

<sup>9</sup>*Baltimore & O. & C. R. Co. v. Ket-*  
*ring*, 122 Ind. 5, 23 N. E. 527.

<sup>10</sup>*Lowell v. Boston*, 111 Mass. 454, 15  
Am. Rep. 39.

ers expressly granted or necessarily implied, it is doubtful if it would be permitted to do so, even if it wanted to.<sup>1</sup> However, there are very few municipal charters which do not contain some provisions about drainage, and all of them require the maintenance of highways. To maintain a highway in a safe condition necessitates drainage, so that the municipality has some authority in the matter. But, so long as it keeps its highways in a safe condition, in the absence of statutory requirement, it has absolute discretion as to how much or how little it will provide. Therefore the municipal corporation is not liable to a private action or to indictment for failure to provide drainage, although the result of its inaction is to permit the continuance of a nuisance on private property.<sup>2</sup> The municipality is the sole judge of the necessities of sewers, and cannot be held liable for failure to provide them of sufficient size to accommodate the persons wishing to make use of them.<sup>3</sup> And in constructing a drain the municipality need not consider the needs of any particular piece of property, or

<sup>1</sup> Some courts have, however, held that the power to supply drainage is inherent in municipal corporations, and need not be specially conferred. *Philadelphia v. Tryon*, 35 Pa. 401; *Fisher v. Harrisburg*, 2 Grant Cas. 291; *Potter v. Norwood*, 21 Ohio C. C. 461.

A municipal corporation is vested with the power of drainage and to organize drainage districts for that purpose solely by reason of the sanitary benefits to the public and the improvement of the streets which will result from the drainage; and a drainage district so organized is a public, and not a private, corporation; and, although it incidentally is of great benefit to the owners of contiguous real estate, and it is solely by reason thereof that such owners may be taxed by special assessment for the costs of the drainage, yet such fact does not change the character of the corporation. *Springer v. Walters*, 139 Ill. 410, 28 N. E. 761.

But, as a general rule, such authority is traced to statutes where drainage for the benefit of the inhabitants is involved.

Authority to lay out and construct public drains and sewers cannot properly be claimed by a town as necessarily incident to the exercise of its corporate powers or the performance of its corporate duties, if ample provision for them is made by general statutes. *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829.

<sup>2</sup> *Dalton v. Wilson* (Ga.) 44 S. E. 830;

*Georgetown v. Com.* 24 Ky. L. Rep. 2285, 61 L. R. A. 673, 73 S. W. 1011.

A municipal corporation is not liable for damage resulting from the depositing of garbage and drainage from kitchen sinks in a highway, when it has permissive authority to construct sewers and abate nuisances, both being governmental functions. *Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937.

<sup>3</sup> *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Darves v. New Orleans*, 40 La. Ann. 806, 6 So. 100; *Baxter v. Tripp*, 12 R. I. 310; *Mills v. Brooklyn*, 32 N. Y. 489; *McClure v. Red Wing*, 28 Minn. 180, 9 N. W. 767; *St. Paul & D. R. Co. v. Duluth*, 56 Minn. 494, 23 L. R. A. 38, 45 Am. St. Rep. 491, 58 N. W. 159 (*dictum*); *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863; *Johnston v. Toronto*, 25 Ont. Rep. 312; *Buchert v. Boyertown*, 1 Monaghan (Pa.) 577, 17 Atl. 190.

The law does not impose on a municipal corporation the duty of providing drainage for private property within its limits to prevent an inundation thereof caused by the owner of another lot obstructing a water course by filling his own lot to conform with the established grade of a street. *Beatrice v. Knight*, 45 Neb. 546, 63 N. W. 838.

The absence of duty on the part of the municipality is illustrated by a case holding that a person discharging sewage from a house drain into a public street is not relieved from liability by

adapt the sewer to meet them.<sup>4</sup> And consequently there is no liability even though the sewer is placed so high that abutting property cannot be drained into it at all without raising its grade to correspond with that of the sewer.<sup>5</sup> Even when authority has been conferred upon the municipality by statute to construct sewers, it is not liable for failure to exercise the authority.<sup>6</sup> Statutory authority to construct sewers will confer upon the municipality all power necessary to make it effectual. The authority may even be exercised outside the limits of the municipal corporation, if necessary to dispose of the drainage.<sup>7</sup> And the power to order local drainage is not exhausted by one attempt to exercise it.<sup>8</sup> Power conferred upon "any" city to drain will include "every city."<sup>9</sup> And the general power to drain includes the right to dispose of sewage as well as surface water.<sup>10</sup> But general power to construct sewers does not justify the creation of a nuisance.<sup>11</sup> The duty to construct drains may be imposed upon the municipality by statute.<sup>12</sup> And the power may be implied by statute requiring the abatement of nuisances, and the provision for the health and cleanliness of the city.<sup>13</sup> The city must keep

reason of the failure of the municipality to establish a public sewer,—at least not until it appears that no other practical means of discharging the sewage can be devised. *Kirkwood v. Cairns*, 44 Mo. App. 88.

<sup>4</sup>*Betterly v. Soranton*, 5 Lack. Legal News, 179.

<sup>5</sup>*Roberts v. Montreal*, Rap. Jud. Quebec, 16 C. S. 342.

<sup>6</sup>*Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719; *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342.

Authority to construct sewers imposes no duty to do so; and when a municipality has not itself built or accepted as public a sewer across private lands, but the same was made by the landowner of his own volition, it may recover of the latter the price of the labor and materials it furnished in the construction. *St. Albans v. Noble*, 56 Vt. 525.

<sup>7</sup>*Butler v. Montclair*, 67 N. J. L. 426, 51 Atl. 495.

<sup>8</sup>Therefore the city may, in the proper exercise of its discretion, determine that another local sewer on the opposite end of a lot is necessary, which determination, in the absence of abuse, the court cannot review. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

<sup>9</sup>*Heyler v. Watertown* (S. D.) 91 N. W. 334.

An act to provide for sewerage in townships in which there is a public wa-

ter supply applies wherever the supply of water is available for public use, although not owned by the municipality. *State, Gibbs, Prosecutor, v. Northampton Twp.* 52 N. J. L. 496, 19 Atl. 975.

<sup>10</sup>*Lewis v. Alexander*, 24 Can. S. C. 551, Affirming 21 Ont. App. Rep. 613.

<sup>11</sup>*Sayre v. Newark*, 58 N. J. Eq. 136, 42 Atl. 1068.

So, under a power to construct sewers, and assess their cost on property benefited, a municipal corporation cannot license a private sewer to be laid, and the contents emptied into a water course. *Hutchinson v. State*, 39 N. J. Eq. 569 Affirming 39 N. J. Eq. 218.

A statute authorizing the construction by a municipality of a drainage canal from a designated point to a specified slough or lake does not justify the construction thereof to a point short of that specified, emptying into another lake, and overflowing the lands of riparian owners thereon. *Davis v. Sacramento*, 59 Cal. 596.

<sup>12</sup>*Davies v. New Orleans*, 40 La. Ann. 806, 6 So. 100.

<sup>13</sup>It seems that the power to provide for the health and cleanliness of a city grants power to the mayor and common council to cause sewers to be constructed to carry the waste outside of the city, and authorizes the mayor and common council to cause such sewers to be constructed to such points outside of the

its own property free from nuisances, and must drain it if necessary to do so.<sup>14</sup> The duty of the municipality with respect to the care of its highways requires them to be drained.<sup>15</sup> And, in any case, the municipality is liable to supply drainage if the necessity for it is created by its own act.<sup>16</sup> The existence of a private sewer does not interfere with the power of the municipality to construct one of its own, if it considers such construction necessary.<sup>17</sup> And it may adopt and use a private sewer, or one provided at the expense of the state, upon taking the proper means to acquire the right to do so.<sup>18</sup> But it does not become public until the municipality has acquired title to it.<sup>19</sup> It may authorize their construction at private expense.<sup>20</sup> It may, under its general authority, construct the sewer in a section only of its territorial limits, if it will thereby best serve the immediate needs of the public.<sup>21</sup>

**171a. Duty as to surface water.**—The rule that a municipality is not liable to provide drainage for the benefit of its inhabitants applies with full force to the drainage of surface water, except under circumstances which may be created by artificial works or the collection of the waters in a body, the rules as to which will be developed as we proceed. But in the absence of special circumstances, the

city as may be necessary in order to rid it entirely of such waste. *Willson v. Boise City* (Idaho) 55 Pac. 887.

A municipality, in abating a nuisance created by the basement of a barn filling with water and refuse, should do so by constructing a drain rather than filling it with earth, if drainage would render it sanitary; otherwise, it was proper to fill it. *Waggoner v. South Gorin*, 88 Mo. App. 25.

<sup>14</sup>A municipality is as much bound as an individual owner of a lot to find an outlet for the water and filth deposited on ground occupied by a public school, and is liable for damage resulting from the neglect to do so. *Briegel v. Philadelphia*, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038.

<sup>15</sup>The right of an incorporated town to construct sewers is usually regarded as incident to its power to maintain its streets, and does not conflict with authority conferred upon the supervisors of the county to construct levees and drains and change water courses, so as to prevent the exercise of these authorities within the corporation. *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

*Johnson v. Milwaukee*, 88 Wis. 389, 60 N. W. 270; *Olark v. Peckham*, 9 R. L. 155.

<sup>16</sup>*Byrnes v. Cohoes*, 67 N. Y. 204, affirming 5 Hun, 602.

<sup>17</sup>*St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713.

<sup>18</sup>Municipal corporations which avail themselves of a system of sewage disposal provided at the expense of the state may be required to repay the amount advanced, although the system will not be under their control, and even its use will be subject to rules established by the legislature. *Re Kingman*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

A municipal corporation does not adopt a private sewer as a public one by connecting its outlet with a public sewer. *Re Evans Ave. Sewer*, 32 Pittsb. L. J. N. S. 24.

<sup>19</sup>There cannot be a public or common sewer that has not been constructed and maintained by the municipality, and that is not subject to municipal control. *Com. v. Yost*, 11 Pa. Super. Ct. 323.

<sup>20</sup>*State, Hunt, Prosecutor, v. Lambertville*, 45 N. J. L. 279.

<sup>21</sup>*Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91; *Mason v. Chicago*, 178 Ill. 499, 53 N. E. 354.

municipality need pay no attention to the surface water which may flow within its limits.<sup>1</sup> Even if it undertakes to construct a drain to carry surface water, it is not bound to provide one which will be adequate for that purpose, or relieve the adjoining property from water in time of heavy rains or unusual atmospheric conditions.<sup>2</sup> As said in *Aicher v. Denver*,<sup>3</sup> a city is not bound to protect from surface waters those who may be so unfortunate as to own property below the general level of the street, and is not liable for failure to provide for the drainage and disposition of surface water, or for the adoption of an imperfect plan or insufficient drainways to carry off waters in case of excessive storms, so as to prevent injury to improvements made on land below the city grade. The duty of the municipality to keep its streets in a safe condition, however, requires that they be relieved of the surface water which falls or stands upon them in such a way as to render them unsafe or foundrous, and this duty carries with it the corresponding authority to make such drains or gutters along the street as may be necessary to provide for the surface water.<sup>4</sup> And, if the object will be better subserved, the drain may be placed under the surface in the form of an ordinary sewer.<sup>5</sup> The duty as to street drainage is owing to travelers on the highway, however, and not to the owners of abutting property. As said in *Smith v. Tripp*,<sup>6</sup> in an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury; and, where a statute is passed requiring the city to keep the streets in repair, and such statute is passed for the purpose of having the streets kept safe and convenient for travel, the owner of a lot abutting on a street cannot recover for damages to his land by an overflow caused by

<sup>1</sup>*Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Alden v. Minneapolis*, 24 Minn. 254; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342; *Foir v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455; *Gould v. Booth*, 66 N. Y. 62; *Mills v. Brooklyn*, 32 N. Y. 489; *Union v. Durkes*, 38 N. J. L. 21; *Fair v. Philadelphia*, 6 W. N. C. 534; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266; *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

An owner of marsh land cannot require a municipal corporation to maintain a culvert in a neighboring highway,

when his drainage was not usually through the culvert, and its obstruction was from the act of a neighboring landowner. *Lafferty v. Girardville*, 1 Monaghan (Pa.) 513, 17 Atl. 12.

<sup>2</sup>*Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342; *Atchison v. Chalmers*, 9 Kan. 603.

<sup>3</sup>10 Colo. App. 413, 52 Pac. 86.

<sup>4</sup>*Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89; *Dudley v. Buffalo*, 73 Minn. 347, 76 N. W. 44; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Bohan v. Aroca*, 154 Pa. 404, 26 Atl. 604.

<sup>5</sup>*Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

<sup>6</sup>13 R. I. 152.

the failure of the city to keep the street in repair, on the ground that it has violated a statutory duty, to his injury. And the municipality is therefore not liable for injuries to abutting property by its neglect to drain the highway,<sup>7</sup> except where conditions are such as to create a nuisance. So long as the surface is left in its natural condition, it is immaterial that the water runs from the highway down upon the abutting land.<sup>8</sup> Nor is the municipality bound to prevent the water from flowing in its natural course, although the result is that the water accumulates in quantities upon private property after passing there from the highway.<sup>9</sup> In every case where the property of the complainant is below the natural grade of the street, so that the water would naturally flow upon it from the highway, the municipality is not bound to take care of the water, to prevent its injuring such lower property.<sup>10</sup> And it is immaterial that the municipality attempts to construct drains which prove insufficient. Its immunity from liability still continues.<sup>11</sup>

But the action of the surface water is a serious menace to the safety of the highway, and one of the first steps for its improvement is the

<sup>7</sup>*Flagg v. Worcester*, 13 Gray, 601; *Byrne v. Farmington*, 64 Conn. 374, 30 Atl. 138; *Acker v. New Castle*, 48 Hun, 312, 1 N. Y. Supp. 223.

A municipal corporation is not bound to provide a sewer to abate a nuisance caused by water running from its streets along a natural depression over abutting property. *Miller v. Newport News* (Va.) 44 S. E. 712.

<sup>8</sup>*Smith v. Tripp*, 13 R. I. 152; *Dudley v. Buffalo*, 73 Minn. 347, 76 N. W. 44; *Daniels v. Denver*, 2 Colo. 669; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Sowers v. Lowe*, 20 W. N. C. 76, 9 Atl. 44; *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327.

A city is not liable for waters running along its streets and finally spreading over adjoining land, where it does not appear that the water would not flood the land in the same way if there were no streets there. If there was any remedy by reason of the laying out of streets, it would be under the statutes, and not by a common-law action. *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327.

<sup>9</sup>*Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339.

<sup>10</sup>*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Young v. Leedom*, 67 Pa. 351; *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887; *Allen v. Minneapolis*, 24 Minn. 254; *Lee v. Minneapolis*, 22 Minn. 13.

A municipal corporation is not liable for damage because of the mere insufficiency of the curbing on an ungraded street to prevent surface water from flowing onto private lands. *Costello v. Conshohocken*, 8 Pa. Co. Ct. 639.

A municipal corporation is not liable for damages to property by surface water which naturally found its way to a river at the point where a ravine was formed by the wash thereof partly within a street and partly on the property damaged, where the proof fails to show either a tortious omission or breach of duty on its part with reference to filling up or repairing such ditch or ravine. *Gilmer v. Montgomery*, 26 Ala. 665; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

<sup>11</sup>The fact that a city, after notice that drains constructed to carry off street surface water are insufficient, fails to use ordinary diligence to make them serve the purpose intended, does not render the city liable for an overflow of private property by surface water from the street, where it did not accelerate the flow of water, or collect the same and discharge it on such property otherwise than it would naturally have been discharged thereon, when it was not negligent either in devising or adopting the plan of the drains. *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

adoption of means to relieve it of such menace. This may be accomplished by raising the grade so as to prevent the water from settling on the street, by making the surface more impervious, to prevent the water from saturating the roadway, and by the construction of drains to carry it to some other point. All of these proceedings have more or less effect on the adjoining property. The general rule is that, so far as the circumstances of the case and public necessities will permit, the same rules concerning injuries to private property by the overflow of water should be applied to municipal corporations in the management and improvement of their streets as would be applied to private individuals in the management and use of their property.<sup>12</sup>

Steps for the improvement of a highway cannot proceed far before natural conditions are changed, and the surface water from the street becomes a more serious burden upon the abutting owner; and the question then arises as to the duty of the municipality with respect to it. In the natural condition of the highway, the surface water flows naturally to the lowest level, and the burden rests where it falls, either on the highway, or on the adjoining property. Neither the public nor the abutting owner is under any obligation to care for the water for the benefit of the other. The more the natural condition is changed by improvements in the highway so that the burden is increased on the adjoining property, the greater will be the duty of the municipality with respect to it.<sup>13</sup>

**171b. Effect of raising street grade.**— Adjoining proprietors have a right to improve their property as they see fit, and one cannot complain of the ordinary injuries consequent upon the other's improvements. This rule includes the altering of the grade of the property, so that one cannot complain if, by reason of the other's raising the surface of his land, the natural flow of surface water is changed, excepting so far as the interference may be with a natural swale or depression which forms a natural outlet for surface water, and in such cases the better reason denies the right to interfere unless a substitute for it is furnished. Municipal corporations are entitled to the benefit of this rule. Consequently, when they do no more than merely raise the grade of a street, they are not liable for thereby preventing surface water from flowing onto the street from adjoining property, except in some states which refuse to permit any interference with the natural course of drainage; nor are they liable for causing the wa-

<sup>12</sup>*McClure v. Red Wing*, 28 Minn. 186, *sitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324.  
<sup>13</sup>1 Am. St. Rep. 671, 31 N. W. 863; <sup>14</sup>*Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585.



ter to flow in the other direction onto the adjoining property. There is, therefore, no duty to provide for carrying away the water so interfered with. In *Wakefield v. Newell*,<sup>1</sup> this absence of liability is placed upon the ground that the usual changes of grade must be presumed to have been contemplated and provided for at the laying out of the highway. But it is unnecessary to resort to this ground to uphold the right of the municipality to change the grade of its streets. It has the right by the same rule which permits the landowner to make such improvements on his property as are necessary for its beneficial use.<sup>2</sup> And this rule relieves the municipality from liability even though it renders the drainage of adjoining property more difficult.<sup>3</sup> Very few cases present the simple fact of changing the grade so that the course of the water between the adjacent land is merely altered. Additional facts usually exist, such as the gathering of the water, or the change of outlet for a flow coming from an extended territory. Either of these facts would give a right of action against a private individual,<sup>4</sup> and there is no reason why it should not do so

<sup>1</sup> 12 R. I. 75, 34 Am. Rep. 598. See also *post*, 188a.

<sup>2</sup> *Kehrer v. Richmond City*, 81 Va. 745; *O'Donnell v. White* (R. I.) 53 Atl. 633; *Hirth v. Indianapolis*, 18 Ind. App. 673, 48 N. E. 876; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Stewart v. Clinton*, 79 Mo. 603; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Downs v. Ansonia*, 73 Conn. 33, 46 Atl. 243; *Sisson v. Stonington*, 73 Conn. 348, 47 Atl. 662; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598; *Freburg v. Dar- enport*, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705; *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274; *Watson v. Kingston*, 114 N. Y. 88, 21 N. E. 102; *St. Louis v. Gurno*, 12 Mo. 414.

The owner of property injured by the raising, to conform to a bridge grade, of a highway, which lessened the value of the building, and caused water to flow into its lower story, has no cause of action against the town or its agents doing the work, shown to have been done lawfully and in a proper manner. *Benden v. Nashua*, 17 N. H. 477.

Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may affect injuriously the adjacent property

owners; but, where the power is not exceeded, there is no liability unless created by statute, and then only in the mode and to the extent provided, for the consequences of its being exercised and properly carried into execution. The owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from the premises onto the street; and, on the other hand, the municipal authorities may exercise their power in respect to the gradation, improvement, and repair of streets, without being liable for the consequential damages caused by surface water to adjacent property. *Allen v. Paris*, 1 Tex. App. Civ. Cas. (White & W.) § 885, p. 506.

If, when a city's duty to the public requires that it raise the level of its streets through low places to such height as to make them suitable for travel by keeping them drained of surface water, the adjoining property is thereby overflowed during heavy rains because it is lower than the street, the event is *damnum absque injuria*, and the owner has no legal claim upon the city for the construction of a drain either for his premises or the streets. His proper protection is to raise the grade of his lots. *Alden v. Minneapolis*, 24 Minn. 254.

<sup>3</sup> *Tate v. St. Paul*, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158.

<sup>4</sup> See note to *Gray v. McWilliams*, 21 L. R. A. 593.

against the municipality. In the cases in which the courts have denied the right of action, the full effect of the principles involved does not seem to have been considered. In many instances a street improvement consists, in part, at least, of the hardening of the surface so as to make it impervious to water. The effect of this hardening, together with the slope given to the surface, is to accumulate the water at the edge of the street and cast it in a body on the land of the abutting owner. The principal reason at the bottom of the rule that there is no liability for altering the grade of land so as to interfere with the flow of surface water is that most of the water coming from rain and melting snow finds its way immediately into the ground, and there is no great quantity to flow along the surface. The hardening of the surface of the street interferes with this natural condition as much as the placing of a building on the land with a roof extending over its entire surface. No one contends that a private owner can place such a building on his land, and allow the eaves to cast the water immediately on his neighbor's land, without making any provision for caring for it. Another element which is involved in the improvement of a highway is the bringing of the surface to a uniform grade over long stretches of territory, the effect of which is to cause the water to flow along the street for a considerable distance, thereby changing its natural course and gathering it in a body; and, when it is in that condition, no private owner can cast it immediately on his neighbor's land without liability. The rules governing the rights with regard to surface water, as between individuals, would make the municipality liable for its acts in either case if it did not make some provision to care for the water so accumulated and concentrated. Few of the courts, however, have considered these principles, but have regarded the street improvement merely as a change of grade, which was held to cast no liability upon the municipality for its acts.<sup>5</sup> So far as these decisions lose sight of the altered conditions which result in the accumulation of an unnatural quantity of water, which is cast in a body on the abutting property, they are not founded on true principle.<sup>6</sup> In *Bronson v. Wallingford*,<sup>7</sup> the court held that surface water must be turned from the roadbed into drains and gutters, and at times will flow in considerable quantity. It would be practically impossible for towns, cities, and boroughs in most cases to prevent such water from flowing onto the lands of the adjoining proprietors. To hold them responsible for not doing so in all cases would be un-

<sup>5</sup>*Hubbard v. Webster*, 118 Mass. 599; <sup>6</sup>*Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605.  
*Field v. West Orange Twp.* 46 N. J. Eq. 183, 2 Atl. 236. <sup>7</sup>54 Conn. 513, 9 Atl. 393.

reasonable. It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that they can be held responsible.

Of course, there are times of unusual storms when the falling water would do injury in spite of all precautions; but in the ordinary case there is no reason why, with even ordinary care, a municipal corporation which has gathered the water from its streets into gutters should not conduct it to a natural outlet without any injury to any one, and the failure to do so is such clear evidence of negligence that it should be required to show that the injury could not be avoided in order to relieve itself from liability. As said in *Wright v. Wilmington*,<sup>8</sup> a municipal corporation must cause its streets to be constructed in such manner, and with sufficient side draining, as to remove, without injury to adjacent lots, such surface water as, from experience and knowledge of the past, may be reasonably anticipated to fall, and may be provided for. Wherever the civil law which makes the lower property servient to the upper property for the receipt of drainage in its natural channels is in force to its full extent, the municipality cannot change the burden of its servient position without liability for the injuries thereby caused.<sup>9</sup> If the Constitution makes the municipality liable in case it damages property by its works, or the statute imposes a liability, all injuries caused by the casting of surface water onto adjoining land by a change of the grade must be paid for.<sup>10</sup>

**171c. Effect of gathering water.**— If the municipality has gathered water from a tract of country, either by construction of drains or by the grading and improvement of streets, so as to cause the water to flow along the surface, it must care for the water so that it will not flow upon the land of private owners.<sup>1</sup> So, if the water is diverted

<sup>8</sup> 92 N. C. 156.

<sup>9</sup> *Keithsburg v. Simpson*, 70 Ill. App. 467; *Bloomington v. Brokaw*, 77 Ill. 194; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591.

A municipal corporation raising the grade of a street by an embankment so as to form a levee along a river front is bound to make sufficient drains or sewers by the side of the embankment to carry off all water flowing from the levee, so as to keep it away from adjacent property; and a failure so to do will render it liable for injuries to adjacent land overflowed thereby; but if it is prevented from doing so by an injunction at the suit of a citizen, such citizen cannot recover for any injury occasioned to his property by the want of drains

which he has himself prevented the city from making. *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

<sup>10</sup> *Woodbury v. Beverly*, 153 Mass. 245. 26 N. E. 851; *Barfield v. Macon County*, 109 Ga. 386, 34 S. E. 596; *Addy v. Janesville*, 70 Wis. 401, 35 N. W. 931.

But the raising of the grade of a highway, though it cause the surface water to flow into the dooryard of an adjoining proprietor, is not the making of a water course or place for draining off the water from a highway, within the meaning of a statute authorizing such acts, provided the water is not drained into a dooryard in front of a dwelling house. *Doorns v. Ansonia*, 73 Conn. 33. 46 Atl. 243.

<sup>1</sup> *McCray v. Fairmont*, 46 W. Va. 442,

from its natural channel, it must be taken care of and turned into some natural drain, and cannot be abandoned so as to cause injury to private property, although such property is situated below the street grade.<sup>2</sup> And the water cannot be abandoned in the highway in such a way as to become stagnant and cause a nuisance, even though it does not flow upon the property of the abutting owner.<sup>3</sup> The municipality is bound to care for the water, although it has received it

33 S. E. 245; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Byrnes v. Cohoes*, 67 N. Y. 204; *Thoman v. Corington*, 23 Ky. L. Rep. 117, 62 S. W. 721; *Carson v. Springfield*, 53 Mo. App. 289; *Follmann v. Mankato*, 45 Minn. 457, 48 N. W. 192; *Schweitt v. Stillwater*, 80 Minn. 287, 83 N. W. 180.<sup>4</sup>

A municipal corporation is liable to a landowner for injury from surface water collected by it, if its conduct in failing to guard against possible injury from the surface water so collected is unreasonable under the circumstances. *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88.

If a city is negligent in its provision for the escape of surface water which it has collected from a large tract, and it overflows the land of an individual, to his injury, the municipal corporation is liable if it had notice of the defective condition; and if the injury would not have occurred but for that cause, it is no defense that the cellar floor of the house was cut down, and earth between it and the street removed so that when the water was raised a few inches in the gutter it ran into the cellar. *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826, 70 Md. 56, 16 Atl. 380.

Where a city collects water by means of ditches which empty into a ditch in front of the plaintiff's lot, and such ditch is not sufficient to carry off the water emptied therein, and the plaintiff's property is thereby overflowed, the city is liable, although it appears that the plaintiff's lot is as well drained as it would have been had the ditch not been constructed; as the liability of the city depends on the sufficiency of the ditch to conduct away the water diverted into it. *Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. 231.

When the supervisors of a town, for the purpose of improving one of its highways by ditches and sluices, divert large quantities of water into the slough of a landowner, situated on premises adjoining the highway which he had improved for meadow, pasture, and crops, and replace the bridge beneath which waters from the slough had flowed with culverts insufficient to drain the slough properly, the town will be liable for the injuries sustained by the landowner. *Peters v. Fergus Falls*, 35 Minn. 549, 29 N. W. 586.

<sup>2</sup>*Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. 231; *Effingham v. Surralls*, 77 Ill. App. 460; *Valparaiso v. Kyes* (Ind. App.) 66 N. E. 175; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863.

A municipal corporation is liable for injury to property from the backing of surface water thereon by reason of its negligent construction of a sewer for carrying off such water, diverted by it from its natural channel. *Frostburg v. Dufty*, 70 Md. 47, 16 Atl. 642.

<sup>3</sup>*Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326.

Collecting surface water in a body in an alley, and failing to provide reasonably sufficient means for its escape, causing the same to overflow adjoining premises and remain standing in the alley, is a continuing nuisance rendering a municipal corporation liable to the owner of the injured property for successive actions, and cannot be regarded as a permanent, lawful improvement negligently constructed, for which all damages must be recovered by the owner at the time the work is done. *New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

An abutting owner may maintain an action against a municipal corporation for collecting surface water from several streets and conducting it by means

by its flowing along the highway from another municipality.<sup>4</sup> And if it undertakes to dispose of water so accumulated, it must do so in a skilful manner.<sup>5</sup> A municipal corporation has no right, even by skilful plans and careful execution, to accumulate by its system of drainage large quantities of surface water in one channel and pour it out upon a public street, without making provision for a sufficient escape of the water so as not to damage adjoining property owners.<sup>6</sup> The municipality cannot gain a right by prescription to permit its ditches into which it has diverted surface water to remain insufficient, so as to cause the water to injure the adjoining property.<sup>7</sup> The liability is the same where the water is accumulated merely by the grading of streets as where, in addition, gutters are constructed to carry the water to the point where it is abandoned. As said in *Inman v. Tripp*,<sup>8</sup> where a city is required to keep its streets in proper repair,

of gutters to the end of a street opposite such owners' property, where it is permitted to stand and become stagnant, emit offensive odors, and, upon occasions of heavy rains, overflow the sidewalk, and flood such owner's property, entering the cellar, washing out the soil, and doing other injury. *Clark v. Rochester*, 43 Hun, 271.

A city is liable for an injury to the wall of a building, due to the collection of a large quantity of water in the street at an excavation made where the street is being graded, when such injury might have been avoided by the contemporaneous excavation of an avenue crossing the street, or by the construction of a drain. *Jacour v. New York*, 3 Duer, 406.

A declaration alleging that a municipal corporation cut a ditch along and close to one line of plaintiff's residence lot, and left the ditch in such a condition that the water coming or falling into the same could not run off in any direction, and that water has accumulated in said ditch, stood and stagnated there, in consequence whereof there has been all the time on the premises of plaintiff such a sickly and unwholesome stench that his premises have been unfit for occupation, and malarial diseases have been generated thereby on his premises, causing sickness in his family,—makes a prima facie case, at least, of special damage, for which he is entitled to recover. *Hamilton v. Columbus*, 52 Ga. 435.

<sup>4</sup>*Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200.

But a borough is not liable for damage to private land in a township by surface water which is drained from its highway into the township highway without objection from the latter, which thus accepts the burden of taking care of it. *West Bellevue v. Huddleston*, 1 Monaghan (Pa.) 129, 16 Atl. 764.

<sup>5</sup>*Ludlow v. Yonkers*, 43 Barb. 493.

<sup>6</sup>*Crawfordsville v. Bond*, 96 Ind. 236.

<sup>7</sup>*Effingham v. Surrells*, 77 Ill. App. 460.

<sup>8</sup>11 R. I. 520, 23 Am. Rep. 520.

But the court, in *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598, in discussing the case of *Inman v. Tripp*, said that in that case "we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface water, than an individual has over his own land, but only that it has no greater power; or, in other words, that it is liable for discharging the surface water accumulating in its streets and highways to the same, or very much the same, extent as an individual is liable for discharging such water from his own land upon his neighbor's. If this action were against an individual instead of a town, we do not think a declaration similar in form would be sufficient. For mere neglect by an individual to retain on his own land water which, falling there, would naturally flow onto his neighbor's land, there is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbor's land."

and is authorized, in the discharge of this duty, to grade them and to alter their grades, the city has no right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with all the miscellaneous filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land, and into his cellar and well, where the city also has power to make drains and culverts. The municipality may be liable for the work of contractors if it retains control of the work, and neglects to see that no injury is done.<sup>9</sup> The mere refusal of the landowner to permit the taking of suggested steps to avert the injury will not prevent his right of recovery if the public authorities had no right to insist on that way of relieving the evil.<sup>10</sup> The remedy of the injured property owner is an action for damages.<sup>11</sup> But where the act is clearly illegal, and there is no adequate remedy at law, a court of equity will enjoin the act.<sup>12</sup>

<sup>9</sup> A municipal corporation which enters into a contract with an independent contractor for the regrading of a street, by the terms of which it may assume control and finish the work at his expense upon unreasonable delay in its prosecution, will be liable for injury done to abutting property by water collected from surface drainage and a natural water course and thrown thereon by excavations made by the contractor, and left without any attempt to complete the work for fourteen years. This ruling was placed on the ground that the nuisance was permitted by the city to remain to the injury of abutting owners. *Fogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

<sup>10</sup> The act of a highway supervisor in offering to dig a ditch over an owner's land, by which damage thereto from the flowage of water through a culvert built by him in the highway would be averted, and the refusal of such owner to permit the same to be dug, do not relieve him from liability for the damage caused by such flowage, by virtue of a statute authorizing him to enter upon and construct ditches upon land adjoining a highway when necessary for the construction or repair of such highway, without showing that the culvert was necessary for the construction, repair, or preservation of the highway, and that it was constructed at a proper place. *Conwell v. Emrie*, 4 Ind. 209.

<sup>11</sup> A property owner has a right of action against a city to recover for damages caused by successive overflows of his land, where it is shown that the city so unskillfully graded and paved its streets and alleys as to raise them above the plaintiff's property, and close the natural outlet of water so as to concentrate it upon his lot, and then negligently constructed its sewer, and closed up the manhole or drain so as to let the water accumulate upon the plaintiff's property. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

<sup>12</sup> A township will be enjoined from maintaining an unauthorized culvert across a highway, the effect of which is to unite artificial water channels, change the natural flow, and increase the volume of water on one side of the highway, without providing an outlet therefor, thereby causing an increased volume of water upon private land. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 806.

But where the surface flow of water has been concentrated into an artificial channel insufficient for the purpose, an injunction will not be granted against a city to prevent the enlargement of the channel so as to carry off the natural flow of water. *Soranton's Appeal*, 121 Pa. 97, 6 Am. St. Rep. 755, 15 Atl. 483, Reversing *Goulden v. Soranton*, 3 I. & C. L. Rev. 340.

## II. DUTY OF CITIZEN TO PAY FOR DRAINAGE.

**172. On what basis can one be required to drain or contribute to its cost.**— The question whether or not, by reason of organization or otherwise, an aggregation of people can compel an individual, against his will, to bear or share the expense of drainage for the common welfare, reaches to the very foundations of any theory of democratic government. In governments founded on force the question can never become a practical one. But where all men are free and equal, and have established a government under which all have equal rights, by what authority can one man, or any number of men, say to another: We consider the drainage of a section of land necessary, and you must effect it or share the expense of doing so? The only possible ground for such authority must be his consent, either express or implied. If the consent has not been expressly granted in the Constitution of the state, the questions then are: Is it necessarily included in his agreement to the formation of the government? or, Has he delegated authority to his representatives in the government to express his consent? The hypotheses involved in these questions are so nearly identical that they may, for practical purposes, be regarded as the same. Does, then, the consent to the formation of the government include consent to bear or share the expense of drainage for the public good? There are certain things which all agree that one consents to, such as to share in the expense of the government and the maintenance of highways, and to aid in the common defense against the public enemy and in the maintenance of order and punishment of crime. But he has expressly provided, in most instances, that his property shall not be taken from him for the private benefit of another, or even for the benefit of the public, unless he is compensated therefor. And the whole theory of the government is based upon the principle that burdens must be approximately equal and uniform. But the government is organized to obtain certain benefits which cannot come from individual effort. Among these are better sanitary conditions, the amelioration of ruinous natural conditions of performing labor, and the creation of conditions which will most largely aid the people in the battle for life. In view of these objects which the individual seeks to attain when joining a community in organizing a government, he will not be permitted to maintain conditions on his own property which are detrimental to the general welfare. Therefore, he cannot maintain a common nuisance. Further, he must render his aid in furthering the common welfare, so far, at least, as he is one of those who will be benefited by the effort to make an im-

provement. Applying these principles to the solution of the problem whether or not the individual agrees to aid in the drainage of the land, the answer would seem to be that necessary drainage is one of the things in the expense of which an individual consents to share when he consents to the formation of the government: That his share of the expense is to be determined, not by the benefit to himself, but by ascertaining his share of the total cost when divided among all the property benefited in proportion to benefits; that he cannot be charged with any burden for the benefit of others who do not bear their share of it; and that in no case can he be required to drain for the benefit of other individuals. Fixing the limits of the district which is to bear the burden of the tax as well as the distribution of the burden among the residents of it is primarily a legislative question with which the courts cannot interfere unless it is plain that the fixing of the bounds or the distribution of the burden has been made arbitrarily, without any reference to the rights or interests of the taxpayer under the general rule stated.

The rule as above stated has not been in terms followed by all the courts, but the results reached have not been far different from what its application would have produced.<sup>1</sup> The rule is easily understood, and in most cases easy of application. The only difficulty in its enforcement would be that found in the application of any rule involving human judgment, and offering opportunities for inequality through favoritism or prejudice.

The owners of land which needs draining may enter into an agreement among themselves for its drainage and the payment of the cost, and statutes authorizing such proceeding are valid.<sup>2</sup> One man cannot be compelled to drain his land for the benefit of his neighbor, except where the lack of drainage constitutes a nuisance which may be abated under the general principles governing the abatement of nuisances.

<sup>1</sup> In one case it was said that the right of the legislature to pass drainage acts, though obviously not resting in the power of eminent domain, and derogatory to private property rights by compelling the private owner to suffer and pay for the improvement of his property because other contiguous owners desire to so improve theirs, while not to be justified on first principles, has nevertheless become established as a sort of local common law by legislative, judicial, and popular recognition for nearly a century, so that it is now to be regarded as legitimate legislation. *Hoagland v. Wurts*, 41 N. J. L. 175.

<sup>2</sup> The New Jersey act of March 8, 1871,

providing for the drainage of the Pequest river meadows under a commission made up of and selected by the land owners, is, in its general scope and purpose, constitutional; and the assessments made under it, while they are to be apportioned as fairly as the commissioners can judge, and laid on the lands benefited, are not limited by the actual benefits conferred; the limitation to this effect, contained in the act of April 2, 1868, applies only to assessments by commissioners appointed by a court or judge. *Re Pequest River*, 42 N. J. L. 553.

<sup>3</sup> *Woodruff v. Fisher*, 17 Barb. 224.



And the legislature cannot place private property in the hands of a commission, to be drained for the benefit of its owner against his consent, upon application of persons who make a contract for the work, and who are to receive compensation for doing it.<sup>4</sup> And a statute cannot require a landowner to maintain drains on his property for the purpose of carrying off water which accumulates on that of his neighbor.<sup>5</sup> After a railroad or canal has been established and constructed, the legislature cannot require its owner to maintain drainage ditches along the right of way for the benefit of adjoining owners.<sup>6</sup> So the owner of an estate is not bound to maintain ditches which are on another's property, to carry the water from his own land.<sup>7</sup> The same principle prevents one man from conferring a benefit upon the land of another without his consent, and then requiring him to pay for it.<sup>8</sup> When drainage is necessary for the public welfare, the legislature may make provision for it, and may provide for meeting the cost out of the general tax fund, or levy the expense on the section benefited, as may seem best to the authorities.<sup>9</sup> The mere fact that the sewer may be of special advantage to those living in its immediate vicinity does not prevent its construction at public expense.<sup>10</sup> The fact that the public good requires the drainage gives

<sup>4</sup>*Coster v. Tide Water Co.* 18 N. J. Eq. 54, Affirmed in 18 N. J. Eq. 518, 90 Am. Dec. 634.

<sup>5</sup>*Rutherford's Case*, 72 Pa. 82, 13 Am. Rep. 655.

<sup>6</sup>*Chicago & E. R. Co. v. Keith*, 67 Ohio St. 279, 60 L. R. A. 525, 65 N. E. 1020; *Field v. Chicago, R. I. & P. R. Co.* 76 Mo. 614.

But under an act of Parliament requiring a canal company to construct a drain on each side of the canal and parallel therewith in lieu of part of an ancient drain destroyed by it, and by another section requiring the company to make arches, tunnels, culverts, and drains, and to keep in repair all such arches, culverts, tunnels, and drains, the company is bound not only to cleanse the drains constructed under such section, but the drains provided in lieu of the ancient drain. *Priestley v. Foulds*, 2 Mann. & G. 175, 2 Railway Cas. 422, 2 Scott N. R. 265.

A statute requiring a railroad company to make, without compensation, the necessary opening through its roadbed, and build and maintain a suitable culvert for the accommodation of a drain crossing its right of way, when notified to do so by the county drain commissioner, is unconstitutional. *Chicago &*

*G. T. R. Co. v. Chappell*, 124 Mich. 72, 82 N. W. 800.

<sup>7</sup>*Jolliffe v. Chesapeake & O. R. Co.* (Va.) 20 S. E. 781.

<sup>8</sup>*Coster v. Tide Water Co.* 18 N. J. Eq. 54, Affirmed in 18 N. J. Eq. 518, 90 Am. Dec. 634.

The legislature cannot constitutionally enact any law authorizing one person to improve the lands of another by draining, and compel the person benefited to pay to the other the assessment therefor, unless the public, also, is in some way benefited thereby, as that the drain is necessary and conducive to the public health, convenience, or welfare, or of public benefit or utility; and then it can be done only by due course of law. *Tillman v. Kircher*, 64 Ind. 104.

The construction of a sewer is a local improvement where its cost is raised upon the property supposed to be benefited by it. A public improvement is one where the expense is charged upon all the taxable property within the municipality. *Kinsella v. Auburn*, 26 N. Y. S. R. 884, 7 N. Y. Supp. 317.

<sup>10</sup>An assessment for the expense of constructing a sewer in a municipality is not invalidated by the fact that such sewer would conduce largely to the convenience and advantage of those whose

the legislature power to provide for it and assess the cost upon the particular locality where the conditions exist which require amelioration.<sup>11</sup> And the consent of the owner of the property to the improvement need not be obtained.<sup>12</sup> If property below grade in a municipality collects surface water which is allowed to stand and constitute a nuisance, the legislature may require it to be drained; and, if necessary to effect that result, may require it to be filled up by its owner. And this power may be conferred upon a municipal corporation.<sup>13</sup> But when the nuisance is created by acts of the mu-

property is in its vicinity, its nature of a public improvement not being affected thereby. *Cone v. Hartford*, 28 Conn. 363.

<sup>11</sup>*Wishmier v. State*, 97 Ind. 160; *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677; *Brown v. Keener*, 74 N. C. 714.

The legislature has the power to compel the reclamation of swamp and overflowed lands at the expense of the owners thereof, essential to promote the health of the people and advance public good, even though it be regarded as a local improvement; and a statute providing therefor is not a violation of the constitutional provision securing to citizens the right to acquire, possess, and protect property, which is not infringed by taxation for general purposes or local improvements; nor that securing the right to trial by jury, which has no application to proceedings for the collection of taxes; nor that providing for due process of law, and prohibiting the taking of private property for public use without just compensation, as the enforcement of a valid tax by whatever mode is not a taking without due process, or a taking of private property for public use without compensation; nor is it a violation of the requirement of equality and uniformity of taxation, which has no application to assessments levied for local improvement. *Hagar v. Yolo County*, 47 Cal. 222.

Charging upon abutting owners the cost of improving sewers in front of their property, having been recognized as valid prior to the adoption of a constitution, must be considered as embraced in the law of the land under the provision of such constitution that no one shall be deprived of his property except by the law of the land. *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842.

<sup>12</sup>*Brewster v. Syracuse*, 19 N. Y. 116. So, requiring citizens to become members of drainage districts, and share the

expense of drainage, against their wills, does not make the law unconstitutional. *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721.

<sup>13</sup>*Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871, Reversing 57 Hun, 36, 10 N. Y. Supp. 499; *Nickerson v. Boston*, 131 Mass. 306; *Bancroft v. Cambridge*, 126 Mass. 438; *Patrick v. Omaha* (Neb.) 95 N. W. 477.

A statute giving municipal corporations the power to direct any lot within their limits on which, or part of which, water should at any time become stagnant, to be raised, filled up, or drained, and, in case of failure or refusal of the owners to do so, authorizing its being done at the expense of the municipality, the cost of which shall be charged against the lot owner, and be a lien on the lot, is within the power of the legislature, under a constitutional provision requiring the general assembly to provide for the organization of municipal corporations, since the power of creating such corporations necessarily implies authority to confer upon them such police power as may be necessary for their internal government, among which none is more important than the power to adopt such sanitary regulations as may be required to provide for the safety and to preserve the health of the inhabitants. *Bliss v. Kraus*, 16 Ohio St. 54.

But after the passage of a statute authorizing the municipal authorities to require the raising of the grade of property for the benefit of the public health, and, in case of the owner's failure to do so, to take the property and pay them its value, the municipal authorities cannot, acting as a board of health, raise the grade and require the owner to pay for it, but they must act under the statute. *Cambridge v. Munroe*, 126 Mass. 496.

A notice in a newspaper in general

municipality, the cost of abating it cannot be thrown on a private owner.<sup>14</sup> The action of the proper authorities in determining the size of the taxing district, whether it shall be the whole of a municipal subdivision, or only a part of it, is conclusive in the absence of fraud, and will not be declared void merely because it is oppressive.<sup>15</sup> The only ground on which a particular tract of land can be drained under compulsion is that the public good requires it. But the mere fact that the drainage is for the public good does not prevent the placing of the cost on the section of territory where the work is to be performed. Therefore, in determining the validity of a local assessment, it is wholly immaterial what proportion of the total cost is for the public benefit and what for the benefit of the property upon which the assessment is levied, if the public good is based upon, and grows out of, the welfare of the property upon which the assessment is levied, or the undrained property constitutes a nuisance to the public generally, so that an assessment of particular property can rest upon the ground that its owner is bound to prevent his property from becoming a nuisance to the public, or that he is bound to contribute to the expense of the improvement of the property in the district upon

circulation of a resolution requiring owners of municipal property upon which water becomes stagnant to fill the same is sufficient notice to enable the city to hold them responsible for the cost in case they fail to do the work and the city is compelled to do it. *Independence v. Purdy*, 46 Iowa, 202.

A resolution of a city council directing lot owners to fill or drain their lots in such manner as shall be necessary to remove the stagnant water requires not merely the removal of the water then on the lots, but that the work be done so as to prevent a recurrence of stagnant water from the same cause, and is justifiable as a reasonable sanitary measure for the preservation of the health of the inhabitants. *Bliss v. Kraus*, 16 Ohio St. 54.

But a statute permitting a board of health to provide for the proper drainage of land where surface water injurious to public health cannot be carried off by sewers does not give them power to require the filling in of large tracts of land at large expense, so as to charge the cost on the property alleged to be benefited. *Re Van Buren*, 79 N. Y. 384, Affirming 17 Hun, 527.

<sup>14</sup>The assessment by a municipal corporation which has created a nuisance

on property within its limits by grading a street, thereby damming a stream, causing stagnant water to stand on the property, of the cost of filling the property in order to abate the nuisance, under an ordinance authorizing it to abate a nuisance caused by stagnant water, and assess the cost upon the property filled or drained, will not be sustained in equity. *Lashury v. McCague*, 56 Neb. 220, 76 N. W. 862; *Patriok v. Omaha* (Neb.) 95 N. W. 477.

But when a city has graded a street adjoining certain lots without providing proper sewers, because of which water becomes stagnant and a nuisance on the lots, and causes the nuisance to be abated by filling the lots, assessing the cost on the lot owners, equity will not enjoin the enforcement of the assessment if the owners have been actually benefited by grading the street and filling the lots, as, in the absence of allegations to the contrary, compensation for injury to the lots by grading the street will be presumed to have been fully made by filling the lots. *Watkins v. Milwaukee*, 55 Wis. 335, 13 N. W. 222.

<sup>15</sup>*Heman v. Allen*, 156 Mo. 534, 57 S. W. 550. Affirmed in 181 U. S. 402b, 45 L. ed. 922, 21 Sup. Ct. Rep. 645, Overruling 59 Mo. App. 490.

which the assessment is laid.<sup>16</sup> There are expressions in the cases cited which would indicate that the right to make a local assessment is unlimited, and can be sustained even when the drain is for the benefit of the property wholly outside of the section assessed; but the principle cannot be carried to that extent. For example: If an outlet sewer is necessary to carry the drainage of a municipal corporation several miles through farm land to reach a place of discharge, there is no principle of taxation which will permit the assessment of the whole cost upon abutting property, because it would result in compelling the property to pay for an improvement made wholly for the benefit of other property to which it owes no duty, and the assessment would be prohibited by the rule which relieves one man from the duty to drain for the benefit of his neighbor. So, where the drainage is for the benefit of a whole city, the expense cannot be thrown upon the particular land through which the drain is constructed, but the district must include approximately all the land for the benefit of which the drain is constructed.<sup>17</sup> So the cost of widening and deepening a natural water course for the purpose of draining lands is not assessable upon particular lands, but must constitute a charge upon the general fund of the municipality.<sup>18</sup> The application of the broader rule would confer authority to require the owner of wet land or a mill pond to drain his land and pond at his private expense for the public good; which, of course, cannot be done except where the land constitutes such a nuisance that the owner is under obligation to abate it.<sup>19</sup> The true principle upon which the local assessment is to be upheld, although the improvement is for the public good, is indicated in *Zigler v. Menges*,<sup>20</sup> which held that the construction of a ditch which reclaims wet lands, and drains marshes and ponds, thereby removing causes that produce disease and serious discomfort, promotes the health and welfare of the public; and a law providing for the construction of such ditches at the expense of private persons who receive a special benefit thereby violates no con-

<sup>16</sup>*Leitch v. LaGrange*, 138 Ill. 291, 27 N. E. 917; *Stroud v. Philadelphia*, 61 Pa. 255.

<sup>17</sup>The charter of a drainage company under which a tax is levied upon the owners of swamp lands drained, and which are situated in the rear of the city, is unconstitutional, where the improvement is intended for the benefit of the whole city. *Re New Orleans Draining Co.* 11 La. Ann. 338.

Where a city had, at the time of the passage of the Iowa statute of 1878, commenced a general system of sewer-

age by the levy and expenditure of a general tax therefor, it could not, under the provisions of that statute, provide for the assessment of the cost upon the adjacent property. *Independent School Dist. v. Burlington*, 60 Iowa, 500, 15 N. W. 295.

<sup>18</sup>*Sutherland Innes Co. v. Romney*, 30 Can. S. C. 495.

<sup>19</sup>*Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166.

<sup>20</sup>121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782.

stitutional provisions, but is a lawful exercise of the police power of the state, although, if no element of public good exists, such assessment is unauthorized. The principles that, to authorize the improvement, it must be for the public good, and that property cannot be assessed for the benefit of other property, are reconciled so as to uphold the local assessment by the consideration that the section benefited may be so large that its drainage will be for the public good, and yet the benefit be so localized, with respect either to territory or population, as to affect only a limited part of a political subdivision, and the cost of the drainage may be limited to the part so affected. This is the principle which renders valid proceedings for the organization of improvement, reclamation, and drainage districts, and limits the assessment to the property included within them.<sup>21</sup> The amount which is to be assessed against any particular piece of property is governed by the necessities of the district at large, and not by what would answer its own needs.<sup>22</sup> As already seen, drainage is authorized by the police power of the state.<sup>23</sup> And the absolute cost may be met by an exercise of the taxing power, and such proceeding is not within the constitutional provisions prohibiting the taking of private property for public use, or requiring due process of law.<sup>24</sup> Sewer assessments are not within a constitutional requirement of uniformity of taxation.<sup>25</sup> A private individual may be required to drain

<sup>21</sup>*Re New Orleans Draining Co.* 11 La. Ann. 338; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

<sup>22</sup>*Re Boggs Ave.* 30 Pittsb. L. J. N. S. 17.

<sup>23</sup>*Supra*, § 170.

<sup>24</sup>*Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091; *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208; *Eyerman v. Blaksley*, 78 Mo. 145.

Neither the United States Constitution nor its Amendments were designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having this object in view, must often be had in certain

districts, such as for the draining of marshes and irrigating arid plains. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The owner of reclaimed swamp land is not deprived of his property without due process of law, where it is taken in pursuance of a judgment rendered after full hearing and due procedure in a suit instituted to recover an assessment imposed by statute on such land. *Re Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366; *People ex rel. Post v. Brooklyn*, 4 N. Y. 419, Overruling 6 Barb. 209.

<sup>25</sup>*Parkersburg v. Taenener*, 42 W. Va. 486, 26 S. E. 179; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899; *People ex rel. Post v. Brooklyn*, 4 N. Y. 419, Overruling 6 Barb. 209.

by the terms of the government grant under which he holds title to his property.<sup>26</sup> If the legislature provides the manner in which the cost of the drainage may be met it cannot be changed by a local subdivision.<sup>27</sup> Laws authorizing the drainage of land at the expense of private property will be strictly construed.<sup>28</sup> The legislature may cast the expense made necessary by the drainage improvement upon any local subdivision or district it chooses.<sup>29</sup> When the drains are built at the expense of the municipality, it may be compelled to pay the cost to the contractors, although it may have recourse to a property assessment to reimburse itself.<sup>30</sup> Equity will not, on the ground of restraining a nuisance, restrain action under a law to enable the owners of flats to improve their lands and to secure them from the overflow of the tides, and then making it their duty effectually to drain those lands when an acknowledged nuisance might thereby be abated.<sup>31</sup>

**173. Application of rule that assessment depends on benefit.**—One of the grounds upon which an assessment for drainage may be upheld is that the property assessed is benefited by the improvement to the extent of the assessment, and that, therefore, it should pay for the benefit received. This is not the sole ground upon which the assessment can be upheld, as has been seen in the preceding section; but

<sup>26</sup>The purchaser of swamp lands from a county cannot compel a conveyance thereof to him unless he shows a performance by him of the conditions contained in his contract of purchase, which require him to drain such land and improve one half thereof, as well as to pay the purchase money, all of which are conditions precedent, to be kept and performed by the purchaser before he is entitled to a deed; and the fact that it was the custom of the drainage commissioner not to insist upon the performance of any part of such contracts except the payment of the money does not affect the right of the county to enforce the same: such waiver not being binding upon it unless made by its authority. *Licington County v. Henneberry*, 41 Ill. 179.

<sup>27</sup>*McCutcheon v. Toronto*, 22 U. C. Q. B. 613.

A municipal corporation has the power to construct sewers and assess the cost thereof to the abutting property owners, under a statute authorizing municipal corporations to construct, among other street improvements, drains and sewers, and by a subsequent section authorizing the collection by special assessments

of the cost "to have the sidewalks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for a full improvement in general," the latter clause having reference to, and embracing, all improvements authorized by the preceding section. *Allen County v. Silvers*, 22 Ind. 491.

<sup>28</sup>*Rutherford v. Maynes*, 97 Pa. 78, Affirming 9 W. N. C. 221.

A statute providing that the expense of constructing a sewer shall be assessed on the property benefited is not invalid for failure to expressly limit the assessments to property specially benefited, as it will be construed as so doing. *Ferguson v. Stamford*, 60 Conn. 432, 22 Atl. 782.

<sup>29</sup>The statute authorizing drainage commissioners to remove bridges on public highways without compensation when necessary in constructing drainage ditches is constitutional and valid. *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201.

<sup>30</sup>*Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897.

<sup>31</sup>*McNeal v. Assisunk Creek Meadow Co.* 37 N. J. Eq. 204.

this is the ground which has come most prominently into notice by the courts, so much so, in fact, that some of the courts have regarded it as the only ground upon which the assessment can be upheld. There is no doubt that an assessment which does not exceed the benefit conferred is valid.<sup>1</sup> And since such a large proportion of the cases have dealt with this branch of the subject it requires special consideration. The assessment of the benefits is a matter of legislative discretion; and so long as the apportionment bears some relation to the benefits actually conferred, such discretion will not be interfered with by the courts.<sup>2</sup> And under this rule any property actually benefited is subject to assessment.<sup>3</sup> When the rule of benefits is adopted, the constitutional rule of uniformity no longer applies, and the assessment cannot be defeated because it is not uniform.<sup>4</sup> Where the statute allows both methods of assessing lands benefited by drainage, the assessment should be made according to the benefit, regardless of value, rather than *pro rata* upon the value of the lands.<sup>5</sup>

<sup>1</sup>*Com. use of Pittsburg v. Woods*, 44 Pa. 113; *Wolf v. Philadelphia*, 105 Pa. 25; *Rutherford v. Maynes*, 97 Pa. 78. Affirming 9 W. N. C. 221; *Hatch v. Pottawattamie County*, 43 Iowa, 442.

A statute providing for the drainage of swamp or overflowed lands of individuals if, in the judgment of the supervisors, it is demanded by or will conduce to the "public health and welfare," and providing for the apportioning of the whole cost thereof upon the lands benefited in proportion to the benefits respectively derived therefrom, is valid as an exercise of the police power of the state, although it cannot be sustained as the exercise of the power of eminent domain for a public use. *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389.

<sup>2</sup>*People ex rel. Cook v. Nearing*, 27 N. Y. 306.

Assessment of a nonconsenting landowner for benefits conferred by the construction of a drain rests wholly in the discretion of the legislature, where the right to condemn the easement or property of such owner is conferred by the state Constitution. *Re Tutthill*, 50 N. Y. Supp. 410.

<sup>3</sup>A tenement situate in the King's dockyard, deriving a benefit from the public sewers, and occupied by an officer of the government who pays no rent, is liable to be rated to the sewers. *Netherton v. Ward*, 3 Barn. & Ald. 21.

County roads lying on a higher level

than the surface of a township in which drainage works are being constructed may be charged with such proportion of the work as may be just, if, in fact, such roads are greatly improved and benefited by the work proposed to be done. *Essex County v. Rochester Twp.* 42 U. C. Q. B. 523.

The construction of a large ditch, or the improving of a natural stream, which enables a landowner to discharge into it his lateral ditches, constructed for the drainage of his own land, and thus secure good drainage without encroaching upon the rights of others, is a special, as distinguished from a general, benefit, which will support an assessment for the construction of the ditch. *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

Where the present market value of lots will be increased by the construction of a sewer in a street not abutting upon or contiguous to such lots by the putting in at the street intersections of sewer connections, thus increasing the opportunity for drainage, a special assessment may be levied thereon for the cost of the sewer, to the extent of such special benefits. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

<sup>4</sup>*Masters v. Portland*, 24 Or. 161, 33 Pac. 540; *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817; *Moore v. People*, 106 Ill. 376.

<sup>5</sup>*People ex rel. More v. Jefferson County Ct.* 56 Barb. 136.

**173a. Benefits must be certain.**—If the assessment is to be upheld on the ground that the property is benefited by the improvement, the benefit must be certain; and the assessment cannot be upheld unless it is made to appear that the benefit will equal the full amount of the assessment to be levied.<sup>1</sup> And the assessment cannot be upheld if the property is so situated that it cannot be benefited by the sewer.<sup>2</sup> But land which was a portion of a tract abutting on the sewer at the time it was constructed does not become nonassessable by the fact that at the time of the completion of the sewer it has become nonabutting through the division of the original tract.<sup>3</sup> Property cannot be regarded as benefited if it is not relieved from water or rendered more healthful, or which cannot make use of the drain as constructed.<sup>4</sup>

<sup>1</sup>*Chicago v. Addock*, 168 Ill. 221, 48 N. E. 155.

<sup>2</sup>*Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673. 19 Pac. 450; *Providence Re-treat v. Buffalo*, 29 App. Div. 160. 51 N. Y. Supp. 654; *People ex rel. More v. Jefferson County Ct.* 56 Barb. 136.

Forasmuch as a drainage act is an exercise of legislative power in derogation of common-law rights of property, and resting in the sanction of long local usage and custom, it is essential to its validity that the method of assessing the land included in the drainage district ratably, in proportion to the benefits conferred, be followed; and an act which allots quotas in advance of the work by estimating anticipated benefits deviates too far from the ancient custom to be valid. *Hoagland v. Wurts*, 41 N. J. L. 175.

The owners of lands sought to be charged for the construction of a drainage ditch can equitably be required to pay only for the benefits conferred by the ditch as actually constructed, where not fully completed as located, established, and ordered constructed. *Peck v. Watros*, 30 Ohio St. 590.

<sup>3</sup>*Philadelphia v. Nock*, 44 W. N. C. 556; *Allegheny City v. King*, 18 Pa. Super. Ct. 182.

<sup>4</sup>*Bickerdike v. Chicago*, 185 Ill. 280. 56 N. E. 1096; *State, McKevitt, Prosecutor, v. Hoboken*, 45 N. J. L. 482.

When the expense of a sewer is to be assessed upon benefited property according to benefits, the assessments must be confined to property abutting thereon. *Parker's Appeal*, 169 Pa. 433. 32 Atl. 574; *Re Grant Street*, 17 Pa. Super. Ct. 459.

Lands lying at a distance, and separated by intervening lots from a sewer

which receives and carries to tide water a natural stream that traverses some and runs near others of them, collecting and taking away their surface water, are not benefited by, or subject to assessment for, such sewer. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186. Affirmed in 48 N. J. L. 370, 5 Atl. 178.

A city authorized to construct sewers and levy a special assessment therefor against the property immediately benefited is not entitled to assess, for the construction of a sewer on one street, lots fronting on a parallel street 351 feet distant, and to which there is no access for over one half of this distance except through private property. *People ex rel. O'Reilly v. Kingston*, 53 App. Div. 58, 65 N. Y. Supp. 590.

An abutting owner is not benefited by a sewer laid so close to the surface that he cannot drain into it, so as to be subject to assessment for its construction. *People ex rel. Locke v. Rochester*, 5 Lans. 14.

But it has been held that it is no defense to an action brought by a contractor upon a local sewer assessment that the level of defendant's lot is below that of the sewer, where it is the lot owner's duty to fill up such lot to abate a nuisance created thereon by a pond of stagnant water, which is a violation of the police regulations of the city as to maintaining such ponds. *Toledo use of Gates v. Kohn*, 2 Ohio N. P. 47.

And also that the exercise of the power of assessment for sewer purposes, conferred by the legislature, presupposes the question of benefit to have been determined by the city council, in whose discretion it is left, and further inquiry is precluded; so that it is no defense to an assessment that the sewer was of no



And the benefit must be present, or at least have such a relation to the property that the fact of future benefit is plain. It is not sufficient that there is a possibility of benefit in the future.<sup>5</sup> The benefit, however, may be indirect, such as the improvement of the health of the community, or the improvement of highways.<sup>6</sup> The fact that the property assessed has no immediate use for the sewer is not sufficient to defeat the assessment.<sup>7</sup> But the mere fact that surface water from the land assessed eventually reaches the sewer is not enough to sustain an assessment against it if the water would, in its natural

benefit because the surface of the lot was below the bottom of the sewer. *Cincinnati use of Nolte v. McDermott*, 5 Ohio Dec. Reprint, 494.

<sup>5</sup>*Re Pequest River*, 39 N. J. L. 433, Affirmed in *Hoagland v. Wurts*, 41 N. J. L. 175.

An assessment upon lots not abutting upon a proposed sewer is void where the surface drainage through such lots without such sewer is good, and its construction would operate as a dam to such drainage because above the surface of the ground, and the benefits thereto are based upon a prospect for a future connection with the sewer, but no drainage district is created which will drain into it, and no provision is made which will eventually effect such connection. *Title Guarantee & T. Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

The benefits which are to be taken into account by the commissioners in apportioning the charge or benefit under the California reclamation law are those only which spring from a system of works which such assessment is levied to construct or maintain, and not presumptive benefits from other purely prospective works. *Reclamation Dist. No. 103 v. West*, 129 Cal. 622, 62 Pac. 272.

<sup>6</sup>*Soady v. Wilson*, 3 Ad. & E. 249, 4 Nev. & M. 777, 1 H. & W. 256.

The mere fact that the right to enforce an assessment on lands for benefits conferred by the construction of a ditch arises from the benefits which the ditch confers upon one or more highways, which benefits to the highways will be of no special benefit to the landowners, and for the improvement of which they, in common with others, contribute by the payment of a uniform road tax, does not render the statute unconstitutional as the taking of private

property for a private purpose or without just compensation, or on the ground that they are thereby taxed twice for a public improvement from which they derive no special benefit, since the right to impose such assessment is founded upon the benefit which the land assessed is supposed to receive from the drain: but the right to coerce that payment for the improvement of their own property, being to some extent the exercise of the power of eminent domain, can only exist when the public good is involved in the enterprise, which public good must be presumed by the legislative declaration that such ditches may be established when one or more public highways will be benefited thereby. *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

Although a sewer may not be required for a particular parcel of land, that circumstance will not relieve such property from liability for assessment for the cost of its construction, when the sewer is necessary to and improves the surrounding lots, and thus works an indirect benefit to the property in question. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

<sup>7</sup>*Sanitary Dist. v. Joliet*, 189 Ill. 270, 59 N. E. 566; *Clapp v. Hartford*, 35 Conn. 66.

A sewer assessment which apportions upon the territory that has immediate need of the sewer, and can make use of it at once, a sum sufficient to pay for a sewer for its own use, and upon more remote territory such sum as would pay for the enlargement of the sewer, made necessary to meet its requirements, is fair, and conducive to equity of apportionment. *McKee Land & Improv. Co. v. Swikehard*, 23 Misc. 21, 51 N. Y. Supp. 399; *McKee Land & Improv. Co. v. Williams*, 63 App. Div. 553, 71 N. Y. Supp. 1141.

course, have left the property without the aid of the sewer.<sup>8</sup> All land affected by a drainage system is subject to assessment for an outlet which is necessary to the success of the system.<sup>9</sup> But in order to authorize the assessment of property for the construction of a drain which will afford an outlet for the drain upon which the property to be assessed is located, statutory authority is necessary, where the drains are constructed along natural depressions so that the upper drainage district is not particularly benefited by the enlargement of the drain in the lower district.<sup>10</sup> And after an outlet has been completed, statutory authority is necessary to permit a municipality to include in the amount assessed for a sewer which empties into it part of the cost of the outlet, for which no assessment was made when the outlet was constructed.<sup>11</sup> Assessments may, however, be made for the outlet upon property which will eventually use it, although it is not needed at the time the assessment is made.<sup>12</sup> The method of levying such assessments differs in different localities, and in some places the practice is to wait to levy the assessment for the outlet until it is used; and in such cases the assessment cannot be made upon the probability that the outlet will be eventually used, but the natural

<sup>8</sup>*Beals v. James*, 173 Mass. 591, 54 N. E. 245; *Blue v. Wentz*, 54 Ohio St. 247, 43 N. E. 493.

<sup>9</sup>*State, Green, Prosecutor, v. Hotaling*, 44 N. J. L. 347; *Bayonne v. Morris*, 61 N. J. L. 127, 38 Atl. 819; *State, Schlaffer, Prosecutor, v. Union*, 53 N. J. L. 67, 20 Atl. 894; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351.

The Ontario drainage law providing that, when a drain constructed in one municipality is used as an outlet, or will provide an outlet, for drainage from lands in another municipality, lands benefited may be assessed for their proportion of the cost, applies to drains properly so-called, and does not include original water courses that have been deepened or enlarged. *Broughton v. Grey Twp.* 27 Can. S. C. 495, Reversing 23 Ont. App. Rep. 601.

The cost of extending a sewer made necessary because the state has granted the lands under water in front of the mouth of the sewer, which space has been filled in by the grantee, may be assessed upon the property benefited, under a charter provision authorizing an assessment based on benefits to defray the expense of sewer extension. The power to extend sewers is a continuing power, which is not exhausted where

one assessment has been made. *Cleveland v. Yonkers*, 22 N. Y. S. R. 863, 4 N. Y. Supp. 84.

Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under a statute providing for the assessment of land for the construction of drainage works used as an outlet. *Sutherland Innes Co. v. Romney*, 30 Can. S. C. 495.

The treatment of a sewer as an entirety in the assessment of benefits cannot be questioned because, in its construction for the peculiar and almost exclusive benefit of the property abutting on a certain street, it was necessary, in order to reach the main sewer, to conduct it for a short distance through an intersecting street. *Re Grant Street*, 17 Pa. Super. Ct. 459. This is held to be consistent with *Re Morewood Ave.* 159 Pa. 20, 28 Atl. 123, 132.

<sup>10</sup>*Kankakee Drainage Dist. v. Lake Fork Special Drainage Comrs.* 130 Ill. 261, 22 N. E. 607, Reversing 29 Ill. App. 86.

<sup>11</sup>*Brown v. Fitchburg*, 128 Mass. 282.

<sup>12</sup>*Mason v. Chicago*, 178 Ill. 499, 53 N. E. 354.

facilities for making the connection must exist before an assessment is laid.<sup>13</sup>

The cost of the construction of a discharging sewer which receives discharges from lateral sewers within a certain district, but situated wholly outside of such district, cannot be assessed against the lots and pieces of ground in such district, under a statute prescribing that the cost and expenses of constructing a sewer system shall be assessed against the lots or ground contained in the district in which the same is situated.<sup>14</sup> Under a statute providing that an upper municipality or person which avails itself of another's drain as an outlet for its drain may be assessed its proportionate share of the cost of its construction, an upper municipality whose drainage flows off in a natural water course cannot be held liable for any of the expense incurred by a lower municipality which improves the water course because of its own needs.<sup>15</sup>

Special benefits arising from the construction of a ditch for which a landowner may be assessed, as distinguished from general benefits for which he may not be assessed, are whatever increases the value of the land, relieves it from a burden, or makes it especially adapted to a purpose which enhances its value.<sup>16</sup> They may be the result of relieving the land of surface water,<sup>17</sup> of increasing its healthfulness,<sup>18</sup> and enhancing its market value.<sup>19</sup> And the mere fact that the prop-

<sup>13</sup>*State, Kellogg, Prosecutor, v. Elizabeth*, 40 N. J. L. 274.

No assessment for a trunk sewer can be made upon land for connection of which with the sewer a lateral is necessary, but has not been constructed, and which land is not drained of its surface water any better than before the sewer was constructed. *State, Morris, Prosecutor, v. Bayonne*, 53 N. J. L. 299, 21 Atl. 453.

On the construction of a lateral to connect property with a trunk sewer, the person benefited may be assessed for the cost of a lateral, and for what it will cost at the time to construct the trunk sewer, less what has been paid thereon by other property, if the person assessed is benefited to the extent of that amount. *DeWitt v. Elizabeth*, 56 N. J. L. 119, 27 Atl. 801.

The benefits to the property to be benefited in the future may be assessed at the time of the assessment of the abutting property, although the assessments do not become liens until the connecting sewers are built. *Vreeland v. Bayonne*,

58 N. J. L. 126, 32 Atl. 68, Reversing 60 N. J. L. 168, 37 Atl. 737.

<sup>14</sup>*Ft. Scott v. Kaufman*, 44 Kan. 137, 24 Pac. 64.

<sup>15</sup>*Re Orford Twp.* 18 Ont. App. Rep. 496.

<sup>16</sup>*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

<sup>17</sup>*Beals v. James*, 173 Mass. 591, 54 N. E. 245.

<sup>18</sup>*Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339.

<sup>19</sup>*State, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

Wharf property which is the lowest of grounds to be drained by a sewer is assessable for the construction thereof although no connection is made with the sewer, since the owners of lower grounds are interested in and benefited by the proper drainage of upper grounds, whereby the waters from them are provided with a channel instead of spreading over the ground below. *Boeres v. Strader*, 1 Cin. Sup. Ct. Rep. 57.

erty cannot be benefited for agricultural or sanitary purposes will not defeat the assessment.<sup>20</sup> But land within the water shed, but not abutting on the sewer, cannot be assessed as benefited property for the expense of enclosing as a sewer a water course which formerly furnished open sewerage, on the ground that the odors and noxious substances which cause discomfort and injure health are confined thereby, as such benefit is enjoyed by the whole city in common.<sup>21</sup> If no drainage is in fact obtained by the improvement, the assessment cannot be upheld.<sup>22</sup>

**173b. Relation between benefits and assessments.**— When an assessment is laid upon property for the benefit conferred by a drain, the assessment cannot exceed the benefit conferred, and should be proportionate thereto.<sup>1</sup> An assessment, therefore, of the contract price upon the land, without any regard to the extent of benefit conferred, cannot be sustained.<sup>2</sup> So, if one parcel of land receives greater benefit than another, its assessment should be correspondingly greater.<sup>3</sup>

<sup>20</sup>*Illinois C. R. Co. v. East Lake Fork Special Drainage Dist.* 129 Ill. 417, 21 N. E. 925; *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

<sup>21</sup>*Re Beechwood Avenue Sewer*, 179 Pa. 490, 36 Atl. 209. The court refused to modify, or to distinguish, this case from *Re Park Avenue Sewers*, 169 Pa. 433, 32 Atl. 574.

<sup>22</sup>Assessments for the paving of a street and the providing of all drainage necessary therefor are void, and cannot be enforced in an action by the city for the benefit of the contractor, although such work was done in the manner directed by the officers to whose discretion the points and manner of making such a drainage were left by the contract, where the necessary drainage was not furnished at all; since, as to the land owners on the street, there is a contract for the furnishing of the necessary drainage, which must be fulfilled. *Tolledo use of Wernert v. Grasser*, 5 Ohio S. & C. P. Dec. 178.

See, also, *infra*, § 239.

<sup>1</sup>*Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

<sup>2</sup>*Tide-water Co. v. Ooster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

The New Jersey act of March 27, 1874, creating in Hoboken and Weehawken two drainage districts, and constituting a commission to build main and lateral sewers to drain them, and adopting a plan by which the sewage was

to be pumped by steam power from deep sewers, and imposing a surface tax, uniform according to area, on each lot in the drainage districts, to defray the expense of running and maintaining the pumps and engines, also imposing a special tax on the drainage districts in proportion to the expenditure in each to pay interest on the construction bonds and improvement certificates, and authorizing an assessment on the districts drained of the whole cost of the sewers, main and lateral, and pumping works, is void, because the burden laid is not graduated and limited by the benefits to the property drained; because, the drainage district, not being coterminous with any political subdivision, cannot be separately taxed; and because the property, whether real or personal, out of which the tax is to be collected or levied upon, is not designated, nor is any mode of enforcing collection prescribed. *State, M'Closkey, Prosecutor, v. Chamberlin*, 37 N. J. L. 388.

<sup>3</sup>*Sherwood v. Duluth*, 40 Minn. 22. 41 N. E. 234.

A drainage act by which the cost of the improvements is to be assessed on the land benefited in proportion to the benefits conferred subjects the benefited land to a charge of such portion of the expense as accords with the benefit received; and does not require the land owner to pay a proportion of the whole cost, measured by the benefit to him,

**173c. Excessive assessments.**—If the assessment is to be sustained because of benefit conferred, and the assessment plainly exceeds the benefit, it will not be upheld.<sup>1</sup> So that in case the property derives no benefit, it is not liable to assessment.<sup>2</sup> The courts in some cases have been so impressed with the necessity of making the assessment correspond with the benefit that they have held that the assessment could be laid on no other ground than that of special benefit.<sup>3</sup> This declaration, however, loses sight of the cases of drainage to abate nuisances, and for the general public good, the principles governing which are set forth in a preceding section.<sup>4</sup> And it must be limited to cases in which the assessment is sought to be sustained on the ground of benefits, and not under the general police and taxing power of the state to ameliorate local conditions.<sup>5</sup>

An order of court allowing drainage commissioners to raise a certain sum for improvements in the district is not a direction of an assessment against lands regardless of benefits, but merely limits the amount that may be raised, the assessment of which is left for the jury.<sup>6</sup> Mere matters of detail in adjustment of the assessment are for the officers having charge of the improvement, and not for the courts, and the courts will not interfere with matters of judgment, but will only interfere in case the officers manifestly proceed on a wrong principle, or make a wrong use of a right principle in reaching their conclusion.<sup>7</sup> Legislative authority to assess the cost of a drain on abutting property concludes the question whether or not it

whether that proportion exceed the benefits or not, and is therefore within the legislature's constitutional power. *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497.

<sup>1</sup>*Re New Orleans Draining Co.* 11 La. Ann. 338; *Lovell v. Sny Island Levee Drainage Dist.* 159 Ill. 188, 42 N. E. 600; *Parker's Appeal*, 169 Pa. 433, 32 Atl. 574; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Hosmer v. Hunt Drainage Dist.* 135 Ill. 51, 26 N. E. 587; *People ex rel. Ijams v. Meyers*, 124 Ill. 95, 16 N. E. 89; *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

<sup>2</sup>*Metropolitan Bd. of Works v. Vauxhall Bridge Co.* 7 El. & Bl. 964, 26 L. J. Q. B. N. S. 253, 3 Jur. N. S. 1216.

<sup>3</sup>*Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876.

A strip of land lying along a sewer, which is too narrow to be benefited by its construction, cannot be assessed for its cost. *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306.

<sup>4</sup>*Supra*, § 172.

<sup>5</sup>*Hosmer v. Hunt Drainage Dist.* 135 Ill. 51, 26 N. E. 587.

<sup>6</sup>*Hosmer v. Hunt Drainage Dist.* 134 Ill. 360, 26 N. E. 584.

<sup>7</sup>*Oil City v. Oil City Boiler Works.* 152 Pa. 348, 25 Atl. 549; *DeGravelle v. Iberia & St. M. Drainage Dist.* 104 La. 703, 29 So. 302; *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 95; *Walsh v. Arnous*, 6 La. Ann. 97; *State v. Britton, Prosecutor, v. Blake*, 35 N. J. L. 208, Affirmed in 36 N. J. L. 443; *People v. Hagar*, 52 Cal. 171; *Miller v. Logan County*, 3 Ohio C. C. 617.

Conflicting testimony as to whether or not lands assessed under a drainage act are in fact benefited will not justify the court in setting aside an assessment, even in cases of great hardship. It must appear that the commissioners were so clearly wrong as to indicate bias, partiality, fraud, corruption, or other undue influence. *Re Pequest River*, 42 N. J. L. 553.

is benefited so far as the courts are concerned.<sup>8</sup> The levying of a tax is *prima facie* evidence that the property is benefited.<sup>9</sup> Under such rule the mere fact that the taxpayer shows that in the particular case the drain is of no actual benefit to him will not induce the court to interfere for his relief if the assessment was made on a right principle, and an attempt was made to place the assessment on the property which should bear it.<sup>10</sup> But the mere levying of the assessment is not conclusive, and may be shown to have included property which should not have been included because it was not bound to contribute to the expense of the improvement, for the reason that it was not within the territory which could be charged with such expense.<sup>11</sup>

**173d. Excessive drainage facilities.**—The theory that the right to require a landowner to pay for drainage is based on the benefit conferred on him is tested when the attempt is made to make an assessment for drainage which is in excess of the needs of the property assessed, and is for the benefit of other landowners or the public. Under such circumstances a strict adherence to the doctrine that the benefit must equal the assessment will preclude the assessment of the entire cost of the improvement upon the particular land, although it in fact should bear the burden. The courts, therefore, even though attempting to adhere to the benefit theory, have made numerous exceptions which have quite weakened the theory, although they have not professed to discredit it. The doctrine of frontage and area assessments, which will be considered in a subsequent section,<sup>1</sup> requires an abandonment of the benefit theory so far as it is applied to make the benefit to the individual tracts assessed equal the assessment, and the principles already set forth show that the theory represents only a portion of the law governing the local assessments for drainage purposes; but, for the purpose of determining the principles of the courts which profess to adhere to such theory, an examination of the exceptions which they have made will be undertaken. If the drain for which the assessment is made is larger than the needs of the assessed property require, a strict application of the doctrine of benefits would absolve the property from such portion of the assessment as is in excess of such needs.<sup>2</sup> But if the drain is no larger than is needed by

<sup>8</sup>*J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 139, 44 N. Y. Supp. 317.

<sup>9</sup>*Heman v. Wolff*, 33 Mo. App. 200.

<sup>10</sup>*Cincinnati's use of Wilson v. Fugman*, 5 Ohio N. P. 14.

<sup>11</sup>*Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196; *People ex rel. Marvin v. Brooklyn*, 23 Barb. 166.

<sup>1</sup>*Post*, § 175.

<sup>2</sup>*Parker's Appeal*, 160 Pa. 433, 32 Atl. 574.

But under a municipal charter authorizing the assessment of the expense of constructing a sewer on land specially benefited, the owners of land along the line of improvement, who are benefited to an amount exceeding the cost of the

the particular district which was in need of drainage, for the benefit of which the drain is constructed, there is no contention in any quarter that the assessment should be set aside for that reason.<sup>3</sup> Conversely, if the drain is made much larger than the needs of the district through which it is constructed require, for the purpose of accommodating other districts or sections of territory, there is no principle of taxation which would throw the entire cost on the local district.<sup>4</sup> The theory of benefit thus appears to be limited to the right to lay an assessment upon the particular section of territory for an improvement upon it, and not upon the particular parcels within that section which are incidentally benefited. If the larger section

sewer, cannot object to their assessment, on the ground that the sewer was constructed larger than the necessities of ordinary sewerage required, for the purpose of receiving the discharge from other drains. *Hungerford v. Hartford*, 39 Conn. 279.

The owner of a vacant lot is benefited by the construction of a sewer in the increased value of the lot, and the fact that it is vacant will not relieve it from assessment under a charter providing that assessments for the expense of constructing a sewer shall be according to the benefits conferred. *Clapp v. Hartford*, 35 Conn. 66.

That there is no immediate need of local drainage in the case of a particular lot or parcel of land will not exempt it from assessment for sewer purposes, under a statute providing for exemption of land for which local drainage is not needed, where it will be benefited as are other lands in the sewer district by having the sewage carried away, in addition to the local benefit when built upon. *Ford v. Toledo*, 64 Ohio St. 92, 59 N. E. 779.

Land located in a drainage district within a municipal corporation is not relieved from liability for special assessment levied for the construction of a sewer system involving the construction of a central reservoir and pumping works within the district, because it is somewhat higher than the adjoining lands, and could have been drained by the ordinary "gravity system." The choice of the mode of drainage is within the legislative discretion of the municipal authorities, with which the courts will not interfere unless clearly abused, and the only question that concerns landowners, in a proceeding to confirm a special assessment in such case

is, whether or not their lands are assessed more or less than they are benefited by the improvement, or more or less than their proportionate share of the cost. *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

<sup>4</sup>*Harrisburg v. Cummings*, 6 Pa. Dist. R. 437.

But the cases holding that property cannot be assessed for the construction of a trunk sewer when a lateral would have been sufficient were appeals or exceptions to the report of the jury of viewers. After their report has been confirmed, such a readjustment of amounts, if entered upon in a defense to the lien, would be in disregard of the effect to be given to the record of the confirmed report of the jury of view. *Philadelphia v. Nook*, 44 W. N. C. 556.

And some cases have lost sight of the principle involved, and held that a district sewer may be constructed of dimensions larger than necessary for the drainage of the district, so as to receive drainage from other districts, and the property within the district be compelled to pay for it, under a charter authorizing the construction of district sewers to connect with public sewers or other district sewers, of such dimensions as may be prescribed by ordinance, the cost of the same to be assessed against the property located in the district. *Kansas use of Adkins v. Richards*, 34 Mo. App. 521.

So, under the Massachusetts statutes, the cost of an outlet sewer, which is also intended for the use of the property through which it is constructed, need not be assessed on any part of the property drained by the connecting sewers. *Ayer v. Somerville*, 143 Mass. 585, 10 N. E. 457.

is sufficiently benefited so as to uphold a special assessment for the improvement, land within the section cannot refuse to bear its portion of the assessment merely because it is not specially benefited by the improvement. This shows that the assessments upon the individual parcels are not supported by the fact that the benefit is equal to the assessment, but by the fact that, as members of the community, the owner of the parcel is bound to bear his share of the public burden, and that he is regarded as sharing in the benefit to the general public to such an extent that he cannot be heard to say that he received no special benefit. The exceptions which the courts have made to the general theory of assessments for benefits, therefore, show that even the courts which profess to adhere to that theory do not do so, but actually decide in favor of the broader doctrine while apparently only making exceptions to the benefit theory which they profess to follow. Again, if the drain is constructed larger than present needs require, to accommodate future inhabitants of the district for which it was created, and the property in which is charged with its cost, the individual taxpayer cannot refuse to pay his assessment on that ground, because the officers in charge of the improvement must be given discretion as to the best means of providing for the needs, both present and prospective.<sup>5</sup> These considerations show that in considering the question of benefits for which property can be assessed, regard should be had not to the needs of the individual, but to those of the community or district, the interests of all the members of which are the same, and for the protection of which interests the individuals unite their private interests in a plan for the common welfare. Property cannot be assessed for the construction of drains which are outside of, and do not benefit, the natural district in which the property is located.<sup>6</sup> The extent to which courts depart from the theory of benefits while assuming to follow it is illustrated by a ruling that the fact that the assessment of benefits exceeds the intrinsic value of the land

<sup>5</sup> The mere fact that real estate within a municipal corporation has not been subdivided into lots and blocks, and that it is in present use solely for farming purposes, does not exempt it from a special assessment for a trunk sewer capable, with laterals, of draining the whole territory, where, by reason of its adaptability for suburban residences, the construction of such sewer will result in an increase in the present market value thereof. *Leitch v. LaGrange*, 138 Ill. 291, 27 N. E. 217.

<sup>6</sup> While the measure of a sewer assessment is the amount of the benefit,

yet it cannot exceed the cost of the improvement, so that a municipal corporation cannot take the aggregate cost of local sewers for a whole district,—that is, treat the main sewers as local, require the excess of cost to be paid by the city, and divide this aggregate sum by the aggregate frontage of abutting lots, to establish a rate of cost, and then assess this rate against each lot according to frontage, with an equitable allowance for corner lots, etc., liable to charge for more than one sewer. *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576.



assessed does not invalidate it.<sup>7</sup> Of course, it cannot be contended that the assessment follows the rule of benefits if it exceeds the total value of the property after the improvement is made.

**173e. Assessment of land already drained.**—Under the rule that assessments are based on benefits, no assessment can be laid upon property which is already drained, unless it is because of incidental benefits, such as the improvement of the healthfulness of the community, or the betterment of highways, or some other cause which will result in individual benefit to the property upon which the assessment is sought to be laid.<sup>1</sup> If lands already supplied with drainage are exempted from assessment by statute, they cannot be assessed if they are already supplied with local drainage, and are not specially benefited by the construction of the drain for which the assessment is sought to be levied.<sup>2</sup> But the mere fact that property is drained by

<sup>7</sup>*Re Tuthill*, 50 N. Y. Supp. 410.

<sup>1</sup>*Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

Under a municipal charter requiring that assessments for the expense of constructing a sewer be assessed on lands specially benefited, it cannot be said that lands already drained of their surface water by a brook which found its way to a river are specially benefited by the construction of a sewer through other lands, into which the waters of such brook are turned and carried to the river. *Hungerford v. Hartford*, 39 Conn. 279.

It is not within the discretion of commissioners authorized to assess the cost of a sewer upon such real estate as they shall deem benefited, to assess a lot drained by another sewer, and which could not connect with the new sewer except by crossing for over 100 feet the land of other parties, while another and larger lot directly opposite is not assessed. *Longley v. Hudson*, 4 Thomp. & C. 353.

Abutting property cannot be assessed for the construction of a sewer on the opposite side of the street, when a sewer has already been constructed on the adjacent side of ample capacity, and the new one could not be reached from the premises because of double car tracks, and gas and water pipes in the middle of the street. *Philadelphia v. Potter*, 5 Pa. Co. Ct. 324.

A property owner is not liable for a sewer frontage tax, in so far as the new sewer is laid in the same street and parallel to a sewer erected at his private expense, of materials, in a manner, and

under a plan specified by the municipal corporation, as those are elements which constitute a public sewer. *Philadelphia use of Noonan v. Verner*, 8 Pa. Co. Ct. 97.

Where a sewer has been made through an alley in the rear of a lot, on which there is but one improvement, already supplied with drainage by the sewer previously made in the street in front, such lot cannot be assessed for the alley sewer, unless there is actual drainage into it. *Cincinnati v. Weicell*, 9 Ohio Dec. Reprint, 677.

A private sewer is not independent of a public one, so as to exempt its owner from assessment for the expense of building the latter, where it was encountered in constructing the public one, rendering it necessary to cut it, after which it was connected with and discharged into the public sewer. *Sargent v. New Haven*, 62 Conn. 511, 26 Atl. 1057.

<sup>2</sup>*Cincinnati use of Wilson v. Hess*, 19 Ohio C. C. 252; *Toledo use of Gates v. Lake Shore & M. S. R. Co.* 4 Ohio C. C. 113; *Blue v. Wentz*, 54 Ohio St. 247, 43 N. E. 493.

Property drained by a sewer constructed at the expense, partly of the municipality and partly of the property owners, is provided with local drainage within the meaning of a statute exempting such property from assessment for a system of sewer improvement. *Weicell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196, Affirming 9 Ohio Dec. Reprint, 677.

An owner of property afforded drainage by an existing sewer cannot be assessed

a private drain which the owner may be required to discontinue, or which does not meet the needs of the property as it would be served by a public drain, does not absolve the property owner from liability to contribute to the cost of the public one.<sup>3</sup> So the land is not relieved from liability to assessment because sewers adequate for its drainage have been constructed in other streets if, according to the drainage plan in force, the owner has no right to use them, or may be required to use the drain in his own street.<sup>4</sup> And the mere fact that a sewer already exists is not of itself sufficient to show that there is no benefit from the construction of the new one, so as to be subject to assessment.<sup>5</sup>

for the cost of a new general system of sewerage, in the construction of which the old sewer was destroyed or changed. *Potter v. Norwood*, 21 Ohio C. C. 461.

But an assessment of property for the construction of a sewer is not invalid as being already provided with local drainage, within a statute prohibiting the assessment of lots not needing or already provided with local drainage, where the old sewer, beginning and ending on private property, is subject to be closed at any time, and has in fact no proper outlet. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

Where the topography of the property furnishes all necessary local surface drainage, and a tile sewer, constructed by the property owner, receives and discharges the surface and other drainage upon the premises into a trunk sewer, there is a sufficient local drainage, within the meaning of a statute exempting from assessment for sewer purposes, property provided with sufficient local drainage. *Cincinnati v. Sullivan*, 9 Ohio S. & C. P. Dec. 598.

An injunction will be granted to restrain the collection of an assessment upon property for the construction of a local sewer, under a statutory provision that lands not needing, or already supplied with, local drainage cannot be assessed for the construction of local drainage facilities, where, many years prior thereto, such property had been assessed, according to benefits, for a sewer of considerable length, and tapped by other sewers, although not abutting thereon, as such sewer is a main sewer within a provision permitting the construction of local sewers where no main sewer has been established, of the benefits of which the owners of the property so assessed were justified in availing

themselves, so that they were already furnished with sufficient drainage. *Miller v. Toledo*, 12 Ohio C. C. 706.

An injunction will be granted to enjoin the collection of a sewer assessment at the suit of the owner of one of the subdivisions of a lot, which, prior to its subdivision, abutted on an alley in which a sewer had been constructed, in the rear of the subdivision of which a new sewer is constructed, where the owner of such subdivision had paid a proportion of the assessment against the whole of the original lot for the prior established sewer, and had constructed a drain pipe into it, as his lot is already supplied with drainage so as to be exempt from assessment for the construction of another sewer, under the Ohio statutes. *Miller v. Toledo*, 7 Ohio N. P. 477.

*Philadelphia v. Oadwallader*, 20 W. N. C. 14; *Re Evans Avenue Sewer*, 32 Pittsb. L. J. N. S. 24; *Re Broad Street*, 9 Kulp, 37; *Sargent v. New Haven*, 62 Conn. 511, 26 Atl. 1057.

The owner of property benefited by the construction of a public sewer is not exempt from assessment therefor because already amply served by its private drain constructed in the street under license from the municipal corporation, and it is immaterial that such private sewer had been tapped by the board of education without his consent. *Philadelphia use of Yost v. Odd Fellows Hall Assn.* 168 Pa. 105, 31 Atl. 917, Affirming 4 Pa. Dist. R. 3.

*Philadelphia v. Nock*, 44 W. N. C. 556; *People ex rel. Albright v. Buffalo*, 52 N. Y. Supp. 689.

*Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89.

The mere fact that one whose estate is assessed for construction of a sewer

In determining the amount of an assessment on a particular piece of property for the expense of constructing a sewer under a charter providing that the assessment be in accordance with the benefits conferred, it is proper to take into consideration the fact that the owner had constructed a private drain, in consequence of which the improvement was of less benefit to him, and for that reason to assess him less than otherwise would have been done.<sup>6</sup> In any event, to relieve from assessment because of existing drainage, it must be adequate to the needs of the property. Therefore, there may be an assessment for a sewer when the existing drain is only for surface drainage.<sup>7</sup> And the sewer must be not only adequate to the needs of the property sought to be assessed, but it must not be detrimental to the public interests, so that the public will have no right to require its removal.<sup>8</sup> And its capacity must be sufficient to meet all needs.<sup>9</sup>

had drained into a culvert laid across the highway will not show that the estate was not benefited, if it does not appear that the culvert was laid out as a drain, or that he had any right to drain into it. *Keith v. Boston*, 120 Mass. 108.

<sup>6</sup>*Clapp v. Hartford*, 35 Conn. 66.

<sup>7</sup>*Cincinnati v. Honnigfort*, 32 Ohio L. J. 32; *Thrall v. Williamsport*, 18 Pa. Co. Ct. 330; *Ford v. Toledo*, 64 Ohio St. 92, 59 N. E. 779.

It is no defense to an action brought to recover a sewer assessment that there had been previously constructed in the street, by the city, at its own expense, a tile sewer, solely for the drainage of stagnant water from a pond into a trunk sewer, although such tile sewer is of sufficient capacity to drain abutting lots, under a statute exempting lots from assessment for local drainage or sewerage where already provided therewith, as such statute contemplates a sewer intended and used exclusively for the drainage and accommodation of the lots. *Toledo use of Gates v. Brown*, 2 Ohio N. P. 45; *Toledo use of Gates v. Kohn*, 2 Ohio N. P. 47.

<sup>8</sup>*Avondale v. Scudder*, 12 Ohio C. C. 770; *Sargent v. New Haven*, 62 Conn. 511, 26 Atl. 1057.

Lots are not to be deemed already provided with drainage, so as to be exempt from taxation for sewer purposes, because they reach back to a permanent water course, which will take their surface water, where drainage other than surface water cannot be

turned therein without creating a nuisance, prohibited by statute. *Cincinnati use of Jonte v. Kasselmann*, 10 Ohio Dec. Reprint, 790.

An upper proprietor whose land is already sufficiently drained by private ditches conducting the water upon lower lands, which he has no right to burden therewith in that way, is benefited by the construction of a public ditch draining such lower lands so as to make his drainage thereafter lawful, and may be assessed for the construction thereof, although the ditch does not reach his land or receive water directly therefrom; and, in estimating such benefits, the viewers may take into consideration anything increasing the market value of the land by reason of the drain, including the advantage thereto afforded by having the outlet to his private drains made lawful, and a release from liability of injunction on the part of the lower landowners, restraining the wrongful discharge thereon. *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700.

<sup>9</sup>*DeKoven v. Lake View*, 129 Ill. 399, 21 N. E. 813.

Under a statute authorizing the assessment of the expense of a sewer on every person "whose real estate may be benefited thereby," property may be assessed which connects with a sewer for which the sewer the expense of which is to be assessed forms an outlet, where, before the building of the new sewer, the old sewer was at times choked up so that the property connected with it was flooded, which evil was

The owner of lands within a drainage district cannot defeat a second assessment necessary to complete the drainage system so as to drain other lands in the district, on the ground that his lands were drained by the improvement made by the first assessment, and therefore did not need further drainage.<sup>10</sup> A corner lot is liable to assessment for lateral sewers, under a statute providing that the cost of such a sewer must be assessed upon the owners of lots fronting on the streets through which it runs in proportion to the benefit received, not exceeding the actual benefit, since a sewer benefits property by drainage of the street as well as by direct connection with it.<sup>11</sup> A statute authorizing a sewer assessment on adjacent property refers to property adjoining the sewer, and does not authorize assessment of land on a cross street in which a sewer may also be laid at any time, although the property is benefited by the sewer, since a private drain therefrom empties into it.<sup>12</sup>

The adequacy of a private sewer, for the purpose of exempting its owner from assessment for the expense of constructing a public one, must be determined after the completion of the public one; and where, in constructing the public sewer in a highway, the private one was encountered, rendering it necessary to cut it, it was no longer adequate.<sup>13</sup>

**174. Who may be included in drainage district.**— When, under the procedure of a particular state, drainage is done by districts which are small political subdivisions of the state, organized to carry on a particular improvement,<sup>1</sup> the question who may be made members of the districts depends upon the further one as to who is liable for the cost of the drainage. The creation of the district is simply a convenient way of putting into practice the principle that those living within the area within which an improvement is needed may, if the public good requires it, be compelled to bear the burden of the improvement. The segregation of this section from the common mass

corrected by the new outlet sewer. a tax upon any territory less extensive than the political subdivision of which

*Workman v. Worcester*, 118 Mass. 168.  
*Briggs v. Union Drainage Dist. No. 1*, 140 Ill. 53, 29 N. E. 721.

*People ex rel. Taber v. Adams*, 45 N. Y. S. R. 270, 18 N. Y. Supp. 443; *Philadelphia v. Cadwallader*, 3 Pa. Co. Ct. 203.

*Colcyn v. Tarbottom*, 7 Pa. Dist. R. 540, Affirmed in 43 W. N. C. 503.

*Sargent v. New Haven*, 62 Conn. 511, 26 Atl. 1059.

<sup>1</sup>In New Jersey it has been held that the legislature has no power to impose

it is a part, except by due regard to the special benefits accruing to those on whom it falls; and, to constitute such a political subdivision, the territory must be invested with some, at least, of the general governmental and administrative powers and functions, as the design of its creation. A drainage district does not fall within such category. *State, Lydecker, Prosecutor, v. Drainage & Water Comrs.* 41 N. J. L. 154.

of property, and treating the persons residing therein by themselves, does not violate the constitutional provisions as to uniformity of taxation, since it may be regarded as a special proceeding where the landowner is required to pay for benefits specially conferred upon the land.<sup>2</sup> The size of the district, and the territory to be included, are largely matters of legislative discretion, although the bounds must be fixed with some regard to the common interests.<sup>3</sup> It is not necessary that all the territory ultimately drained by a single system shall be united in one district, but the various parts of the system may be created independently to construct the portions in which they are specially interested, and the sections may eventually be combined into one whole.<sup>4</sup> Any benefit to be derived from, or interest in, the construction of the drain, is sufficient to justify the inclusion of the property in the district.<sup>5</sup> And land which was not originally included may be added to it when the owner takes the benefit of the improvement.<sup>6</sup> The questions growing out of the actual levying of the tax upon the property, and the defenses which the owner has because of errors in proceedings, or erroneous inclusion or exclusion of land, will be taken up in a subsequent section.<sup>7</sup>

**175. Area or frontage assessments.**— Under the strict rule that assessments must be based on benefits, it is not permissible to apportion the assessment according to the area or frontage of the property. But the recognition of districts or small sections of country as drainage units, the property in which is all benefited by the improvement, and which ought to contribute to the expense of the drainage, has forced a departure from the strict idea that assessment must be based on benefits. In such cases it is the entire district which is benefited, and

<sup>2</sup>*Kilgour v. Drainage Comrs.* 111 Ill. 342.

The common council of a city have a right to designate a special taxing district for sewer purposes, instead of levying the tax upon the whole city or upon a wider district within which the inhabitants would be benefited thereby as regards health, since the construction of sewers is a work of convenience to the particular locality drained by them, and may be undertaken without regard to the improvement of the natural surface or the protection of health. *Warren v. Grand Haven*, 30 Mich. 24.

<sup>3</sup>*Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

<sup>4</sup>The fact that a sewer constructed in one district or portion of a city connects with, or is an extension of, another al-

ready constructed, does not make the territory drained by both a single and distinct district, requiring all the property therein to be assessed for the sewer last constructed, but only the territory drained and specially benefited by the construction of such connecting section or extension can be assessed for its cost. *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

<sup>5</sup>*State, Henderson, Prosecutor, v. Jersey City*, 41 N. J. L. 489.

If the work of a drainage district protects lands from overflow, then they are directly benefited, and may be annexed to the district. *Streuter v. Willow Creek Drainage Dist.* 72 Ill. App. 561.

<sup>6</sup>Sec post, § 228.

<sup>7</sup>Post, § 239 et seq.

the district represents the public, so that the machinery of the government may be utilized to effect the drainage.

When the attempt is made to apportion the tax among the people of the district, two methods of procedure are found available. First, there may be an assessment according to benefits. This is not regarded as a form of taxation, so that the constitutional provisions as to uniformity do not apply. The assessment merely represents the increased value conferred upon the property by the improvement, and the landowner may be required to pay for the improvement to the extent of this benefit. Upon this theory the assessment must be levied as nearly as may be according to the benefit received. But another view may be taken of the matter. The property within the benefited area may be regarded as a local taxing district, upon which the expense of the improvement may be imposed, and the fund raised by a tax levied upon the property. As said in *Galesburg v. Searles*,<sup>1</sup> under the statutes of Illinois, a municipal corporation may pass an ordinance providing for the construction of a sewer in one of its streets, the cost thereof to be paid, one half by general tax, and one half by special taxation to be levied on the property contiguous to the improvement in proportion to the benefits accruing to the respective parcels of land along the line of the improvement by the making thereof; and it is not necessary to its validity that, before its passage, an examination shall have been made of such property, and the probable benefits thereto by the construction of the sewer have been determined to be one half the cost thereof, since special taxation does not imply special benefit or any benefit, and no attention need be paid thereto, after that mode of taxation is adopted, further than may be paid by the city council in determining which particular one of the several modes of special taxation of contiguous property open to them shall be resorted to. This being a proceeding by special taxation, and not by special assessment, the steps required to be taken in the latter case need not be regarded.

Under this view the principles governing taxation generally apply, and under the constitutional provisions the tax must be uniform upon the property in the district. Two methods of reaching this result are available; one, the assessment of an ad valorem tax upon all the property; and the other the assessment of an area tax. The drainage improvement is usually for the benefit of the land in its natural state, without regard to the improvements which may have been placed on it, and is of no benefit to the personal property or buildings in the

<sup>1</sup>114 Ill. 217, 29 N. E. 686.

district as such. To reach the interest which is most clearly affected by the improvement, therefore, the tax should be laid upon the land itself according to area, and this may be by the total area or by the frontage upon the improvement.

The question of the desirability of the improvement should in some way be left to the inhabitants of the district, because then, unless the improvement will, on the whole, be a benefit, it will not be made. The excessive burdens in most cases arise where the duty to improve is imposed on the district by outside influences, and results not so much in the benefit of the district, as in that of the general public. In such cases strict equality of burden is not so just as a burden distributed according to benefits; but, so far as the property is equally benefited, there is no objection to an area or frontage assessment.

There are many points of difference between an area or frontage assessment for a drainage improvement, and for a street paving improvement, and the objections which might justly be urged against the latter are of much less weight against the former. The only property which is likely to be benefited by the drainage is that in the vicinity of the drainage improvement, so that the entire benefit may be said to result to it, and the increase in the value of the property is usually greatly in excess of the cost of the improvement; while in the case of a street pavement the improvement may be of no actual benefit to the property abutting on the street, and be for the exclusive convenience of merchants or property owners living some distance away. The mere paving of a street does not necessarily increase the value of the property abutting thereon, since the street accommodations already exist and may be entirely adequate to the needs of the abutting property, while in the case of the drainage improvement, the very fact that the improvement is needed shows that it will be of some benefit, at least, to the property drained by it. The courts which uphold the area or frontage assessment for the most part do so on some theory of benefits to the individual parcels assessed rather than upon the broader ground of uniformity within the taxing district. The superficial area of the district must, of course, be fixed according to benefits, because no land can justly be included within the district unless it is benefited; but, when the bounds have once been fixed, the district as a whole may be required to meet the cost of the improvement.<sup>2</sup> Deference to the benefit theory has led the Massachusetts court to hold that, within the district, assessments may, as a mode of equitable adjustment, be

<sup>2</sup>*Re Loudon*, 89 N. Y. 548.

divided into three classes,—“direct benefit, remote benefit, and more remote benefit.”<sup>3</sup> And to reach an equitable adjustment, and, at the same time, make use of a system of apportionment which shall not be so cumbersome as to be self-destructive, it may be necessary to combine the benefit assessment with the area assessment. It may be argued that, if the area or frontage assessment is to be upheld, the constitutional requirements of uniformity of taxation will require that the tax be uniform within the district; and if the tax is to be upheld on the theory of benefit, then the frontage or area assessment cannot be upheld unless it can be shown that such a method of assessment is in proportion to the benefit. But the making of assessments for local improvements is different from the exercise of the power of taxation generally. The taxing power may be exercised to secure necessary drainage, and the tax may be levied on the particular locality upon which the burden should rest. It may be made uniform on all land throughout the district. But such proceeding will result in needless hardship. A tract of land most of which lies so as to be comparatively well-drained, but which is sufficiently in need of additional drainage to be equitably included in the district, should not be assessed at the same rate as a tract which lies completely under water. So land which is benefited by the laying of a sewer in a street only so far as the street is drained and put in better condition should not be assessed equally with a lot abutting on the street in such a way as to be able to drain into the sewer. The theory of assessment according to benefit may therefore be employed to classify the property within the district, and the rule requiring uniformity of taxation to fix a uniform tax upon property of the same class.<sup>4</sup> In any consideration of

<sup>3</sup>*Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

<sup>4</sup>A municipal corporation having statutory authority to construct sewers by special assessment may prescribe the rule of apportionment thereof, having reference to the special benefits accruing to the abutting property by reason of the improvement, so as to secure an assessment in proportion to those benefits, as nearly as practicable. *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

A sewer assessment is not invalid because one of two tracts of land equally distant from the sewer is assessed much higher than the other, where the former tract is situated on the more desirable street, and the cost of constructing laterals therefrom to the sewer will be much less than in the case of the second tract. *McKee Land & Improv. Co. v.*

*Swikehard*, 23 Misc. 21, 51 N. Y. Supp. 399.

That assessors in imposing a sewer assessment adopted a uniform sum per foot front on one street and a different and uniform one on other streets does not raise a presumption that the officers failed to make the assessment according to the ratio of benefit which in their judgment resulted to the premises assessed from the improvement. *Denise v. Fairport*, 11 Misc. 199, 32 N. Y. Supp. 97; *McKee Land & Improv. Co. v. Williams*, 63 App. Div. 553, 71 N. Y. Supp. 1141.

A scheme for the assessment of the cost of a trunk sewer is not unconstitutional from the fact that it provides for the assessment upon property abutting on the sewer to the full extent of benefits imparted to it, and the remainder



the cases bearing on the validity of area assessments, the principle upon which the court is proceeding must be kept in mind, for any reasoning based on the benefit theory will be inapplicable to a case proceeding on the assessment-district theory, and, although the courts have tried to reach the same result and uphold the area method of assessment, a too strict adherence to the benefit theory in some cases has prevented a uniformity in the reasoning, and has led to some decisions which cannot be upheld on principle. Under the benefit theory it has been held that it is not a good objection to a sewer assessment that it is laid on the lots according to linear measurement, if such is a mere basis of arriving at benefits, when naught appears to show that the lots were not of similar size and characteristics, and if the property on the line is specially benefited to the extent of the cost of the improvement.<sup>5</sup>

upon property on laterals, so that the assessment of the property on the sewer may be greater in proportion than that upon the laterals. *State, Central New Jersey Land & Improv. Co., Prosecutor, v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713.

In assessing the cost of a sewer, one section of which was excavated through rock, the cost of the rock excavation should not be assessed upon the property between the rock and the outlet to the same extent as upon that above the rock. *Freeland v. Bayonne*, 58 N. J. L. 126, 32 Atl. 68.

A statute which provides that all such assessments shall be made upon all estates abutting upon that portion of any street or highway in which any sewer has been, or may be constructed, at the rate of 60 cents for each front foot of such estates upon such street or highway, and 1 cent for each square foot of such estates between such street or highway and a line not exceeding 150 feet distant from and parallel with the line of such street or highway; provided, however, that where any estate is situated between two streets or highways, the area upon which such assessment of one cent per square foot is made shall not extend to more than one half the distance between such streets or highways, and provided, also, that where any estate is situated at the corner of two streets or highways, or otherwise so situated as to be assessed for the expense of making a sewer in one of such streets or highways, that portion of such estate assessed for a sewer in one of such streets or highways shall not be liable to be assessed upon its area for

the cost of constructing a sewer in the other of such streets or highways, but only for its frontage upon such street,—is not in conflict with a constitutional provision that “the burdens of the state ought to be fairly distributed,” when applied in the compact part of a city, on the ground that such a mode of assessment is unequal and unfair. *Cleveland v. Tripp*, 13 R. I. 50; *Bishop v. Tripp*, 15 R. I. 460, 8 Atl. 692.

*State, McKeritt, Prosecutor, v. Hoboken*, 45 N. J. L. 482; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *Brown v. Keener*, 74 N. C. 714.

An assessment for a trunk sewer, made at an unvarying rate per square foot, is consistent with a charter provision requiring an assessment based on benefits, where it was levied by the assessors in good faith, after careful consideration. *People ex rel. Albright v. Buffalo*, 52 N. Y. Supp. 689.

When the rule of assessment for the construction of a permanent public improvement, such as a sewer, is according to benefits conferred, the foot frontage rule is the most equitable to be devised, since every portion of the abutting property has the equal right and opportunity to use the sewer. “I can conceive of no fairer measure of benefits held out to the abutting owners, and no fairer rule by which to apportion the burden of construction. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49.

The fact that commissioners, in assessing contiguous lots for the construction of a sewer, assessed against each lot the exact cost of the improvement

That doctrine merely holds that the area assessment is valid so far and only so far as it represents benefits, and courts which have attempted to apply that theory have held that if the area assessment is not according to benefits it cannot be upheld.<sup>6</sup> But the doctrine is impracticable, and the later and better considered cases have abandoned the benefit theory except so far as the question of incorporating the property in the district is concerned, and held that all the property in the district may be assessed by a uniform frontage<sup>7</sup> or area<sup>8</sup> assessment. If the drainage was necessary, and was properly done, the cost will not exceed the benefit, and the fact that it does so may be taken into consideration on the question of the validity of the proceedings; but where the proceedings are properly undertaken and carried out there is no objection to the area method of assessment. Constitutional provisions requiring taxation according to value do

in front of the same, or that the same is in exact proportion to the frontage, will not, of itself vitiate the assessment, if the special benefits are equal to the cost and in proportion to the frontage, although a special assessment made on the basis of frontage alone, and without regard to special benefits, would be invalid. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

The fact that the commissioners, in their report of the amount of assessments levied against the contiguous property for the construction of a sewer, gave the frontage of the lots upon the street, or that they assessed against each lot the exact cost of the sewer in front of the same, will not, of itself, vitiate the assessment, where it appears that they determined that the benefit to each lot was equal to the cost of the sewer in front thereof, although such assessment would be void if they had assessed the cost of the improvement according to the frontage without finding that the special benefits are in that proportion. *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

*People ex rel. Parker v. Jefferson County Ct.* 55 N. Y. 604; *Lee v. Ruggles*, 62 Ill. 427.

A uniform assessment arbitrarily imposed by the lot on all property affected in the same way by the construction of a sewer will not be sustained if the advantages to the land vary. *State, Freer, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

A sewer assessment apportioned upon property within the assessment district,

which includes lots remote from the sewer, according to superficial area, and irrespective of benefits, is unlawful. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

*Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *State, Central New Jersey Land & Improv. Co., Prosecutor, v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713; *DeWitt v. Elizabeth*, 56 N. J. L. 119, 27 Atl. 801; *People ex rel. Scott v. Pitt*, 64 App. Div. 316, 72 N. Y. Supp. 191; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.

The legislature may impose upon property fronting upon, or connecting with, a sewer improvement, an assessment of a fixed sum per linear foot, without giving any hearing as to the justice of such rule of apportionment. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 682.

Stat. 1867, chap. 106, providing for the construction of sewers, the expense thereof to be met by the mayor and aldermen assessing the real estate along the line of the sewers and some other specially benefited land its proportionate share of the expense, is not unconstitutional on the ground that it authorizes an assessment exceeding the benefit received by the estate assessed. *Smith v. Worcester*, 182 Mass. 232, 65 N. E. 40.

*Heman v. Allen*, 156 Mo. 534, 57 S. W. 559. Affirmed in 181 U. S. 402, 21 Sup. Ct. Rep. 645, 45 L. ed. 922; *Gillette v. Denver*, 21 Fed. 822; *St. Joseph use of Gibson v. Farrell*, 106 Mo. 437.

not apply to such proceedings.<sup>9</sup> If the property is included in the district its owner cannot object to the assessment on the ground that the property is not benefited, even if the property was already provided with sewerage. Such questions must be raised in the proceedings for the organization of the district and the inclusion or exclusion of property, and cannot be raised to defeat an assessment after the district is organized.<sup>10</sup> On the theory that the landowner, in becoming a member of the government organization, agrees to contribute to the expense of necessary drainage, he may be required to contribute at times in excess of the actual benefit returned to him through the particular improvement, his recompense being made to him in the advantages secured by the general operation of the government. But any assessment which greatly exceeds the visible benefits raises a strong presumption that the improvement was unnecessary, or that the burden was unjustly distributed. And in case the assessment confiscates the property, as sometimes happens, there is no excuse which can be considered for a moment. Any system of assessments which must be adjusted by human agency is liable to work injustice in individual instances,<sup>11</sup> but if the injustice is general and widely distributed it is very strong evidence that the particular improvement for which the assessment is laid was entered upon not for the benefit of the local district upon which the burden is cast, but for some larger

<sup>9</sup>*Creamer v. Allen*, 3 Mo. App. 545; *Sucain v. Fulmer*, 135 Ind. 8, 34 N. E. 639.

An assessment for construction of a sewer is to be made upon the land according to its value exclusive of buildings; and the relative benefit which each estate on the line of the sewer may receive is immaterial. *Snow v. Fitchburg*, 136 Mass. 183.

But in New Jersey it is held that a sewer tax levied according to a percentage of the cost of construction upon the lineal frontage of lots past which it runs is invalid, because, regarded as an ordinary property tax, it conflicts with a constitutional requirement that assessments be according to the true value; and considered as a special assessment, it is not imposed for and within the limits of special benefits conferred by the improvement. *State, Reynolds, Prosecutor, v. Paterson*, 48 N. J. L. 435, 5 Atl. 896.

<sup>10</sup> It is no defense to an assessment for a local sewer that an abutting lot had adequate drainage from a sewer in the alley in the rear, also one on a side street, for both of which it had been assessed, and will receive no benefit from

the new sewer, under a statute authorizing the whole cost of local sewers to be assessed on abutting property in proportion to area. Under this statute the assessment is not placed on the basis of special benefits, and the courts can afford no remedy for hardships imposed by what amounts to a double assessment. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

*Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

Unless the municipal officers abused their discretion in determining that the second sewer was a necessity. *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351.

When it is within the judicial discretion of the assessors of a sewer tax to adopt the foot-frontage rule of apportionment, the most that can be said against it on the ground that it worked inequitably in some cases is that it was an error of judgment. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49.

<sup>11</sup> The law requires no more than approximate equality in the making of sewer assessments. *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

area which should be made a portion of the taxing district before the assessment can be upheld. One citizen cannot be taxed for the benefit of another.<sup>12</sup> And if the public authorities attempt to construct an improvement for the benefit of a large portion of the community, and compel a small portion to pay for it, the proceeding is void, and should be set aside.<sup>13</sup> The statutes may determine the method of assessment, and if they require an assessment according to benefits, an area assessment cannot be upheld unless it is shown to be according to benefits.<sup>14</sup> If the requirement is that the cost be assessed "equitably and ratably," an assessment upon property situated at a distance from the improvement, and which is not shown to be benefited, will not be set aside, merely because of those facts.<sup>15</sup> Under a statute providing that in no case shall any tract of land be assessed in a greater amount than its proportionate share of the expense of constructing a drain, it is error to assess the whole of the expense of making a drain and the costs of the proceeding upon one tract of land, leaving another benefited by such drain not charged with its proportionate share.<sup>16</sup> A statute providing for the assess-

<sup>12</sup> Failure to assess all the lands that should be assessed for the construction of a drain renders such assessment invalid. *Nevins & O. C. Twp. Draining Co. v. Alkire*, 36 Ind. 189.

<sup>13</sup> *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204.

A statute requiring the cost of a sewer to be laid upon abutting property according to the lineal measurement of the property upon the sewer is void so far as it applies to property located at an angle in the sewer so that it is liable to assessment for both its width and length, where it receives but slight additional benefit from the turn in the sewer. *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379.

This principle is violated by a Pennsylvania case which held that an assessment according to frontage may be made on property abutting on a street through which a culvert is constructed to carry the water of a stream which has been adopted for drainage purposes, although no benefit results to the property assessed because it does not drain into the stream. The charge is a tax or assessment which the city is empowered to make. *Philadelphia v. Lips*, 4 Phila. 150.

<sup>14</sup> *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366; *ReKlock*, 30 App Div. 24, 51 N. Y. Supp. 897.

A sewer tax assessed strictly in pro-

portion to the frontage on a street raises a strong inference that the requirement of the ordinance that the assessment be in proportion to the benefit has not been complied with. *Warren v. Grand Haven*, 30 Mich. 24.

Under a charter of a municipality requiring that the expense of constructing a sewer be assessed on the owners of property specially benefited, the quantity and the value of the land owned by each person, together with the needs of the property, should be considered in determining the amount of benefit conferred by the improvement, and a by-law of the municipality providing for the assessment of owners of land fronting on the sewer in proportion to the number of feet front owned by each is not reasonable or fair, and will not be followed by the court in reviewing the assessment. *Clapp v. Hartford*, 35 Conn. 66.

But under authority to levy the expense of constructing a drainage ditch as a tax "upon such property as they shall determine is especially benefited thereby," a municipal corporation may levy the said expenses *pro rata* as to area upon an "improvement district" composed of benefited lands. *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

<sup>15</sup> *Springfield v. Gay*, 12 Allen, 612; *Goodrich v. Minonk*, 62 Ill. 121.

<sup>16</sup> *Gilkerson v. Scott*, 76 Ill. 509.

ment of taxes for the construction of a gutter upon property fronting on the highway does not require an assessment of all the property fronting on the highway, if the gutter is constructed only in front of a part of the property.<sup>17</sup> A by-law imposing a uniform rate for draining into the common sewers of a city of a certain amount per foot frontage, to be charged upon the proprietors of real property for each and every foot frontage of property draining into such sewers, is invalid, as being an arbitrary rate not taxed in proportion to the assessed value of property, as required by statute.<sup>18</sup> For the purpose of determining the area of property to be assessed, vacant property may be treated as one tract, although it has been subdivided into lots.<sup>19</sup>

**176. Right to meet expense of drainage by public tax.**— In the absence of any constitutional provision prohibiting the state from entering upon works of internal improvement there is no reason why the expense of drainage should not be met by general taxation. There may be cases in which the necessity for drainage affects such a wide stretch of country, and involves the welfare of such a large portion of the population of the state, as to make the improvement one which should be met by a general state tax. So it may be that the drainage affects a whole county or municipal corporation; and in such cases the cost may be raised by a general tax upon the government division to be benefited.<sup>1</sup> A recommendation by the village board of health that sewers be constructed does not authorize the village authorities to pay for their construction out of the village treasury instead of by assessment upon the property benefited in the manner provided by law.<sup>2</sup>

The imposition of a general tax upon the inhabitants of a city for the construction of a sewer cannot be upheld by reason of the inherent power of a city to impose taxation for the preservation of the

<sup>17</sup>*Kendig v. Knight*, 80 Iowa, 29, 14 N. W. 78.

<sup>18</sup>*Alducell v. Toronto*, 7 U. C. C. P. 104.

<sup>19</sup>*Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>1</sup>*Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Johnson v. Duer*, 115 Mo. 371, 21 S. W. 800.

The legislature may appropriate money from the state treasury to aid in paying the cost of providing a system for sewage disposal, embracing in its benefits a number of cities, towns, and a large population. *Re Kingman*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

A municipal corporation which has

authority to divide the city into sewerage districts in such manner as the council may determine may constitute the whole municipality one district. *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

Where the cost of lateral sewers has been assessed to abutting property, but the main arteries have been constructed at the expense of the city, a plan to construct other sewers by a special tax upon the city at large is not inequitable. *Grunevald v. Cedar Rapids* (Iowa) 91 N. W. 1059.

<sup>2</sup>*Re Plattsburgh Taxpayers*, 27 App. Div. 353, 50 N. Y. Supp. 356.

public health or safety, but such power, if it exists, must be derived from its charter.<sup>3</sup> But if the improvement is strictly of local benefit, the expense should be borne by the parties interested, and not imposed upon the property at large.<sup>4</sup> There is no objection, however, to the levying of a general tax upon the inhabitants of a municipal subdivision to meet the expense of a drainage improvement which will benefit the whole community.<sup>5</sup> Whether the tax should be a general or local one is, in most cases, determined by the language of the statute.<sup>6</sup> The members of a drainage district may be assessed for the benefit conferred by the construction of an outlet in another district.<sup>7</sup> And a highway district may be assessed for the benefit of a drainage district,<sup>8</sup> and townships may be assessed for benefits to their highways.<sup>9</sup> The legislature has authority to provide that school lands benefited by the construction of drainage ditches shall be taken into consideration in apportioning the cost of the improvements.<sup>10</sup> The cost of necessary bridges across drainage ditches may be imposed by statute upon either the drainage or the road district.<sup>11</sup>

**177. The land is liable for the assessment.**— An assessment for a

<sup>3</sup>*Byrne v. Corington*, 15 Ky. L. Rep. 33, 21 S. W. 1050.

<sup>4</sup>*Dawson v. Aurelius Twp.* 49 Mich. 479, 13 N. W. 824.

<sup>5</sup>*Byrne v. Corington*, 15 Ky. L. Rep. 33, 21 S. W. 1050.

Local assessments for the purpose of constructing a public ditch are not "taxes" within the meaning of a constitutional provision that "the general assembly may delegate the taxing power, with the necessary restrictions, to the state's subordinate political and municipal corporations, to the extent of providing for their existence, maintenance, and well-being, but no further." *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

<sup>6</sup>*Bacon v. Nanny*, 28 N. Y. S. R. 391, 7 N. Y. Supp. 804.

<sup>7</sup>*Drainage Comrs. v. Drainage Comrs.* 91 Ill. App. 241.

<sup>8</sup>*Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201.

So, where the drainage of swampy or marshy ground will improve a highway over the same, and the public will be benefited thereby, a drainage district including such a highway will be doing that which it was the duty of the highway district to do, and it imposes no burden upon the latter that it shall be required to contribute, in proportion to

the benefit thus received, towards the cost of such drainage. *Colfax Highway Comrs. v. East Lake Fork Special Drainage Dist.* 127 Ill. 581, 21 N. E. 206.

<sup>9</sup>*Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735; *Young v. Wells*, 97 Ind. 410; *State ex rel. Horrall v. Thompson*, 109 Ind. 533, 10 N. E. 305.

<sup>10</sup>*State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368.

<sup>11</sup>*Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201; *Union Drainage Dist. v. O'Reilly*, 132 Ill. 631, 24 N. E. 426, Affirming 34 Ill. App. 298.

A drainage commissioner cannot, by mandamus, compel the board of county commissioners or township trustees to remove bridges over a stream in order that a contractor may use his dredging boat on such stream in constructing a drain, in the absence of any statutory authority requiring them to do so. *State ex rel. Fadley v. Henry County*, 157 Ind. 96, 60 N. E. 939.

In New York it is the duty of commissioners acting under the drainage act, who, in the course of the work, have carried a ditch or channel across a highway, to restore the highway to its former state of usefulness by the erection of a suitable bridge. *Conewango v. Shaw*, 48 N. Y. Supp. 1.

drainage improvement so far partakes of the character of a tax that it may be levied on the land in the absence of a statute forbidding such proceeding.<sup>1</sup> And the assessment is strictly *in rem*, and the lien on the land does not render the landowner personally liable for its amount unless the statute makes him so.<sup>2</sup> And as such lien it follows the land in the hands of grantees and mortgagees, and the right to make the assessment takes precedence of mortgage liens.<sup>3</sup>

A purchaser of land, during the pendency of a petition for drainage, from a grantor who is named in the petition and has notice thereof, is bound by the proceedings to the same extent as though he had held the legal title when the petition was filed, and had been named therein and notified, under a statute making such an assessment a lien from the date of the filing of the petition.<sup>4</sup>

A lien will not be given priority over existing mortgages unless the statute so provides.<sup>5</sup> The drainage benefits the owner of the land, and should be borne by him rather than by the tenant.<sup>6</sup> As between life tenant and remainderman, the assessment should be borne by the latter.<sup>7</sup>

**178. Exemptions.**—A drainage district cannot tax state property lying within its limits for the improvement unless it is expressly authorized to do so by statute.<sup>1</sup> But an assessment for a drain is not within a general exemption from taxation.<sup>2</sup> The terms of the statutory exemption may, however, be such as to indicate an intention to exempt the property from liability for drainage assessments. Thus, an exemption of the property "except for state purposes" will render

<sup>1</sup>*Level of Hull Case*, 2 Strange, 1127.

<sup>2</sup>*Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

A landowner is not liable in assumption for the cost of the construction of a ditch over his land, established under a statute, in pursuance of which the assessment of benefits and damages to such land was made, in the absence of averments in the complaint that he either requested the work done or promised to pay for it. *Bogart v. Castor*, 87 Ind. 244.

<sup>3</sup>*Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767; *Re Pequest River*, 42 N. J. L. 553; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

But it has been held that a lien for a drainage ditch cannot be given a retroactive effect from the time of the approval of the assessment to that of the filing of the petition, so as to cut out a

mortgage executed in the interim upon the property to one who was not a party to the drainage proceedings, and had no notice whatever of them. *Cook v. State*, 101 Ind. 446.

<sup>4</sup>*Chaney v. State*, 118 Ind. 494, 21 N. E. 45.

<sup>5</sup>*State ex rel. Vawter v. Loveless*, 133 Ind. 600, 33 N. E. 622.

<sup>6</sup>*Wetmore v. Campbell*, 2 Sandf. 341; *Baltimore & O. R. Co. v. Pausch*, 7 Ohio N. P. 624.

<sup>7</sup>*Tragbar's Estate*, 12 Pa. Co. Ct. 635; *Bradley's Estate*, 14 Pa. Co. Ct. 672.

<sup>1</sup>*Polk County Sav. Bank v. State*, 69 Iowa, 24, 28 N. W. 416.

<sup>2</sup>*Harrisburg v. St. Paul's Church*, 5 Pa. Dist. R. 351; *Lockwood v. St. Louis*, 24 Mo. 20; *First Presby. Church v. Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35; *Re Harding Street Sewer*, 31 Pittsb. L. J. N. S. 147.

the property nonliable for drainage assessments.<sup>3</sup> So, where the charter provides that "all the property of this corporation . . . shall be forever exempt from all taxes and assessments," the charter will operate to exempt the property from sewer assessments, although sewer assessments did not exist at the time the charter was granted, it appearing that street assessments which are of a similar nature were well known at the time the charter was granted.<sup>4</sup>

Land already drained may be exempted from assessment for new improvements.<sup>5</sup> Where the superstructure of a railroad company and water stations are exempt, land used for a terminal which is not an integral part of the property of the company, used in conducting its business as a carrier, is not exempt.<sup>6</sup> The municipal authorities may stop themselves from enforcing an assessment against property benefited.<sup>7</sup> And the legislation of the state may be such as to relieve all but those joining in the petition from liability to assessment.<sup>8</sup> But

<sup>3</sup>*Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732.

So, church property is exempt where the act authorizing municipal corporations to construct sewers, etc., by special assessments prohibits them from assessing an amount in any one year in excess of 10 per cent of the value of any lot or lands as the same is valued and assessed upon the tax duplicate for state and county or city taxes, and no other mode is provided by law for ascertaining the value of such property. *First Presby. Church v. Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35.

<sup>4</sup>*Swan Point Cemetery v. Tripp*, 14 R. I. 199.

<sup>5</sup>The mere passage of a prior ordinance for the construction of other sewers which would effectually drain certain lots does not make such lots "already provided with drainage," within the meaning of a statutory exemption from assessment for sewers of lots so provided, where the prior ordinance was never carried into execution, although still unrepealed. *Cincinnati v. Bickett*, 26 Ohio St. 49.

<sup>6</sup>*Philadelphia v. Philadelphia & R. R. Co.* 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610; *Philadelphia use of McCann v. North Pennsylvania R. Co.* 1 Pa. Super. Ct. 254.

Land owned by a railroad company, across a part of which switching tracks are laid to connect land and river navigation, does not assume the character of "roadbed," and thus shield the whole against lien and sale for a sewer im-

provement. *Philadelphia use of Pugh v. Philadelphia & R. R. Co.* 1 Pa. Super. Ct. 236, Affirming 16 Pa. Co. Ct. 624.

<sup>7</sup>Commissioners appointed to assess benefits for the construction of a sewer cannot assess landowners who, under the statute, authorizing the improvement, are subject to assessment, where the trustees, in consideration of the conveyance of the right of way, covenanted that such owners should not be liable to assessment, although such action of the trustees was unauthorized, since the trustees, while retaining possession of the right of way, could not repudiate the covenant. *J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 139, 44 N. Y. Supp. 317.

But a promise by the executive board of a city that no part of the expense of constructing a sewer, except a nominal sum, shall be assessed against certain premises, is ineffectual when such a promise is not within the powers conferred upon the board. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

<sup>8</sup>The assessment of the expense of constructing a drain upon other landowners being benefited thereby, as well as upon the petitioner, for which provision is made by N. Y. Laws 1895, chap. 384, permitting the owner of agricultural lands to institute proceedings for the drainage of such lands or the protection thereof from overflow by the construction of drains or dikes upon the lands of other persons, is not authorized by N. Y. Const. art. 1, § 7, providing for the passage of general laws for the con-



an exemption of property which makes a discrimination against part of the property which ought to bear a share of the burden, and creates an unequal burden, is void.<sup>9</sup> The mere fact that land is devoted to public use does not prevent its being assessed if it is still subject to private ownership.<sup>10</sup> By this rule the property of railroad companies and of turnpike companies generally is not exempt by the fact that it is used in serving the public. A turnpike, being the private property of a turnpike company, is subject to an assessment of benefits for the construction of a ditch, established under the law, the same as other private property.<sup>11</sup>

Likewise the property of a railroad company.<sup>12</sup> In order to justify the assessment of a railroad right of way it is not necessary that the track, as well as the right of way, be benefited.<sup>13</sup> Where the assessment is made to depend entirely upon benefits, if the property of the railway company is devoted to a use which may not be permanent it may be assessed.<sup>14</sup>

struction of such drains and dikes, since the Constitution contemplates that the expense shall be borne by the petitioner. *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303.

<sup>9</sup> An act limiting a sewer tax to holders of real estate worth at least \$100 is in conflict with a constitutional provision requiring property to be assessed for taxes under general laws and by uniform rules according to its true value, but one complaining of such an assessment, who is liable at all, is not entitled to have it wholly vacated, but only to have it referred back for correction according to constitutional principles. *State, Auryansen, Prosecutor, v. Hackensack Improv. Commission*, 45 N. J. L. 113.

<sup>10</sup> The use of land as a public wharf is not a dedication of the land to the city as a highway, subject to the right to collect wharfage, so that the owner escapes liability for a sewer assessment. *Boeres v. Strader*, 13 Ohio Dec. Reprint, 414.

<sup>11</sup> *Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360.

<sup>12</sup> *State, Paterson & H. River R. Co., Prosecutor, v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Baltimore & O. & C. R. Co. v. Ketring*, 122 Ind. 5, 23 N. E. 527.

A railroad right of way, although located in a public street, is liable to special assessment for the construction of a sewer therein and the measure of benefits thereto is the present increased market value of the property by reason of

the drainage; but increased revenues to the company, likely to result by the building up of the territory thus drained, cannot be taken into consideration. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Illinois C. R. Co. v. East Lake Fork Special Drainage Dist.*, 129 Ill. 417, 21 N. E. 925; *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

<sup>13</sup> *District No. 3 Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073.

A railroad company is not entitled to an injunction to restrain the location and construction of a ditch, which it is claimed does not benefit it, and the collection of an assessment, a large proportion of which is apportioned to it, under a statute authorizing an injunction in case of gross injustice, where it appears that the road is benefited to some extent, and that much of the necessity for, and very much of the expense of, the improvement, was directly occasioned by the obstruction to the natural flow of the water from part of the marsh to its outlet by the construction of its embankment across the marsh with only a small culvert therein, which was subsequently closed up. *Cleveland, C. C. & St. L. R. Co. v. Logan County*, 17 Ohio C. C. 436.

<sup>14</sup> *New York, N. H. & H. R. Co. v. New Britain*, 49 Conn. 40. This case is distinguishable from others in which the court had held that the use of the property was such that precluded it from re-

### III. RIGHT TO EXERCISE POWER OF EMINENT DOMAIN IN DRAINAGE PROCEEDINGS.

**179. Principles authorizing exercise of power.**—As will be seen when we come to consider the rights of drainage as between individuals, one landowner has no right of way over his neighbor's land for a drainage ditch regardless of the necessities.<sup>1</sup> And the government has no more authority in such a matter than the individual himself. It cannot authorize the construction of a drainage ditch under the power of eminent domain over the land of a private citizen for the benefit of another citizen, nor can it authorize such right of way when it furthers private interests only.<sup>2</sup> As said in *Coster v. Tide Water Co.*<sup>3</sup> taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery. The fact that the prosperity of each individual conduces in a certain sense to the public welfare does not justify the taking of private property to increase the prosperity of individuals.<sup>4</sup> And if the taking cannot be upheld by the exercise of the right of eminent

ceiving any benefit from the improvement. In those cases the special use to which the property was devoted had been made practically irrevocable by expensive buildings or structures specially adapted to such use, while in this case the element of permanency is wholly lacking, and there is no presumption that the special use will not be changed.

<sup>1</sup>*Gilbert v. Foote*, cited in 5 Barb. 474, 483.

Under Mass. Gen. Stat., chap. 148, which provides for draining swamp lands, the county commissioners have no power to permit the owner of a swamp to cut a drain so as to cast the water therefrom upon the lands of another person, if it has no outlet therefrom and would merely submerge such land. *Sherman v. Tobey*, 3 Allen, 7.

<sup>2</sup>*State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216; *Woodruff v. Fisher*, 17 Barb. 224; *Reeres v. Wood County*, 8 Ohio St. 333; *Anderson v. Baker*, 98 Ind. 587; *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *People ex rel. Pulman v. Hen-ion*, 64 Hun, 471, 19 N. Y. Supp. 488.

The mere fact that larger and better crops will be raised on two farms sought to be drained does not authorize the establishment of a ditch. *McQuillen v. Hatton*, 42 Ohio St. 202.

The drainage of agricultural lands by

"necessary drains, ditches, and dikes upon the lands of others, under proper restrictions, and upon just compensation," for which provision may be made by general laws, under N. Y. Const. 1894, art. 1, § 7, is a taking of private property for private use in violation of the 14th Amendment to the United States Constitution, prohibiting a state from depriving any person of his property without due process of law. *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303.

A few cases have apparently recognized the validity of statutes permitting drainage for private benefit. *Sherman v. Tobey*, 3 Allen, 7.

In *Coomes v. Burt*, 22 Pick. 422, the court, without considering the question of the constitutionality of the statute, explains its purpose as follows: The legislature provided that so far as the lands of the proprietors to be benefited were concerned, treating them as owners of a common property, and regarding the common and general benefit of all, such ditches might be cut as the common interest might require. So far as they had an interest in the water course leading from the premises or lands to be benefited by the improvement, they should have, through the agency of the commissioners, an unobstructed enjoyment of this outlet.

<sup>3</sup>18 N. J. Eq. 54.

<sup>4</sup>*McQuillen v. Hatton*, 42 Ohio St. 202.

domain it cannot be so by referring the attempted exercise to the police power.<sup>5</sup> So the power cannot be exercised to permit a private corporation to drain land for the purpose of obtaining compensation which will result from doing the work.<sup>6</sup> The mere fact that the statute permits the owner of wet land to reclaim it by draining over the land of his neighbor does not make the statute invalid, since it will be so construed as to require the public benefit to appear before it can be exercised.<sup>7</sup> If the drainage is for the benefit of the public, the statute allowing it to be constructed over private property will not be rendered invalid by the fact that it will also result in private advantage.<sup>8</sup>

*For public welfare.*—If the drain is intended not for the benefit of an individual, but for the general public welfare, there is no doubt that the power of eminent domain may be exercised to secure a right of way for it. The power of eminent domain is a prerogative power, held by the sovereign for the express purpose of enabling it to resume possession of property which is needed for the public good. When, therefore, a drain is needed for the public good, this power is properly called into activity; and under it the right of way can be acquired. And it is held that any public benefit, such as the improvement of the public health or of public highways or the redemption of large tracts of waste lands or any other public utility, is sufficient to authorize the exercise of the power.<sup>9</sup> As said in *Thomas v. County Comrs.*<sup>10</sup> it is not sufficient that the ditch will drain the lands adjacent to it, or enable the owners of adjacent lands to raise larger and better crops, but the public health, convenience, or welfare must in some way suffer for want of the ditch. The public convenience may be subserved by the fact that in times of freshets water which overflows turnpikes and bridges will be carried away more rapidly, and with less injury to such roads and bridges. If the construction of the ditch will lead to a more healthful community and a more prosperous neighborhood,

<sup>5</sup>*Oribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

<sup>6</sup>*State, Kean, Prosecutor, v. Driggs Drainage Co.* 45 N. J. L. 91.

<sup>7</sup>*Chambers v. Kyle*, 67 Ind. 206.

<sup>8</sup>*Sessions v. Crunkilton*, 20 Ohio St. 349; *State ex rel. Holtz v. Henry County*, 41 Ohio St. 423; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Winslow v. Winslow*, 95 N. C. 24.

<sup>9</sup>*State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216; *Porter v. Durham*, 74 N. C. 767; *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009, fol-

lowed in *Northern Ohio R. Co. v. Hancock County*, 63 Ohio St. 32, 57 N. E. 1023; *Thompson v. Wood County Treasurer*, 11 Ohio St. 678; *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475; *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306; *Chambers v. Kyle*, 67 Ind. 206; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Anderson v. Baker*, 98 Ind. 587.

<sup>10</sup> Ohio N. P. 449.

and will result in the reclamation or bettering of a considerable quantity of low, wet, or swamp lands, or drain stagnant ponds, thereby improving the public highways of the vicinity and health of the community, and increasing the value of the land of the surrounding country of the proposed ditch, the ditch will be conducive to the public health, convenience, or welfare. It is not necessary that the whole public should be interested in the construction of the improvement. It is sufficient if the people of the neighborhood or vicinity of the improvement will be benefited.<sup>11</sup> The question of public utility has reference to the drain as a whole, without regard to the county lines which may cross it.<sup>12</sup> The law must make proper provision for the determination of the question of public utility.<sup>13</sup> But the mere fact that a statute providing for the establishment of a drainage district does not declare that it is for the public benefit will not destroy its validity, since the court, in order to uphold it, will construe it so as to require its operation for that purpose only.<sup>14</sup> The presumption is in favor of the public character of the improvement, so that the burden of showing the contrary is upon the one alleging it.<sup>15</sup> If no valid provision has been made for the acquisition of the right of way the whole act falls.<sup>16</sup>

**180. For public health.**—The improvement and preservation of the public health is one of the objects for which drainage may be undertaken under the power of eminent domain, and some courts have gone to the extent of declaring that it is the only purpose.<sup>1</sup> The weight of authority is against the latter view, but there is no dissent from the proposition that the improvement of public health is a purpose for which the right may be exercised.<sup>2</sup> The improvement of the health of the portion of the public living in the immediate neighborhood of

<sup>11</sup>*Thomas v. County Comrs.* 5 Ohio N. P. 449; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Ross v. Davis*, 97 Ind. 79; *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 67 N. E. 1009; *Chesbrough v. Putnam & P. Counties*, 37 Ohio St. 508; *Hartwell v. Armstrong*, 19 Barb. 186; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88.

<sup>12</sup>*Meranda v. Spurlin*, 100 Ind. 380.  
<sup>13</sup>*Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. 636.

<sup>14</sup>*State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216.

<sup>15</sup>*McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. 1011; *Reick v. Voight*, 110 Ind. 279, 11 N. E. 306.

<sup>16</sup>*Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

<sup>1</sup>*Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Burk v. Ayers*, 19 Hun, 17; *Catlin v. Munn*, 37 Hun. 23; *Re Drainage in Penfield*, 3 App. Div. 30, 37 N. Y. Supp. 1056; *Re Draining in Chili*, 5 Hun, 116; *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 613.

<sup>2</sup>*Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947; *State ex rel. Gordon v. McNay*, 90 Wis. 104, 62 N. W. 917; *McKinsey v. Bowman*, 58 Ind. 88; *Tillman v. Kircher*, 64 Ind. 104; *Bate v. Sheets*, 64 Ind. 209; *Deisner v. Simpson*, 72 Ind. 435; *Ross v. Davis*, 97 Ind. 79.

the land to be drained is sufficient to sustain the proceeding.<sup>3</sup> A ditch, to be conducive to public health, convenience, and welfare, so as to authorize the taking of private property therefor, need not be absolutely necessary for that purpose, but it is sufficient if, as a whole, it tends to or will contribute in any reasonable degree to such health, convenience, or welfare, by the preservation of highways in times of freshets, the drainage of wet lands, shutting off the cause of malaria and rendering them fit for habitation or otherwise, and is not limited or confined to private or personal interests, or the interests or benefit of a few people in the neighborhood so as to merely drain the lands adjacent thereto, or enable the owners thereof to raise larger and better crops.<sup>4</sup> In *Re Cheesebrough*,<sup>5</sup> it is said that a pond of stagnant water may endanger the health of the neighborhood, and the public may cause it to be drained at once, and for that purpose may dig the necessary drains, and the land may be interfered with for that purpose, under the police power, without compensation.

**181. Reclamation of land.**—The question whether or not a right of eminent domain may be used to secure a right of way for a drainage ditch the object of which is to reclaim wet land has not been answered as uniformly in the affirmative as has the one as to the right to use the power for the preservation of health. The condition of low and wet land may be such as to render it of itself a menace to health, and then it may be reclaimed under the principle stated in the preceding section. In *Kinnie v. Bare*,<sup>1</sup> it was said that upon the basis that low, wet, and marsh lands generate malaria, causing sickness and danger to the health and life of the people, when they are of such character as to injure the health of the community they become, and are, public nuisances which ought to be abated, and the legislature have the right, under the police power inherent in the government, to protect the people from plague and pestilence, and to preserve the public health. But drainage for the purpose of private advantages, such as improving the quality of the land, or rendering it more productive or fit for cultivation, cannot be justified under the police power. Neither public convenience nor public welfare, independent of considerations of the public health, will justify the legislature in the enactment of laws for the construction of drains.<sup>2</sup> If the drainage is primarily for the benefit

<sup>3</sup>*Cheesebrough v. Putnam & Paulding Counties*, 37 Ohio St. 508.

<sup>4</sup>*Thomas v. County Comrs.* 5 Ohio N. P. 449.

<sup>5</sup>78 N. Y. 232.

<sup>6</sup>68 Mich. 625, 36 N. W. 672.

<sup>1</sup>*Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673; *Re Drainage in Chili*, 5 Hun, 116; *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288; *Jenal v. Green Island Drainage Co.* 12 Neb. 163, 10 N. W. 547.

of the public health the mere fact that the drained land will become available for use does not render the proceeding void.<sup>3</sup> When the improvement of the public health is, because of the circumstances, no longer available to support an attempt to drain a tract of wet land, and resort must be had to the general principle that such drainage is a public purpose for which the right of eminent domain may be exercised, we encounter a conflict of opinion. But this conflict may be rendered much less embarrassing if the result which will be attained by the drainage proceedings in the respective cases be kept in view. The results may vary all the way from the reclamation of a large section of the state to the betterment of a private farm. With reference to the former class of lands there can be no doubt that the drainage of them is a public benefit for which the power of eminent domain may be exercised.<sup>4</sup> The New Jersey court has referred the right to reclaim such land to an authority more ancient than the provisions of the constitution for the exercise of the right of eminent domain. It says: To effect the object of drainage of a tract of land the statutes provide that the works to effect the drainage may be located in any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; further, it is not. In none of them is the owner divested of his fee. To effect such common drainage, power is in some cases given to continue the drains through adjacent lands, not drained, upon compensation. All this is an ancient and well-known exercise of the legislative power, and may well be considered as included in a grant of legislative power in the Constitution. Beyond this, private property cannot be taken for private uses, even with compensation.<sup>5</sup> And the Massachusetts court says that if it is lawful and constitutional to advance the manufacturing and mechanical interests of a section of the state by allowing individuals acting primarily for their own benefit to take private property, there would seem to be little if any room for doubt as to the authority of the legislature, acting as a representative of the people, to make a similar appropriation by their own immediate agents in order to promote the

<sup>3</sup>*Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094.

<sup>4</sup>*Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *Re Pequest River*, 39 N. J. L. 433; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Seely v. Sebastian*, 4 Or. 25; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357. 22 N. E. 782.

<sup>5</sup>An act for the drainage of thousands of acres of land lying in a low portion

of the state must be deemed of general and public utility. The right of the state to condemn lands for drains rests on the same foundation as its right in case of public roads, mills, railroads, causeways, schoolhouses, forts, light-houses, etc. *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787.

<sup>6</sup>*Coster v. Tide-Water Co.* 18 N. J. Eq. 54.

agricultural interests of a large territory.<sup>6</sup> These principles apply equally when a material body will be reclaimed by the improvement, so the public good can be said to be promoted by it.<sup>7</sup> And the right will not be defeated by the fact that the effect of the drainage will not extend beyond the bounds of a district which may be relatively small, if the district in fact contains land which is sufficient in quantity, so that if it is reclaimed the prosperity of the state may be materially improved.<sup>8</sup> And the fact that individuals will be peculiarly benefited is immaterial.<sup>9</sup> But when we turn to the case of drainage which will affect the property of only a single individual or of a few persons, we reach a different principle which has not always been perceived. In *Pool v. Trexler*,<sup>10</sup> the court says: "If the general assembly has power to make regulations for draining a swamp containing 10,000 acres, it has the same power in regard to a swamp containing 1,000 acres; so of 100 acres or of 1 acre. There is no distinction in the principle; the only difference is in regard to the degree. Such drainage may be provided for under the police power. The two powers of eminent domain and police regulation are distinct. By the one, property of A is given to B. By the other the property of A is left in him, but is made subservient to the general welfare. The power of the general assembly to make the land of A subservient to the land of B for the purpose of drainage must be yielded upon the authorities and upon the reason of the thing." But there is a difference in principle. If it is necessary to remove a nuisance from an acre of ground it may be done under the police power. But the police power does not extend to giving A the right to drain his acre over the land of B merely because A's prosperity will thereby be enhanced. As said in *Re Theresa Drainage Dist.*,<sup>11</sup> "A statute authorizing drains for agri-

<sup>6</sup>*Talbot v. Hudson*, 16 Gray, 417.

<sup>7</sup>*Leicis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721; *Hartwell v. Armstrong*, 19 Barb. 166.

<sup>8</sup>*Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Hartwell v. Armstrong*, 19 Barb. 166.

<sup>9</sup>*Seely v. Sebastian*, 4 Or. 25.

<sup>10</sup>76 N. C. 297.

So, in *Ellinghouse v. Taylor*, 19 Mont. 463, 48 Pac. 757, the court, in considering the validity of a law providing for the condemnation of a right of way for an irrigation ditch, says: What real distinction is there, so far as the term "public use" is concerned, between the

benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development, and adds to the taxable wealth, of the state, as well as the reclamation by the same means of a number of fields. This ruling was made under a constitution which provides that the purpose of irrigating lands shall be a public use.

<sup>11</sup>90 Wis. 301, 63 N. W. 288.

cultural, sanitary, or mining purposes, without requiring it to be necessary or desirable to promote any public interest, convenience, or welfare, is not valid. The court says no doubt such an improvement may be useful to some, or perhaps many, private owners of land by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly or remotely in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. Some home or homes might be made more cheerful and healthful. But one man's property cannot be taken to make another man's home more cheerful or healthful. It is only when it will make the homes of the public more healthful that any man's property can be taken for sanitary purposes."

Again, the same court said in another case that "this legislation may be referred to the police power by providing for the public health. If it were not for this purpose of the law it would not be endured for a moment, because it would provide for a despotic and most unlawful interference with private property for strictly private purposes and uses, in which neither the people of the state, nor the state itself, nor the public have any interest whatever. It seems marvelous that any court should ever attempt to justify such laws, which are merely and essentially for private purposes, confined to the owners of the lands drained and improved, under the power of eminent domain."<sup>12</sup> When the New York Constitution was adopted in 1894 it provided that general laws may be passed permitting the owners of agricultural land to construct and maintain for the drainage thereof necessary drains, ditches, and dikes upon the land of others with just compensation. Of this provision the court says in *Re Tuthill*:<sup>13</sup> If the effect of this provision is to authorize the appropriation of the land of one man, and the application of it to the private use of another, then it is void. All of the authorities of all jurisdictions agree that no necessity, however great, can authorize the legislature to take the property of one man and give it to another, with or without compensation. An organic law which grants the exercise of such power is void by the provisions of the Federal Constitution as depriving the citizen of his property without due process of law. Under the operation of that provision, we may no longer assert that the drainage of swamp lands may not be had, unless it be justified as a measure to preserve the public health, and we become bound to justify it, and not only to justify it, but to

<sup>12</sup>*Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389. *ex rel. Pulman v. Henion*, 64 Hun, 471, 19 N. Y. Supp. 488.

A similar ruling was made in *People* <sup>13</sup>36 App. Div. 492, 55 N. Y. Supp. 657.



accept it, as it is the voice of sovereign authority. It may be justified upon the ground that the reclamation of land for the purposes of agriculture and habitation is a public purpose. The right of the citizen to enjoy the use of his lands, to bring them under cultivation, and to distribute the product of his land among people generally, is, to a limited extent, a matter in which the general public have an interest. This, when coupled with the performance of those duties which the law devolves upon him as a citizen of the state, makes the exercise of the right a matter of public benefit and utility, sufficient to support the authority which underlies the exercise of the right. The principle of *Fallbrook Irrig. Dist. v. Bradley*,<sup>14</sup> with reference to the irrigation of land, would seem to authorize the exercise of the power of eminent domain in a case where a considerable tract of land may be reclaimed, as there the public good would be conserved, and it might authorize its application to a small tract, where the necessity was urgent, and a considerable body of people would be favorably affected thereby.

**182. For other purposes generally.**— The drainage of highways is a public purpose to secure a right of way, for which the right of eminent domain may be exercised.<sup>1</sup> And the public may take title to an entire tract for the purpose of filling it in and abating a nuisance.<sup>2</sup> And to effect a public benefit the rights of mill owners in their dams and mill rights may be taken to relieve the property of the water, to fit it for commercial and agricultural uses.<sup>3</sup> And after proceedings have

<sup>14</sup>164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

<sup>1</sup>*Baughman v. Heinselman*, 180 Ill. 251, 54 N. E. 313; *Smeaton v. Martin*, 57 Wis. 304, 15 N. W. 403.

A county commissioner has no right to locate a ditch on private land for the improvement of a highway, unless suitable drainage cannot be made in the roadway at the same expense, in which event demand must first be made of the owner, and an opportunity be given him to point out a location therefor, which must be accepted if accessible and suitable; and he can make the location himself only when the owner fails to do so or makes an unsuitable one, under a statute giving him authority, whenever necessary to construct, repair, or preserve a highway, to enter private land and take material therefrom or locate a ditch, etc., thereon without first assessing and tendering the damages, in view of the further provisions of the statute that entries shall not be made when drainage can be made on the roadway at no greater cost, or material can be ob-

tained thereon, and that in all cases demand shall first be made before entering upon an owner's land, and, if he refuse to assent, the commissioner shall notify him of his intention to enter and point out the land to be occupied or the material to be taken, but if he assents, "he may point out the material and the location from which it is to be taken, and, if accessible and fit for the purpose intended, it shall be there taken;" the last clause, taken in connection with the other provisions of the statute, not limiting the owner's right of location merely to material taken, but applying to the taking of the land for the construction of ditches as well. *Caulle v. Hultz*, 118 Ind. 13, 20 N. E. 515.

<sup>2</sup>*Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Dingley v. Boston*, 100 Mass. 544.

<sup>3</sup>In *Talbot v. Hudson*, 16 Gray, 417, which involved the validity of a statute providing for the removal of a dam to relieve property bordering on certain rivers from the water thrown back on them by the dam, the court says, in the

been commenced for the drainage of swamp land, a mill cannot be established which will interfere with the proceedings.<sup>4</sup> But even though a drainage district has been organized with authority to remove dams, it need not exercise the authority unless it is necessary.<sup>5</sup> General authority to construct sewers does not give a right to acquire property for temporary purposes.<sup>6</sup> Land can only be taken for drainage purposes when a necessity for the taking exists. The right to exercise the power of eminent domain rests on public necessity, and cannot be called into existence in the absence of such necessity.<sup>7</sup> Therefore, if adequate drainage can be secured without taking a particular parcel of property, it cannot be taken merely because it will be a little more convenient to do so.<sup>8</sup> But the improvement itself need not be

present case there can be no doubt that every owner of meadow land bordering on these rivers will be greatly benefited to a greater or less extent by the reduction of the height of the dam. The act is, therefore, in a certain sense for a private use, and inures to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. We are to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred upon the commissioners. If any such can be found, we are bound to suppose that the act was passed in order to effect it. The improvement of a large tract of territory situated in several towns, and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of public utility and advantage as to make it the duty of the court to pronounce a statute which might well be designed to effect such a purpose invalid and unconstitutional. The act would stand on different grounds if it appeared that only very few individuals, or a small adjacent territory, were to be benefited by the taking of private property. The advantages which may result from the removal of the obstruction are not local in their nature, nor intended to be confined to a single neighborhood. They are de-

signed to embrace a large section of land lying in one of the most populous and highly cultivated counties of the state, and, by increasing the productive capacity of the soil, to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

A proceeding for damages for the destruction of a dam for drainage purposes may be continued by the administrator of the owner of the dam in case of his death after instituting the proceedings within the time limited. *Phillips v. Middlesex County*, 122 Mass. 258.

*Williamson v. Locks Creek Canal Co.* 76 N. C. 478.

<sup>4</sup>A sanitary district need not remove certain dams in a river unless the same becomes necessary for any purpose of the sanitary district, although a provision in the act creating the district directs that the district "shall remove the dams at Henry and Copperas creek in the Illinois river before any water shall be turned into said channel," where, by other provisions of such act, imposing certain conditions before the removal of the dams, the idea that the sanitary district may destroy the same without reference to the necessity of such action is excluded. *Canal Comrs. v. Sanitary Dist.* 184 Ill. 597, 56 N. E. 953.

*Waterbury v. Platt Bros.* 75 Conn. 387. 60 L. R. A. 211, 53 Atl. 958.

*Chaplin v. Wheatland Highway Comrs.* 129 Ill. 651, 22 N. E. 484; *Rice v. Wellman*, 5 Ohio C. C. 334; *Caldwell v. Harrison Twp.* 2 Ohio C. C. 10.

*Re Rochester & G. H. R. Co.* 58 Hun, 601, 12 N. Y. Supp. 566.

absolutely necessary to entitle the public to enter upon the drainage scheme and take private property in its execution. It is sufficient if the improvement will conduce to the public welfare, and the taking will then be regarded as possessing the quality of being necessary.<sup>9</sup> The public acquires only a right of way; and it cannot remove the earth taken from the trench from the property for use elsewhere. And the landowner has a right to use the fee for any purpose which is consistent with the use of the easement for drainage.<sup>10</sup>

#### IV. INTERFERENCE WITH SURFACE WATER BY MUNICIPAL IMPROVEMENTS.

**183. General principles.**—As has been seen,<sup>1</sup> a municipal corporation is under no obligation to provide for surface drainage except so far as may be necessary to preserve the safety of its streets, or to ameliorate some condition which it has itself created; but it may do so under authority of the legislature. The rights and duties of a municipal corporation or other local subdivision of the state, and of the officers carrying on their work with respect to surface water generally, are governed by the same rules which govern the relations of individuals with respect to such water. The municipal corporation cannot change the natural course of drainage, or cast collected water onto adjoining property to its injury; but it can make reasonable improvements on its own property, although the effect is to alter the grade between its property and that of adjoining proprietors, and therefore change the direction ordinarily taken by the water flowing upon the respective tracts. The rights of the respective parties in regard to surface water under the various circumstances under which the question may arise will be taken up and developed in the succeeding sections.

**184. Changing course of drainage.**—There is no right on the part of a municipal corporation or a drainage or road district to alter the course of drainage so as to throw water upon property where it does not naturally flow. The municipal corporation stands upon the same footing as a private individual, and incurs the same liability when it injures the land of a private individual by throwing thereon water which does not naturally flow there.<sup>1</sup> The property of a private indi-

<sup>9</sup>*Corey v. Sicaggar*, 74 Ind. 211; *Coolman v. Fleming*, 82 Ind. 117; *Blizzard v. Riley*, 83 Ind. 300.

<sup>10</sup>*Sec post*, § 220b.

<sup>1</sup>*Ante*, § 171a.

<sup>1</sup>*Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478; *Torrey v. Scranton*, 133 Pa. 173, 19 Atl. 351; *Sluck v. Laurence Tiep.* (N. J. Eq.) 19 Atl. 663; *Goulden v. Scranton*, 3 Lanc. L.

vidual is subject to no servitude to receive the drainage of public property, and the public will not be permitted to drain its land onto adjoining property of a private individual to his injury, merely for its own convenience.<sup>2</sup> Liability may be incurred by changing the grade of a long section of highway so as to cause the water to flow along a gutter and then overflow onto private property.<sup>3</sup> And also

Rev. 340; *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462.

A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land, where, but for such artificial drains, it would not go. *Field v. West Orange Twp.* 46 N. J. Eq. 183, 2 Atl. 236; *McAskill v. Hancock Twp.* 129 Mich. 74, 55 L. R. A. 738, 88 N. W. 78.

Surface water naturally flowing down a ravine cannot be diverted into highway drains without liability being incurred for the damage resulting from so accumulating it. *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200.

When a city has constructed a street crossing a ravine in which large quantities of collected surface water are accustomed to find an outlet, and has endeavored to divert it into a sewer which is insufficient to admit all the water in ordinary seasons; and when that which overflows upon the street is prevented from again entering the ravine at the other end of the sewer, and thus turned into another street and over adjoining property,—the city will be responsible for the injury which it does, when reasonable care and skill would have provided better facilities. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

If a city in grading streets turns a stream of mud and water onto adjoining property, or creates a stagnant pool in its vicinity, it is liable for the resulting damage. *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Aurora v. Gillett*, 56 Ill. 132.

A municipality which diverts the usual course of surface water, carrying with it sand, mud, and gravel, by placing a wooden box in a ditch, thereby conducting it so as to discharge the sand, mud, and gravel upon property used for marine railways and shipyards, on which such water would not otherwise have flowed, is liable for damages re-

sulting from the abandonment of the premises for such purpose, necessitated by the deposits so thrown thereon, irrespective of negligence in the construction of such artificial drain. *Oahill v. Baltimore*, 93 Md. 233, 48 Atl. 705.

The diversion of the flow of surface water by the construction of waterworks by a municipal corporation upon an elevated lot so as to throw it upon lower land in a larger quantity than before renders the municipality liable to the owner for the damages arising from the increased flow thereon, and the consequent diminution of the value of the land, under a constitutional provision that private property shall not be taken or damaged for public purposes without making just and adequate compensation. *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 47 Am. St. Rep. 132, 20 S. E. 257.

<sup>2</sup>A municipal corporation cannot drain a public road by throwing the water on an adjoining proprietor, unless a statute compels him to receive it, and it is necessary for the good of the community. *Brown v. Sarnia*, 11 U. C. Q. B. 87.

The authority given to a municipal corporation to open and repair roads does not authorize it to cast water flowing along the road onto the land of adjoining proprietors. *Rowe v. Rochester*, 22 U. C. C. P. 319, Affirmed in 29 U. C. Q. B. 590; *Perdue v. Chingwacousy*, 25 U. C. Q. B. 61.

<sup>3</sup>*Rice v. Flint*, 67 Mich. 401, 34 N. W. 719; *Rowe v. Rochester*, 29 U. C. Q. B. 590; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Holmes v. Oathoun County*, 97 Iowa, 360, 97 N. W. 145; *Elgin v. Hoag*, 25 Ill. App. 650.

A city which, on changing the grade of a street, diverts surface water from its natural flow, and casts it in considerable volume upon the premises of a property owner, making gulleys thereon, tearing away piazza posts, and flooding the stable, is liable for the injury done. *Bedell v. Sea Cliff*, 18 App. Div. 261, 46 N. Y. Supp. 226.

Land adjoining a highway which crosses an elevation or ridge several feet higher than the surface of the soil

where the water which has been flowing in a particular direction is, by improvements made by the municipal corporation, turned from its course and cast upon adjoining property.<sup>4</sup> As said in *Guest v. Church Hill*,<sup>5</sup> a municipal corporation is liable for damages to abutting property on which it throws surface water, which, by a change in the grade of its streets and the construction of the drains, it has diverted from its natural flow and concentrated in volume, irrespective of negligence in the work on its streets, or in the construction of its drains.<sup>6</sup> The change in the direction or volume of water must be substantial, and cause more than nominal injury, however, to give a cause of action.<sup>7</sup> The question has frequently been raised by attempt by road commissioners to provide drainage for the highways, and it has been held that an overseer of highways, in making repairs upon the highway, has no right to change the natural course of surface water drainage, or to considerably increase its quantity, so as to cast it upon lands of an abutting owner, where it had not been previously accustomed to flow, or in increased quantities, to his injury.<sup>8</sup> And they

on either side, and over which it is impossible for water to flow naturally, cannot be considered as servient to the land on the opposite side of the ridge, and highway commissioners have no right, by means of a ditch through such elevation, to divert the surface water along the highway from its natural channel and drain it upon such land. *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180, Affirming 34 Ill. App. 87.

The removal of water from a pond, caused by a municipality raising the grade of one of its streets without constructing a culvert, is a ministerial act in the performance of which the city is bound to take all such reasonable care and precaution against possible contingent injuries to others as a discreet and cautious individual would and ought to, under like circumstances, were the whole loss or risk to be his alone. *Kobs v. Minneapolis*, 22 Minn. 159.

In *Perdue v. Chinguacousy*, 25 U. C. Q. B. 61, an action against a municipality for cutting a ditch in a highway, thereby overflowing the plaintiff's land, the defendant's plea averred that it necessarily made the ditch in order to repair the highway. The court sustained the demurrer to the plea upon the ground that, although the cutting of the ditch may have been necessary, the defendant should have further alleged the necessity of using the plaintiff's land as

a receptacle for the drainage, though the court, without deciding, expressed a doubt as to the right of the conservators of the highway to flood the plaintiff's land, even if no other method were obtainable; saying that, if public convenience requires the destruction of private property, the owner of the latter has the right to compensation.

*O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Brunhouse v. York*, 13 Lanc. L. Rev. 397; *Slack v. Lawrence Twp.* (N. J. Eq.) 19 Atl. 663; *Arn v. Kansas City*, 5 McCrary, 558, 14 Fed. 236.

<sup>4</sup>90 Md. 689, 45 Atl. 882.

<sup>5</sup>It is one thing to grade a highway and cast off surface water as a consequence of the grading, and quite another thing to change the natural flow, unite artificial channels, increase the volume of water, and cause it to flow upon private property in an increased volume. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896.

<sup>6</sup>*Rutherford v. Holley*, 105 N. Y. 632, 11 N. E. 818.

<sup>7</sup>*Moran v. McLearn*, 63 Barb. 185, 44 How. Pr. 30; *Young v. Maquon Twp. Highway Comrs.* 134 Ill. 569, 25 N. E. 689, Reversing 34 Ill. App. 178; *Cubit v. O'Dett*, 51 Mich. 347, 16 N. W. 679; *Kensington v. Wood*, 10 Pa. 93, 49 Am. Dec. 582.

may be individually liable for wrongful acts committed by them.<sup>9</sup> Under the doctrine which obtains in some of the New England states as to the liability of municipal corporations, it is held that, when the highway officer does a wrongful act without the express authority of the municipality, it is not liable for his acts.<sup>10</sup> But, when he is acting within the scope of his authority, the municipal corporation for which he acts will be liable for his acts.<sup>11</sup> If the commissioners, in attempting to drain a road, cast the water onto an adjoining landowner to his injury, the act may be enjoined.<sup>12</sup> But the commissioners have discretion as to the proper mode of draining a highway, and will not be enjoined from merely changing the course of drainage, in the absence of fraud or a clear purpose of oppression.<sup>13</sup> Statutes authorizing interference with surface drainage must be strictly com-

<sup>9</sup>*Warfel v. Cochran*, 34 Pa. 381; *Plummer v. Sturtevant*, 32 Me. 325; *Breen v. Hyde* (Mich.) 8 Det. L. N. 1128, 89 N. W. 732; *Tearney v. Smith*, 86 Ill. 391.

An overseer of highways cannot, in attempting to restore a ditch along a highway to its condition before an improvement had been made in it by his predecessor, close a sluice which would carry water from the ditch to his own land, while opening another sluice that would carry the water upon the land of his neighbor. *Moran v. McClearn*, 63 Barb. 185.

An overseer of highways who grants permission to another to clean out a shallow ditch existing by the highway, provided it will benefit the road which it had theretofore drained, is not liable for waters thereby carried on the premises of the plaintiff, even though the person obtaining the permission went too far, and trenched injuriously on the plaintiff's interests. *Parker v. Fields*, 48 Mich. 250, 12 N. W. 194.

<sup>10</sup>*Bryant v. Westbrook*, 86 Me. 450, 29 Atl. 1109.

<sup>11</sup>The wrongful and negligent construction by highway commissioners of a ditch so as to divert the surface water from its natural flow and discharge it upon the land of an adjoining owner to his injury may be regarded as a nuisance, for the continuance of which fresh actions may be brought as often as actual injury is occasioned thereby; and in such case evidence as to damages subsequent to the commencement of the suit is inadmissible. *Allen v. Michel*, 38 Ill. App. 313.

<sup>12</sup>*Young v. Maquon Twp. Highway Comrs.* 134 Ill. 569, 25 N. E. 689.

Highway commissioners may be enjoined from cutting a ditch through the highway which will discharge water upon the land of an adjoining owner at a point where it would not come in a state of nature, especially where their proposed action is not for the purpose of improving the highway or for the public good, but for the benefit of other landowners upon the other side of the highway. *Jewett v. Sweet*, 178 Ill. 96, 52 N. E. 962, Affirming 77 Ill. App. 641. <sup>13</sup>*Baughman v. Heinselman*, 180 Ill. 251, 54 N. E. 313.

A court of equity will not enjoin highway commissioners from draining the roadway by ditches, at the suit of an adjoining landowner, on the ground that such ditch will overflow his land by changing the direction of the natural flow of the water, where such commissioners are clothed by law with the power of determining the best method of improving the public roads, and it does not clearly appear that the ditch about to be dug will result in the injury complained of. *Hotz v. Hoyt*, 135 Ill. 388, 25 N. E. 753, Reversing 34 Ill. App. 488.

Equity will not restrain the highway supervisors in improving the drainage of a public road when they act in the exercise of their judgment, to the benefit of the road and pecuniary advantage of the township, and without injury to the plaintiff. *McCormick v. Kinsey*, 10 Pa. Super. Ct. 607.

And a court of equity will not enjoin the construction of a ditch by highway commissioners over the land of an adjoining owner, which will carry the water in a different direction than the

plied with.<sup>14</sup> Some of the cases have, apparently upon the nonexistent theory that surface water is a public enemy which everyone is at liberty to fight as best he can, contained language which seems to sanction the right of a municipality to dispose of its surface water as it chooses, without regard to the injury thereby done to the adjoining landowner. And the reasoning has resulted in some decisions which are not supported by sound principle. In *Harp v. Baraboo*,<sup>15</sup> it is held that the arrangement of gutters, ditches, etc., by a city in the course of grading and adjusting its streets, whereby the course of surface water is changed and its flow in certain directions or at a certain place increased, is not actionable, although, by the grading of a street, the outlet is obstructed so that the water backs upon private property to its injury. There is no principle of the law governing surface water which justifies such a decision. In *Clay v. St. Albans*<sup>16</sup> the court said that where a municipal corporation, in constructing drains and gutters, changes the flow of surface water, it is not liable, although land is injured thereby, if the water still spreads out as surface water, notwithstanding a change in its flow. But the corporation cannot collect the surface water in a body, and, as such, cast it upon land so as to furrow it out and create or enlarge drain courses through it. That language is self-contradictory. If the water is flowing in a drain or gutter, it, of necessity, does not spread out as surface water, so that the supposed facts upon which the first branch of the proposition is based have no existence, and the decision merely amounts to a statement of the general rule that the municipal corporation is liable for draining surface water onto adjoining property to its injury, with

natural flow, where such commissioners instituted condemnation proceedings to assess such owner's damages for the construction of the ditch, pending on appeal, in the absence of any showing that they intended to construct the ditch before a final determination of the appeal, and where no fraud or oppression is shown. *Baughman v. Heinselman*, 180 Ill. 251, 54 N. E. 313.

<sup>14</sup> A road supervisor has no authority, under a statute authorizing him to open a water course from a road to a natural water course, to open a water course to a pond, as that is not a water course in contemplation of the statute. *McLaughlin v. Sandusky*, 17 Neb. 110, 22 N. W. 241.

When a highway drainage act provides that nothing therein contained shall be so construed as to allow such drainage into or upon any dooryard in

front of any dwelling house, the prohibition must be held to extend to the "whole front dooryard" since the act, being in derogation of private rights, must be strictly construed. *Torrington v. Messenger*, 74 Conn. 321, 50 Atl. 873.

<sup>15</sup> 101 Wis. 368, 77 N. W. 744.

The same ruling is found in *Champion v. Orandon*, 84 Wis. 405, 19 L. R. A. 856, 54 N. W. 775.

And in *Flagg v. Worcester*, 13 Gray, 601, it was held that a municipal corporation has the right to improve and change the grade of its streets, although the effect may be to change the course of surface water and cause it to flow upon land which it did not previously reach; and it is not bound to provide drainage to prevent such flow in that direction.

<sup>16</sup> 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 363.

some language which has the appearance of upholding a public right. The means by which the course of drainage is changed and the result effected by the change amount, in most cases, merely to a collection of the water, and dealing with it in a body; and, as will be seen in the following section, this cannot be done without liability to the owner of the property injured. If the highway officers act under authority of a statute, the municipality is relieved from liability.<sup>17</sup> The relinquishment by a municipal corporation of the right to convey surface water from a highway onto private land is not a ministerial act, but relates to a surrender of a valuable right, and must be made in due form, and the right is therefore not lost by mere nonuser for three years.<sup>18</sup>

**185. Casting collected water onto adjoining property.**—A municipal corporation cannot collect surface water and discharge it in a mass onto the land of a private owner.<sup>1</sup> This rule prevents the drainage of ponds onto adjoining lands.<sup>2</sup> The liability of the municipality

<sup>17</sup>*Gardiner v. Camden*, 86 Me. 377, 30 Atl. 13.

<sup>18</sup>*Eshleman v. Martic Twp.* 152 Pa. 68, 25 Atl. 178.

<sup>1</sup>*Field v. West Orange Twp.* 36 N. J. Eq. 118, Affirmed in 37 N. J. Eq. 600, 45 Am. Rep. 670; *Clark v. Rochester*, 43 Hun, 271; *Bastable v. Syracuse*, 8 Hun, 587; *Gillison v. Charleston*, 16 W. Va. 295, 37 Am. Rep. 777; *Patoka Twp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Weir v. Plymouth*, 148 Pa. 566, 24 Atl. 94; *Troy v. Coleman*, 58 Ala. 570; *Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47; *Kobs v. Minneapolis*, 22 Minn. 159; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863; *Rychlicki v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594, 11 S. W. 1001; *West Bellevue v. Huddleston*, 1 Monaghan, 129, 16 Atl. 764; *Bohan v. Arcora*, 154 Pa. 404, 26 Atl. 604; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135, thereby overruling whatever contrary doctrine may be found in *Vincennes v. Richards*, 23 Ind. 381; *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Follmann v. Mankato*, 45 Minn. 457, 48 N. W. 192; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Valparaiso v. Kyes* (Ind. App.) 66 N. E. 175; *Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50;

*North Vernon v. Voeglor*, 89 Ind. 77; *Princeton v. Gieske*, 93 Ind. 102; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361, 21 N. E. 449; *Young v. Maquon Twp. Highway Comrs.* 134 Ill. 569, 25 N. E. 689; *Robbins v. Willmar*, 71 Minn. 403, 73 N. W. 1097; *Sleight v. Kingston*, 11 Hun, 594, Appeal Dismissed in 73 N. Y. 592; *Bastable v. Syracuse*, 8 Hun, 587, Appeal Dismissed in 72 N. Y. 64; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Derinzy v. Ottawa*, 15 Ont. App. Rep. 712; *Rhodes v. Cleveland*, 10 Ohio, 159, 36 Am. Dec. 82; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266; *Pre-emption Highway Comrs. v. Whittitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324; *Allen v. Michel*, 38 Ill. App. 313; *Field v. West Orange Twp.* 36 N. J. Eq. 118; *Butler v. Edgecater*, 25 N. Y. S. R. 315, 6 N. Y. Supp. 174.

<sup>2</sup>*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

It is prima facie wrongful and a nuisance for a municipality to construct a ditch across one of its streets, whereby a large and unusual quantity of water is turned upon another's premises with destructive force and to his injury, although the drainage is necessary for



is not affected by the fact that the property is below grade.<sup>3</sup> And a particular owner is not deprived of his right of action by the fact that intermediate owners have consented to have the water turned across their property.<sup>4</sup> It is immaterial whether the drain is constructed for the purpose of turning the water onto the adjoining property, or the flooding is a necessary result of the act. It is a trespass in either case.<sup>5</sup> In making the distinction between injuries which result merely from an alteration of the grade of a street, for which there is no liability, and those in which water is collected so that liability results, the court in *Carll v. Northport*,<sup>6</sup> says a municipal corporation may grade, or change the grade of, its streets when it deems it necessary to do so, and property owners cannot complain although surface water is thrown upon the land in larger quantity than formerly, or is prevented from flowing therefrom; but no right exists to collect a material body of water by diverting it from its natural flow, or by other means to gather it together, and to conduct it by any artificial channel and discharge it in a body upon private property. Even courts which hold that the municipality is not liable for changing the flow of surface water so as to cast it onto adjoining property by changing the grade of its streets hold the municipality liable where, by the street improvements, water is collected in one place, and then discharged in a body onto adjoining land.<sup>7</sup> If, for any reason, the water is gathered in a body, it must be taken care of and conducted safely to an outlet in such a way as to do no injury to private property.<sup>8</sup> In the

sanitary purposes, to remove stagnant water from a pond caused by the city's grading a street without a culvert; and the city will be liable for neglecting to dispose of the water in another way, not so much more costly than the way adopted as to justify a reasonably prudent man, regardless of the rights of others, in disposing of the water in that way. *Kobs v. Minneapolis*, 22 Minn. 159.

<sup>3</sup>*Beach v. Scranton*, 5 Lack. L. News, 25; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17.

The fact that land is marshy and already lawfully subjected to a considerable drainage from other lands will not justify a municipal corporation in collecting water from a large area and casting it thereon by artificial means. *Soule v. Passato*, 47 N. J. Eq. 28, 20 Atl. 346.

<sup>4</sup>*Weir v. Plymouth*, 148 Pa. 566, 24 Atl. 94.

<sup>5</sup>*Pye v. Mankato*, 36 Minn. 373, 1 Am.

St. Rep. 671, 31 N. W. 863; *Netzer v. Crookston*, 59 Minn. 244, 61 N. W. 21.

<sup>6</sup>11 App. Div. 120, 42 N. Y. Supp. 576.

<sup>7</sup>*Cannon v. St. Joseph*, 67 Mo. App. 367.

<sup>8</sup>The maintenance by a city of a cesspool draining a large area, whereby water which would have flowed elsewhere, and sewage, are cast upon the premises of a property owner by reason of an obstructed sewer, renders it liable for the damage sustained. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 822.

The flooding of an owner's land by the construction of a sewer or drain so as to gather large quantities of water on one side of a highway and discharge it through a culvert to the other side, from whence it flowed onto the land of an abutting owner, when, before such acts, it had flowed off without injury to his land, is not mere consequential injury for which a municipal corporation is not

section immediately preceding this it has been seen that some of the courts have assumed that the course of drainage along a highway might be changed in such a way as not to gather water into a body which must be taken care of. But this assumption does not accord with the facts. The object of drainage is to gather and dispose of water; and when the proceedings are carried out they will, of necessity, gather the water into larger volume than it would attain in its natural condition, and it is this increase of volume which is the necessary result of the construction of the drains which imposes upon the municipality the duty to care for the water collected by the drain. As said in *North Vernon v. Voegler*,<sup>9</sup> a municipal corporation is liable for the flowing of an owner's premises caused by its so grading a public street as to collect, in an artificial channel, the surface water from the adjoining territory which did not, before that time, flow upon such premises, and to pour the same thereon to its injury; and the fact that the grading was done in pursuance of an ordinance does not relieve the municipality from liability.<sup>10</sup> The unauthorized casting of water onto the land of a lower owner is a nuisance which is remediable as such.<sup>11</sup> The continuance of the nuisance may be enjoined and damages given for the injury already inflicted.<sup>12</sup> Or an action for damages may be maintained from time to time as they occur.<sup>13</sup> Damages may be recovered sufficient to restore the lot to its former condition.<sup>14</sup> In a few cases the liability of a municipality

liable in the exercise of its right to construct drains in and improve its streets, but is a direct injury for which the municipality is responsible. *Crawfordsville v. Bond*, 96 Ind. 236.

A highway culvert cannot be maintained which unlawfully discharges surface water collected from a wide area onto private property at one place. *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61.

<sup>9</sup> 89 Ind. 79.

<sup>10</sup> *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47; *West Orange Twp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670, Affirming 36 N. J. Eq. 118; *Blakely Twp. v. Devine*, 36 Minn. 53, 29 N. W. 342.

<sup>11</sup> *Merritt Twp. v. Harp* (Mich.) 9 Det. L. N. 302, 91 N. W. 156.

A city which creates a nuisance by the excavation of ditches whereby surface water is thrown upon the land of a private owner is prima facie liable for its continuance. *Pennoyer v. Saginaw*, 8 Mich. 534.

While a borough succeeding to the ownership and control of the highways constructed by a town within the limits of the borough is liable for the continuance of a nuisance created by constructing the highway in such a manner that it carries the surface waters onto the adjoining premises, the continuance must be intentional, with knowledge of its existence. *Morse v. Fair Haven East*, 48 Conn. 220.

A city cannot be liable under a charge of originating a nuisance by casting surface water on private property, where it appears that it merely continued the nuisance after territory on which it had been created was annexed to it; and liability for continuing is different from that for originating. *Rychlicki v. St. Louis*, 115 Mo. 662, 22 S. W. 908.

<sup>12</sup> *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Andrews v. Steele City* (Neb.) 89 N. W. 739.

<sup>13</sup> *Carll v. Northport*, 11 App. Div. 120, 42 N. Y. Supp. 576.

<sup>14</sup> *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236.

has been denied, apparently on the ground that the injury did not result from the construction of drains for the collection of surface water, but from the inevitable collection of water through the grading of streets. In *Davis v. Crawfordsville* <sup>15</sup> it is held that a municipal corporation is not liable for damages to land by the flowing thereon of surface water from a street into which such water is thrown by the mere grading of surrounding streets in such a way as naturally to lead thereto, as such damages are the mere consequential result of the improvement of such streets, and not within the rule of municipal liability for the collection of water in one channel and throwing it in a body on lands where it is not accustomed to flow.<sup>16</sup> The result of the grading of connecting streets and uniting of their gutters is the same as though the gutters were constructed expressly to gather and dispose of the water from the extended territory, and the city should not be permitted to do by indirection what it could not do directly; and in holding that there is no liability under such circumstances the court plainly loses sight of the principle involved, and disposes of the case on a minor issue. Under the theory of municipality liability held in Massachusetts, it has been held that the owner of land which adjoins a highway cannot maintain an action at law against the town, which is bound to keep the highway in repair, for the acts of the town officers in so repairing the highway and constructing the water bars within its limits as to cause surface waters to flow in large quantities upon his land, to his injury.<sup>17</sup>

**186. Accelerating or increasing flow.**—The force of gravity which causes all waters flowing on the earth to seek the lowest level creates natural drainage, and provides for the distribution of all water, whether surface water or otherwise. This natural drainage is necessary to render the land fit for the use of man. The streams are the great natural sewers through which the surface water escapes to the sea, and the depressions in the land are the drains leading to the streams. These natural drains are ordained by nature to be used, and so long as they are used without exceeding their natural capacity

<sup>15</sup> 119 Ind. 1, 12 Am. St. Rep. 361, 21 N. E. 449.

<sup>16</sup> *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61.

So it has been held that a municipality is not liable for flowing merely surface water on a citizen's land, by collecting it from a hill top, and sending it in volume through streets cut deeply with great incline toward the injured land, when there is no complaint but what

the opening and grading of the streets forming the channels were properly done for public purposes; but when it is made to appear that, in addition to the surface water, there was drawn off and discharged swamp water that formerly run elsewhere in natural water courses, a judgment against the municipality for damages will be upheld. *Union v. Durkes*, 38 N. J. L. 21.

<sup>17</sup> *Turner v. Dartmouth*, 13 Allen, 291.

the owner of land through which they run cannot complain that the water is made to flow in them faster than it does in a state of nature. Among the steps which are taken for the improvement of property, one of the first is to remove the water from it as rapidly as possible. The right to drain upon and over lower lands without making compensation for such privilege is the same whether the higher land is the farm of an individual owner or is a public highway; and highway commissioners have the right to have the surface water, falling or coming naturally upon the highway, drain through the natural and usual channel upon and over lower lands; and have the right to construct ditches or drains for the purpose of conducting such surface water, even though it is accumulated in ponds, into such natural and usual channels, although the effect may be to increase the volume of water thus carried upon lower lands.<sup>1</sup> In accordance with this principle the flow of the water into the natural streams may be hastened so long as the water is not caused to overflow the banks of the stream to the injury of the land through which it flows.<sup>2</sup> But one landowner cannot be permitted to relieve himself of a burden by casting it upon his neighbor, and so the flow of the water cannot be hastened into the stream to such an extent that the stream cannot dispose of it and the result is to cast it from the highway onto the lower land in a body, to its injury.<sup>3</sup> The same principle which authorizes the hastening of the flow of water into the stream also authorizes its being hastened along natural depressions which act as drainage ditches so as to make the water flow more swiftly there and in greater quantities at a time.<sup>4</sup> The fact that the natural depressions or existing ditches are inadequate to carry the water at the increased rate will give the landowner no right of action. His remedy is to enlarge the capacity of the drains so as to carry the water in its natural course to its natural

<sup>1</sup>*Graham v. Keene*, 143 Ill. 425, 32 N. E. 180.

<sup>2</sup>*Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *O'Brien v. St. Paul*, 18 Minn. 182, Gil. 163.

For a full discussion of this principle, see § 207a, *post*.

<sup>3</sup>Two courts have not followed this principle, but have held that there is no liability under such circumstances. *Wheeler v. Worcester*, 10 Allen, 603; *Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304.

But if a municipal corporation, by means of paved gutters, collects surface water from so large an area that, upon casting it into a natural stream, the filth carried by it clogs the stream and causes

a nuisance to a riparian owner by overflowing his land, it will be liable therefor. *Manning v. Lowell*, 130 Mass. 21.

<sup>4</sup>*Young v. Maquon Twp. Highway Comrs.* 134 Ill. 569, 25 N. E. 689; *Anchor Brewing Co. v. Dobbs Ferry*, 84 Hun, 274, 32 N. Y. Supp. 371; *Miller v. Newport News (Va.)* 44 S. E. 712.

A municipal corporation is not liable for constructing a culvert in such a way as to carry the water along its ancient course, without increasing the quantity. *Noble v. St. Albans*, 56 Vt. 522.

The owner of a servient estate cannot recover from highway commissioners for the construction by the latter, for the benefit of a highway, of a ditch along the same so as to conduct the water

receptacle.<sup>5</sup> And if the course of the water is not changed the mere fact that it is gathered into one stream will not give the landowner a cause of complaint.<sup>6</sup> But the fact that the municipality may hasten the flow of the water does not give it a right to increase the quantity which will eventually flow over the lower property. It cannot, under this rule, gather water and carry it out of the direction in which it naturally drains so as to make it join the hastened flow.<sup>7</sup> If the water has been taken out of its natural course, it may be restored thereto.<sup>8</sup>

along natural channels in the direction it naturally flowed, especially if in so doing the flow of water over his land was not increased so as to damage him in any degree. *Crohen v. Ewers*, 39 Ill. App. 34.

<sup>5</sup>*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Heth v. Fond du Lac*, 63 Wis. 228, 53 Am. Rep. 279, 23 N. W. 495.

Highway commissioners have the right to drain a highway by means of a ditch along the same so as to conduct the water into the natural channel into which it would naturally flow, but in less volume, although, by the unevenness of the ground, ponds had, prior to the construction of the ditch, formed thereon; and a landowner cannot complain of the increased flow in such natural channel caused thereby. *Pre-emption Highway Comrs. v. Whitsitt*, 15 Ill. App. 318.

But an injunction will be granted at the suit of a landowner to restrain the enlargement of that portion of a joint county ditch located in an upper county and which runs through his lands, where it will result in the overflowing of his lands because of the failure of the commissioners to secure, as required by law, a sufficient outlet through the portion of the ditch in the lower county before making the improvement. *Redfern v. Hancock County*, 18 Ohio C. C. 233.

<sup>6</sup>The mere fact that the water which naturally accumulates by the rains which fall upon a city and the surrounding more elevated land is collected into one stream is not sufficient to support an action against the municipal corporation for damage caused by the discharge thereof upon adjoining lands which are the natural outlet of such water, even though it otherwise would have flowed over such lands in many small streams. *Phinizey v. Augusta*, 47 Ga. 260.

So it has been held that highway commissioners have the right, by means of

a ditch, to drain a pond into a highway and discharge the same upon the land of an adjoining owner at the same place it naturally flowed, without increasing the flow, and doing such landowner no actual damage, although to drain the pond it was necessary to cut the ditch in a different direction than the water had formerly flowed through slight elevations in the land. *Palmer v. O'Donnell*, 15 Ill. App. 324.

<sup>7</sup>*Aurora v. Love*, 93 Ill. 521; *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236; *Elliott v. Oil City*, 129 Pa. 570, 18 Atl. 553; *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 989; *Frederick v. Lansdale*, 156 Pa. 613, 27 Atl. 563; *Burton v. Chittanooga*, 7 Lea, 739.

A municipal corporation, in constructing its streets and sewers, is bound so to construct them as to protect the property of its citizens, as far as possible, from damage by overflow of water, which damage is not to be ascertained by the one idea of an increased quantity of water, but by the force, flow, and effect as well. *McArthur v. Dayton*, 19 Ky. L. Rep. 882, 42 S. W. 343.

Under a right to drain highway surface water into a ditch on private property, a municipal corporation cannot justify an increase of the flow of such water by the addition of waste water from a rubber mill. *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200.

But in *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61, it was held that a municipal corporation is not liable for throwing larger quantities of surface water on private lands by making a highway conform to the established grade and paving it, as a consequence of which the area from which the water is collected is enlarged, and more water is drained from the roadbed.

<sup>8</sup>Highway commissioners have the right, in the exercise of their power and duties to keep the roads in repair, to fill up a ditch along a highway and cut a

**187. Damming back.**—When the question of the right to dam back surface water is reached no rule can be formulated which will be equitably applicable to all cases. The circumstances under which the damming back may occur vary all the way from a mere altering of grade so as to change the course of the flow of water falling at or near the division line between the adjoining properties to the obstruction of a ravine in which, in times of heavy rains and melting snows, water rushes with all the force of a mountain torrent. It is very obvious that a rule which would sanction or deny the right to obstruct in one case would not necessarily be the proper rule to apply in the other case. Compared with the evil which would result from refusing to permit a change in the natural grade of property for the purpose of improving it, that which would result from the mere change in the direction of the flow of the water adjoining the division line between the properties would be insignificant, so that the courts are unanimous in holding that no right of action arises for a mere change of that character.<sup>1</sup> As said in *Lampe v. San Francisco*,<sup>2</sup> a municipal corporation is not liable for damages resulting from the proper construction of an embankment in the necessary and lawful grading of a street, which merely causes the surface water upon an abutting lot situated below the level of the official grade to accumulate thereon instead of flowing freely therefrom, as before the grading, where such water had not found for itself a definite channel in which it was accustomed to flow.<sup>3</sup> And the same rule relieves the public officials from liability

culvert across the same so as to restore the flow of water to its natural direction and prevent injury to an adjoining landowner by the throwing of water on his premises not rightfully belonging there; and an adjoining landowner cannot complain although his land has drained into such filled-up ditch for more than twenty years, where he will receive the same advantage by the drainage as before and at as little cost. *Henline v. Stack*, 48 Ill. App. 67.

<sup>1</sup>*Eransville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Herring v. District of Columbia*, 3 Mackey, 572.

Equity will not enjoin highway commissioners from removing a culvert in the public highway and filling up the space with dirt, on the ground that such culvert was necessary to convey the surface water collecting on the owner's premises in its natural course of drain-

age, where it does not appear with sufficient certainty that its removal would result in an injury to such landowner,—it not being clearly established that the water naturally flows in that direction. *Barnard v. Nokomis Highway Comrs.* 172 Ill. 391, 50 N. E. 120, Affirming 71 Ill. App. 187.

<sup>2</sup>124 Cal. 546, 57 Pac. 461, 1001.

<sup>3</sup>*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Alden v. Minneapolis*, 24 Minn. 254; *Corcoran v. Benicia*, 96 Cal. 1, 31 Am. St. Rep. 171, 30 Pac. 798; *Broomall v. Chester*, 1 W. N. C. 228; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266.

In *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719, the liability of the corporation for raising the grade of streets so as to obstruct the flow of surface water was denied; but it was on the ground that the duties in connection with the raising of the grade were public, for which a private action would

for injuries caused by the mere alteration in grades.<sup>4</sup> Some of the cases have applied this doctrine to cases in which definite channels forming a natural outlet for surface water have been obstructed. According to the rule of the civil law such natural drainage channels could not be interfered with to the injury of persons whose land was drained by them. In *Scanlan v. Montreal*,<sup>5</sup> it was held that a city is liable for damages from an overflow caused by its raising the level of a private street near the land overflowed, and filling up a gully by which the water was more easily carried away, so as to expose such land to overflow. This is plainly the equitable rule and the rule which is adopted by the constitutional provision that private property shall not be damaged for public use without compensation.<sup>6</sup> There is a strong current of authority following this rule and holding that a municipal corporation cannot destroy natural means of drainage by grading a street, and provide no adequate means for the escape of surface water.<sup>7</sup> This rule is applicable whenever there is a channel in which the water is accustomed to flow, whether it is formed by nature or by the action

not lie, rather than that there was a right to interrupt the flow of surface water.

The principle of that case was followed in *Kavanaugh v. Brooklyn*, 38 Barb. 232; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Magarity v. Wilmington*, 5 Houst. (Del.) 530.

A township, in repairing a highway, is not liable for the destruction of a culvert across the highway through which surface water from the adjoining land had been accustomed to pass, as the landowner has no right of drainage across the highway for surface water. *Darby v. Crowland Twp.* 38 U. C. Q. B. 338.

One who petitions for the establishment of a grade and the improvement of a street upon which his lots front, and who, without objection, pays an assessment for benefits, without exercising his right to appear before the common council and urge his claim for damages on account of the stoppage of water and the temporary flowage of his land, cannot thereafter maintain an independent proceeding to recover damages for such cause. *Hembling v. Big Rapids*, 89 Mich. 1, 50 N. W. 741; *Collins v. Grand Rapids*, 95 Mich. 286, 54 N. W. 889.

<sup>4</sup>*Gould v. Booth*, 68 N. Y. 62.

And successors of commissioners of highways who, in constructing an embankment upon a highway, neglected to provide a sufficient culvert to carry off

the surface water on abutting property, are not personally liable for injuries caused by such surface water. *Ibid.*

In that case the additional fact appeared that the sewer which the city placed in such street was insufficient, in case of a heavy rain, to carry off the surface water.

<sup>5</sup>Rap. Jud. Quebec, 17 C. S. 363.

<sup>6</sup>*Re Chatham Street*, 191 Pa. 604, 43 Atl. 365.

There is no implication in a contract for sale of lots that the corporate authorities shall have power so to change and improve streets dedicated on the plat thereof as to make them safe and convenient highways for the public, which will relieve the municipality from its liability, under a constitutional provision that it shall make just compensation for all property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, for damages caused by raising the grade of a street so as to check the natural flow of water from one of such lots and cause it to stand thereon. *Avondale v. McFarland*, 101 Ala. 381, 13 So. 504.

<sup>7</sup>*Wilbur v. Ft. Dodge* (Iowa) 95 N. W. 180; *Kemper v. Louisville*, 14 Bush. 87; *Bozman v. New Orleans*, 27 La. Ann. 501; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Lake v. Bok*, 33 Ill. App. 45; *Edwards v. Peoria*, 66 Ill. App.

of the water.<sup>8</sup> When the channel in which the water has been accustomed to flow assumes the character of a swale or ravine having, at certain seasons of the year, a definite stream of water flowing in it, although the stream may not be of such a character as to constitute a water course in the true sense of that term, there should be no right to obstruct the flow without providing means to carry away the water which is known to be in the habit of flowing in the channel.<sup>9</sup> As said in *McClure v. Red Wing*,<sup>10</sup> when, in the judgment of a municipal corporation, it becomes necessary, in making a public improvement, to obstruct the natural channel of a stream formed by surface water made up of rains and melted snow which has fallen on the sides of the ravine in which the water flows, or on the sides of those ravines tributary thereto, and where the water often flows with the rapidity of a torrent and the volume of a small river,—the city is bound to provide artificial channels to carry off the water without injury to the property of others, and to exercise reasonable care, skill, and diligence in doing the work. If it becomes necessary to divert the water upon private property the right must be procured by condemnation proceedings. It has been said that by the common-law rule surface water is a common enemy which anyone may fight as he sees fit without liability for injuries thereby caused to his neighbor. As will be seen when we come to consider the general question of surface water, there is no such rule.<sup>11</sup> But some courts, laboring under the mistaken notion that such rule exists, have applied it to the solution of the ques-

68; *Maguire v. Cartersville*, 76 Ga. 84; *Mt. Sterling v. Jephson*, 21 Ky. L. Rep. 1028, 53 S. W. 1046.

*Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Larabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143; *Edwards v. Peoria*, 66 Ill. App. 68; *Logansport v. Wright*, 25 Ind. 512; *Cotes v. Davenport*, 9 Iowa, 227.

Injury to lands by the filling of streets and raising of catch basins so as to render useless drains previously established and paid for, and causing water to flow back thereon which would otherwise have been carried off, is a continuing nuisance. *Toledo v. Lewis*, 17 Ohio C. C. 588.

In assessing damages from the improvement of a highway, which, from the plan and specification thereof, it appears will result in the flooding of adjoining lands by reason of failure to provide for the extension across such highway of a culvert placed therein on a partial improvement thereof, thereby shutting off the natural drainage of such

lands, the jury are confined to the plan and specification, and cannot consider the statement of members of the village council that if it becomes necessary the village will extend the culvert and take other means to prevent such flooding. *Martin v. Bond Hill*, 7 Ohio C. C. 271.

*Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, 63 N. W. 370; *Stoeck v. St. Paul*, 54 Minn. 549, 56 N. W. 250.

In *Rowe v. Addison*, 34 N. H. 306, it is said by Eastman, J., that surveyors of highways are not authorized to make embankments on the sides of roads so as to throw back upon adjoining owners the water that naturally flows into the highways, it being their duty to make culverts or bridges for it to pass across the roads, or to make channels or canals by the sides of the highways so that it may flow off without injury.

<sup>8</sup> 28 Minn. 186, 9 N. W. 767.

<sup>9</sup> *Post*, chapter XXIX.



tion of the right to obstruct ravines and swales, and have held that it accorded such right.<sup>12</sup> Since, however, such cases are governed by a rule which has no existence, they cannot, of course, be regarded as correct. If the municipality attempts to provide drainage for surface water the flow of which it obstructs, it will be liable for injuries caused by the insufficient capacity of the means furnished.<sup>13</sup> The rule which permits the alteration of the flow of the surface water adjoining the division line between the adjoining properties permits the municipality to erect barriers which will prevent water from flowing upon the sidewalk from adjoining property in such a way as to freeze and make the walk unsafe.<sup>14</sup>

**188. Consequential injuries.**—When the doing of an act does not necessarily involve a trespass upon the adjoining property, but the injury is an incidental effect of the act, there is a tendency on the part of some courts to call it consequential, and to hold the municipality free from liability. Calling an injury consequential is, however, a very unsatisfactory way to dispose of the case. Some injuries may be indirect, and yet plainly entitle the injured person to compensation, and others may be direct and yet be *injuria sine damno*. A consequential injury for which there is no liability to make amends is one which attends the doing of an act which the person doing it has a perfect right to do in the way in which he does it. So that, to determine whether or not an injury is consequential, the lawfulness of the act causing it must first be ascertained. This is a task frequently evaded by declaring the injury consequential because not the result of a trespass, when it may, nevertheless, be the result of some other act which, in law, is wrongful. When the act is done by the state, there is no redress unless expressly given by the Constitution or statutes, and, under the forms of the Constitution which provide compensation for property taken, only, a strict construction would exclude compensation where the property was merely injured. Later constitutions have changed this rule by providing compensation for property damaged. Municipal corporations are not entitled to all the immunity belonging to the state. They become liable, not only when compensation is provided by the Constitution or statute, but also when

<sup>12</sup>*Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Harp v. Baraboo*, 101 Wis. 368, 77 N. W. 744. acquired by the municipality. *Bangor v. Lansil*, 51 Me. 521.

A lot owner may fill up his lot and thereby obstruct a swale into which street gutters empty without either building, or permitting the city to build, any drain in its stead, unless a prescriptive right to such a passage has been

<sup>13</sup>*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Crawfordsville v. Bond*, 96 Ind. 236; *Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282.

<sup>14</sup>*Keith v. Brockton*, 136 Mass. 119.

they are guilty of negligence. In fact, in respect to their dealings with surface water, their liability is that of an individual under like circumstances. They cannot change the course of drainage or concentrate its flow, nor can they gather surface water and cast it in a body on an adjoining owner any more than an individual can. And it is immaterial on the question of liability whether the wrongful act is the result of purpose or the result of improvements undertaken with no intention to injure the adjoining proprietor. Notwithstanding this fact, there are many cases in which the liability of the municipality has been denied on the ground of consequential injury when an individual would be liable. Such theory is entirely wrong. As said by Judge Lawrence in *Nevins v. Peoria*,<sup>1</sup> the theory that private rights are ever to be sacrificed to public convenience or necessity without full compensation is fraught with danger, and should find no lodgment in American jurisprudence. If the Constitution provides for the payment of damages in case of injury to private property, its owner may recover for injuries caused by the casting of surface water thereon, and liability cannot be evaded by calling the injury consequential.<sup>2</sup> It is intimated in *Inman v. Tripp*,<sup>3</sup> that if a statute should expressly authorize a city to grade its streets without regard to the throwing thereby of surface water upon the abutting land, it would be unconstitutional, as authorizing the taking of private property for public use without just compensation. And in *Gray v. Knoxville*,<sup>4</sup> it was held that a municipal corporation is liable for injuries to the premises of a private citizen, caused by the grading of a public street so as to throw surface water thereon, by virtue of the constitutional provision that no man's property shall be taken or applied to public use without just compensation therefor. But the injury inflicted upon adjoining property by the grading of a street does not constitute a taking of property within the meaning of a constitutional provision that damages must be paid for such taking.<sup>5</sup> In so far as

<sup>1</sup> 41 Ill. 502, 89 Am. Dec. 392.

<sup>2</sup> *Cooper v. Dallas*, 83 Tex. 239, 18 S. W. 565; *Churchill v. Beebe*, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

A constitutional provision that private property shall not be taken or damaged for public use without just compensation does not render a city liable for damages to property from surface water where a private individual would not be liable. *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266.

So, when, in repairing a highway, breaks are made across it to conduct

surface water, without changing its natural course or draining more water on lower lands than they were naturally servient to, there is no construction, alteration, or enlargement of a public work within a constitutional provision requiring payment of consequential damages. *Warner v. Muncy Twp.* 18 Pa. Co. Ct. 582.

<sup>3</sup> 11 R. I. 520, 23 Am. Rep. 520.

<sup>4</sup> 85 Tenn. 99, 1 S. W. 622.

<sup>5</sup> *Weir v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

Municipal actions, like the establishment of grades for streets, building of

the injury to the abutting land results merely from the change in the course of the water between the land and the highway, so that it flows from the highway to the land, it results from an act which the municipal corporation has a right to perform, and there is no liability for the resulting injury, if any.<sup>6</sup> This is merely the use which any landowner is permitted to make of his property, and such use gives the neighbor no right to complain. But when the doctrine is carried further so as to absolve the municipality from liability for injuries resulting from the collection or concentration of water or changing its course, the decisions are usually placed upon another ground, which is of doubtful soundness. In *Magarity v. Wilmington*,<sup>7</sup> the court held that the municipal corporation had statutory authority to grade its streets, and was not liable for the flowing of surface water onto adjoining land in the absence of negligence, since "the damage is the result of the exercise of the discretionary power conferred by law upon the city, subject to which private property is held." There is no doubt that, in the absence of a constitutional obstacle, the legislature might authorize drainage over private property without making compensation.<sup>8</sup> And if the legislature had that power it might confer it upon the municipal corporation; but it does not follow that the mere grant of power to grade a street carries with it the right to turn surface water onto adjoining property, to its injury. The municipal corporation has, in that regard, no greater right than the private individual, unless the authority is expressly conferred upon it by the legislature; and, in the absence of such express authority, the private owner holds his property subject to no easement on the part of the

drains, or the construction of sewers under a positive and direct legislative authority, so long as they do not directly encroach on contiguous property, although they may impair its use by indirect consequences, do not constitute a taking of private property for a public use without just compensation within the constitutional meaning. *Aicher v. Denver*, 10 Colo. App. 413, 52 Pac. 86.

<sup>6</sup>*Hoster v. Philadelphia*, 12 Pa. Super. Ct. 224; *Lee v. Minneapolis*, 22 Minn. 13; *Yeager v. Fairmount*, 43 W. Va. 259, 27 S. E. 234; *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863.

A municipal corporation, authorized by law to construct drains in public highways outside its corporate limits, is not responsible for consequential damages to abutting property owners resulting from the proper and reasonable exercise of that authority. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

A municipal corporation is not liable in North Carolina, when, as an incident to the construction or changing of the grade of a street, an owner of adjacent land is injured by the consequential diverting of the surface water, whereby his premises are flooded or his building rendered insecure. *State v. Wilson*, 107 N. C. 865, 12 S. E. 320.

<sup>7</sup> 5 Houst. (Del.) 530; *Roll v. Augusta*, 34 Ga. 326.

<sup>8</sup> A statute permitting persons charged with the repair of highways to drain off water therefrom onto or across the land of others, with a proviso that it shall not be drained into any dooryard, in front of any dwelling house, or into an inclosure used exclusively for the storage and sale of merchandise, thereby exempts towns from liability for injuries inflicted by such drainage. *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393.

municipality to drain over it. A municipal corporation has no more power over its streets than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages without being responsible itself.<sup>9</sup> Though the act of changing grades or providing sewers, or refusing to change them or to provide them, may involve a discretion, yet this is not a sufficient defense to an action against the city when private property has been invaded and its use impaired without compensation, by having surface water thrown thereon as a result of the grading of a street.<sup>10</sup> And a holding that the municipality can, by the plan of improvement, drain surface water over private property to its injury, on the ground announced in *Magarity v. Wilmington*, amounts simply to holding that the municipality has such easement. In *Churchill v. Beethe*,<sup>11</sup> the court held that an embankment which is not an unnecessary or improper improvement of a highway, in the absence of negligence, gives no cause of action to an adjoining landowner because it drains the flow of surface water out of its course over the adjoining property. As we have already seen, water cannot be drained out of its course onto adjoining property to its injury, and the municipal corporation has no greater right to do so than has a private individual; and the fact that the injury is effected by improvements in the highway gives the municipality no greater exemption than as though the act was deliberately done. In *Lee v. Minneapolis*,<sup>12</sup> the court said that, unless expressly so declared by charter or statute, a municipal corporation clothed with full power to grade and improve its streets is not liable to property owners for consequential damages necessarily resulting from the action of its governing body in establishing the grade of a street and causing it to be improved in conformity therewith, whereby surface water is cast on an adjoining lot. There is no fault to find with that language or with the decisions so long as it is applied to consequential injuries proper. But the trouble is, a foundation is made by laying down that rule, and then the rule is applied to injuries resulting from the casting upon the abutting property of collected water, or the turning of water out of its natural course, or some other act which is a direct tort, and the municipality is shielded from its liability therefor by calling it a consequential injury, when in fact it is not such. In *Lambar v. St. Louis*,<sup>13</sup> it was held that a municipi-

<sup>9</sup>*Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

<sup>10</sup>*Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

<sup>11</sup> 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

<sup>12</sup> 22 Minn. 13.

<sup>13</sup> 15 Mo. 610.

pality constructing a ditch in a prudent and careful manner along a highway for the purpose of draining the same is not liable for injuries caused by it to adjoining land. That cannot be true if the result of the ditch was to accumulate water in such quantities near the injured property that the ditch could not carry it, so that it overflowed on the adjoining property. In every case the question to be determined in the first instance is as to the rightfulness of the act, and if the act is rightful, then the injury is consequential; but if the act is wrongful, the liability of the municipality cannot be evaded by calling the injury consequential.

188a. How far are damages included in those paid upon laying out the highway.—Intimately connected with the question of consequential injuries is the one as to how far the damages for the injury done by surface water in the improvement of a highway are included in the compensation made for the right of way. Such compensation includes all injury which may be contemplated as likely to result from the proper and careful performance of the work of improving the highway. It will include all damages which may result from the change of the grade of the highway, in the proper and skilful performance of the work.<sup>1</sup> But the right to open and improve a highway does not include the right to use it as a water course nor to gather together water and fail to care for it. Therefore, damages from such acts cannot be presumed to have been within the contemplation of the parties when the compensation for laying out the highway was made. The Massachusetts court held that within the limits of a highway, the officers of a town may construct drains and culverts; and, if the surface water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action lies for an injury thereby occasioned. When the highway is laid out compensation is allowed to the proprietor of the land for all the damages it will occasion, both direct and incidental.<sup>2</sup> In *Churchill v. Beethe*,<sup>3</sup> the court held that an adjoining owner is entitled, as part of the damages for injuries from the laying out of a highway, to damages for water which is likely to be cast upon his land by the construction of a culvert under the highway. And that therefore there could be no recovery even though water collected on one side of the street was turned through a culvert in a stream onto the property on the other side. It is believed that this doctrine is radically wrong. The public should not be compelled to pay when acquiring a right of way for a highway for the in-

<sup>1</sup>*Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598.      <sup>2</sup>48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

<sup>3</sup>*Turner v. Dartmouth*, 13 Allen, 291.

juries which are likely to result to the abutting property from failure on the part of the public authorities to care for the surface water. Such a course would needlessly and very largely enhance the damages which could be recovered, and impose a burden upon the public for which there is no excuse. A little care on the part of the public officials would do away with the necessity for paying such damages, and the presumption should be that they would use such care, and that, therefore, there would be no injuries from their want of care for which there would be a necessity to make compensation. The very statement of a claim for such damages in a proceeding to lay out the highway would seem so preposterous that it would receive scant consideration; and yet the courts hold that that character of damages should be presumed to have been allowed and paid, so as to deprive the landowner of a second recovery when the negligent conduct of the officers has actually cast the water onto his property. It is very apparent that the possibility of the occurrence of that class of injuries would find no place in any award for the opening of a highway, and if it would not, the presumption that it had should not be used to defeat a claim when the injury has in fact occurred. If the work of constructing the road will necessarily result in injury to the abutting property from surface water, that fact may be taken into consideration. As said in *Bockoven v. Lincoln Twp.*,<sup>4</sup> under the Bill of Rights of South Dakota, which declares that "private property shall not be taken for public use, or damaged, without just compensation," and under the statute of that state which requires that a just compensation be made to one whose land is taken for a public highway, the supervisors, in estimating the value to such lands, may take into consideration the fact that the construction of the road will make a farm over which it passes liable to injury from water accumulating thereon to such an extent that it will interfere with passage from one portion of the farm to another. In *Chicago v. Taylor*,<sup>5</sup> it was held that impairment of the value of property by surface water running down from a viaduct constructed as part of a system of street improvement into adjoining property is a proper element of damages under a constitution requiring compensation for the taking or damaging of property for public use. That seems to express the true doctrine. The ordinary operation of improving a highway may result in a change of the flow of water from the highway to the abutting property. For this, as seen in the preceding section, there is no cause of action. But the munici-

<sup>4</sup> 13 S. D. 317, 83 N. W. 335.

<sup>5</sup> 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

pal corporation has no right to carry water along the street or gather it and cast it in a body across the street; and if it does so it should not be permitted to escape liability for the resulting injury on any theory that it had paid for the right to do so when it acquired its right of way.

**189. Negligent and wrongful acts.**—In order to exempt a municipal corporation from liability for consequential injuries the acts causing them must have been rightful, and must have been free from negligence. As appeared in the preceding section, many acts which were wrongful or negligent and which should have rendered the municipality liable were overlooked and the municipality absolved from liability on the ground that the injury was a consequential one. Surface water cannot be gathered into a body and abandoned so near a neighbor's line as to find its way onto his land to his injury. The maxim, *Sic utere tuo ut alienum non lædas*, applies. Violation of this rule is negligence which will give a right of action. So, if an attempt is made to conduct surface water in a ditch along a neighbor's line the same rule requires that reasonable care shall be exercised to construct a ditch suitable for the purpose for which it is intended.<sup>1</sup> If the municipality collects large quantities of surface water it must provide adequate means to dispose of it, and failure to do so will be negligence.<sup>2</sup> And if the city attempts to provide for the water so collected, and is negligent in doing so, it will be liable for the injury which it causes.<sup>3</sup> If the grading of the street is done so negligently as to prevent surface

<sup>1</sup>*Tearney v. Smith*, 86 Ill. 391.

A city is liable for injuries occasioned by the negligent and unskilful construction of a gutter along private property, and for its failure to keep the gutter free from obstructions, whereby surface water flows thereon which otherwise would not have flowed there, although the lot is below grade. *Gilluly v. Madison*, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137.

<sup>2</sup>*Bates v. Westborough*, 151 Mass. 182, 7 L. R. A. 156, 23 N. E. 1070; *Emery v. Lovell*, 104 Mass. 16.

<sup>3</sup>*Contra, Steinmeyer v. St. Louis*, 3 Mo. App. 256.

However, the Arkansas court has held that where a state statute provides that a city council shall have power to open and construct and keep in repair sewers and drains, the city is not bound to enlarge a drain where by the grading of a street, more surface water is turned into it; and where the drain overflows as a result of the increased amount of surface water, the city is not liable for the

damage to adjacent lands. *Little Rock v. Willis*, 27 Ark. 572.

<sup>4</sup>*Damour v. Lyons City*, 44 Iowa, 276; *Frostburg v. Hitchins*, 70 Md. 56, 16 Atl. 380; *Peoria v. Eisler*, 62 Ill. App. 26; *Aurora v. Gillett*, 56 Ill. 132.

A highway culvert is negligently constructed if upon an improper location, or if placed where it will destroy or render expensive the use of a private way. *DeLauder v. Baltimore County*, 94 Md. 1, 50 Atl. 427.

A city which, in accordance with power given it, directs a culvert to be made to conduct the water of a natural stream which has previously been the outlet through which surface water of a portion of the city has been carried, will be liable for injuries resulting from unskilfully constructing the culvert so small that it will not carry all the water naturally flowing to it. *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316.

While a city may change the grade of a street at its own will or pleasure, yet,

water from running off abutting land the municipality will be liable.<sup>4</sup> And it will be liable if, in raising the grade of the street, it negligently fails to provide for the escape of surface water.<sup>5</sup> So, if gutters are negligently obstructed so as to cause the water to flow over onto adjoining property.<sup>6</sup> Or if water flowing in the street is negligently cast onto adjoining property.<sup>7</sup> Or the drains are constructed

when the grade is changed and sewers or drains are constructed for the purpose of carrying off surface water, and are constructed in such an imperfect manner that the water is turned into the basement of a building of a lot owner, the city will be liable for the damages sustained thereby. *Elgin v. Kimball*, 90 Ill. 356.

In constructing ditches for drainage, made necessary by the erection of walls by a lot owner to protect against surface water, it is the duty of the city to construct them with ordinary skill, and to cause thereby as little injury to the adjacent lot owner as would be consistent with the right to make the improvement. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

The fact that a city lot is below the grade of a street does not preclude its owner from recovering compensation from the city for injuries to property on such lot resulting from a failure of the city to keep a storm-water drain pipe open, if such pipe, when open, would have prevented the injury. *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

Where there is a natural drain or depression across land abutting on a street, which has existed from time immemorial, and which has been the means for carrying off surface water after rain-falls, but the drain has no perceptible bank or bed where it crosses the city street,—the owner of such land abutting on the street may protect it from the flow of the surface water, and build a wall upon it for that purpose; and having this right, he has the same right that any other landowner has to exact of the city in which the land lies in case it undertakes to construct drains for the carrying off of such surface water, that they shall not injure his property. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

<sup>4</sup>*Princeton v. Gieske*, 93 Ind. 102.

In a suit for damages alleging the flooding of plaintiff's premises and injuring goods in his cellar because of the negligence of a municipality in constructing an embankment in raising the

grade of a street, a charge to the jury is imperfect unless the question of negligence *vel non* is submitted. *Kearney v. Thoemason*, 25 Neb. 147, 41 N. W. 115.

A municipal corporation is liable for injury done to private premises by a flowage of water thereon due to the negligent manner in which the work of grading a street and sidewalk was executed, although it is not liable for such damages as are necessarily incident to the property by reason of its location by the bringing of the street and sidewalk to the grade existing when the owner purchased the property, and of which grade he was bound to take notice. *Benson v. Wilmington*, 9 Houst. (Del.) 359, 32 Atl. 1047.

<sup>5</sup>*Ross v. Clinton*, 46 Iowa, 606, 26 Am. Rep. 169.

<sup>6</sup>In *Powell v. Wytheville*, 95 Va. 73, 27 S. E. 805, the complaint alleged that in the improvement of a street the defendant had filled up a ditch or gutter, which carried the surface water flowing along the street, in such a way as to cast the water onto plaintiff's lot, and the court held that if the work was not executed in a proper and skilful manner there arose a common-law liability for all injuries not necessarily incident to the work and which were chargeable to the unskilful or improper manner of exercising it, and that the question whether in doing the work it was necessary to fill up the ditch or gutter, and, if necessary, whether it was practicable to substitute other means of drainage to take the water off, were matters of fact, to be considered on the trial in connection with other circumstances and facts of the case, in determining whether the defendant was guilty of negligence in executing the work.

<sup>7</sup>*Wallace v. Muscatine*, 4 G. Greene, 373, 60 Am. Dec. 131; *Cotes v. Davenport*, 9 Iowa, 227; *Templin v. Iowa City*, 14 Iowa, 59, 81 Am. Dec. 455; *Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. Burlington*, 30 Iowa, 262.

A municipal corporation, although having a right to build an embankment to raise the grade of a street, may be



in such a way as to cast water onto private property, to its injury.<sup>8</sup> In the construction of culverts to carry drainage water the municipal corporation must exercise the care and prudence which a discreet and cautious individual ought to exercise if the whole risk or loss were to be his own.<sup>9</sup> But the municipality will not be held liable to the highest degree of care, nor be held to be an insurer.<sup>10</sup> A municipality may be liable for acts of others with respect to its streets if they are done with its consent, and under its supervision.<sup>11</sup> And the fact that money to pay for the improvement was obtained from the county will not exempt the municipality from liability.<sup>12</sup> The highway officers may be individually liable for negligence or wrongful acts committed by them.<sup>13</sup>

If the municipality attempts to act without authority it will be liable for the injuries caused by it.<sup>14</sup> And where it attempts to con-

liable for injuries caused by surface water thrown upon adjoining property by the negligent manner of the exercise of the right. *Kearney v. Themanson*, 48 Neb. 74, 66 N. W. 996.

One whose property is injured by water caused to flow upon it by the unskillful manner in which an adjoining street is graded is entitled to recover irrespective of the question whether or not he improved his property by the grade furnished him by the city engineer; but if the injury was not caused by the negligent or unskillful way of doing the work, he may not recover for injury consequential to the work, although his improvement was in harmony with the grade furnished him by the city engineer. *Russell v. Burlington*, 30 Iowa, 262.

<sup>8</sup>*Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086; *McArthur v. Dayton*, 19 Ky. L. Rep. 882, 42 S. W. 343; *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88.

Discretionary power to construct a drain does not confer a right to throw waters onto lower lands where they do not naturally flow; so that, when a municipal corporation, under its statutory powers, constructs a ditch, it is liable if it surcharges and so maintains it as to allow adjoining lands to be damaged. *Williams v. Raleigh Twp.* 21 Can. S. C. 103. Affirmed in [1893] A. C. 540, 63 L. J. P. C. N. S. 1, 1 Reports, 431, 69 L. T. N. S. 506.

<sup>9</sup>*Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316.

<sup>10</sup>*Netzer v. Orockston*, 59 Minn. 244, 61 N. W. 21.

<sup>11</sup> A municipal corporation is liable for

the damages resulting to an owner's lot from an obstruction to the drainage thereof, caused by the negligent manner in which the United States government placed the sewer and catch basin when it raised the grade of a street so as to enable the same to cross a levee constructed by it to protect government property, where the municipal corporation consented to the performance of the work, and exercised some authority in the regulation of the mode of constructing the approach; and the fact that such owner consented to a proper construction of the work constitutes no bar to the action. *Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999.

<sup>12</sup>*Van Pelt v. Davenport*, 42 Iowa. 308, 20 Am. Rep. 622.

<sup>13</sup> A surveyor of highways and those acting under him are liable for damages caused by the construction of an embankment across a road in his district, causing water which would naturally pass through his district to flow into an adjoining district and upon the premises of a private owner, being bound to consider the effects of his acts not only upon private land situated in his district, but upon that situated in an adjoining district. *Rouse v. Addison*, 34 N. H. 306.

<sup>14</sup> A city which has power to establish the grade of streets by ordinance will be liable for injuries caused to the adjoining property by surface water by raising a street to a grade otherwise established. *Themanson v. Kearney*, 35 Neb. 881, 53 N. W. 1009.

struct a culvert without authority, it may abandon it without liability for injuries caused by its becoming obstructed.<sup>15</sup> If the city discharges polluted water onto private property, to its injury, it will be liable for the resulting damages.<sup>16</sup> And it can in no case dispose of sewage in such a way as to cause injury to private property.<sup>17</sup>

**190. Obstructed drains.**—It being established, as stated in the preceding section, that a municipal corporation is liable for negligent and wrongful acts which cause surface water to be thrown upon adjoining property, that rule renders the municipality liable in case, after it has constructed drains to carry off surface water, it obstructs them or negligently permits them to become obstructed in such a way as to cause the water to flow onto private property.<sup>1</sup> So that, if the municipality, in the construction of the drain, leaves it in such condition that it is likely to become obstructed, it will be liable for the resulting injury in case such obstruction occurs.<sup>2</sup> So, it is liable if it

<sup>15</sup>*Robinson v. Danville* (Va.) 43 S. E. 337.

<sup>16</sup>*Holmes v. Atlanta*, 113 Ga. 961, 39 S. E. 458.

<sup>17</sup>A city is liable in damages for the act of its commissioner in depositing large quantities of rubbish and offal, offensive and injurious to health, in a lane adjoining plaintiff's cottages, by which the lane was raised 3 or 4 feet, thus wrongfully causing water and filth to flow in and upon said cottages, and rendering a well attached to the houses unfit for use; but the expense of raising one of the houses and removing the kitchen cannot, however, be recovered. *Levis v. Toronto*, 39 U. C. Q. B. 343.

In an action against a municipal corporation for injury to an owner's lot from overflow caused by the diversion of surface water from its natural course and discharging the same into a box sewer across such owner's premises, thereby increasing the quantity of the flow beyond the capacity of such sewer, and causing the same to burst, the fact that the additional waters were polluted by the drainage from privies, cesspools, barnyards, etc., along its course belonging to third parties, thereby rendering the compound which flooded his premises foul, noxious, and unwholesome, is a proper element to be considered by the jury, although the municipal corporation may not have consented to the contamination, or directed it, or been aware of its existence. *Elgin v. Hoag*, 25 Ill. App. 650.

But a municipality which made a cul-

vert across a highway to carry surface water only is not liable for an injury caused by sewage discharged therefrom, deposited by individuals without its permission or sufferance. *Noble v. St. Albans*, 56 Vt. 522.

<sup>1</sup>*Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A village which changes the grade of a street, and destroys a gutter theretofore constructed by it, is liable for the resulting injury, where the waters previously carried away by the gutter are, by reason of the change of grade, cast upon the premises of the owner of a foundry building which was built below the surface of the street, so that the water entered at the windows and flooded the molding room. *Morley v. Buchanan*, 124 Mich. 128, 82 N. W. 802.

<sup>2</sup>A municipal corporation may be found negligent in constructing a culvert to carry water flowing in a gutter under the street so as to leave a gas pipe across it, the result of which is that in a heavy storm refuse floating with the water becomes jammed against the pipe, and backs the water upon abutting property, to its injury. *Buchanan v. Duluth*, 40 Minn. 402, 42 N. W. 204; *Powers v. Council Bluffs*, 50 Iowa, 197.

A municipal corporation, in exercising its power of control over its highways, is liable for negligence in bridging a gutter so that the flow of water in ordinarily severe showers is obstructed, and thus caused to flow in and upon adjoining premises. *Allentown v. Kramer*, 73 Pa. 406.

negligently obstructs the drain, to the injury of abutting property.<sup>3</sup> Or if it permits the drain to get out of repair so that it is no longer sufficient to carry the water which will naturally flow in it.<sup>4</sup> The liability exists even in cases where the municipality permits the drain to be obstructed by strangers.<sup>5</sup> So, if the catch basins constructed to carry surface water into the sewers are negligently permitted to become obstructed so that the water flows over onto private property, the municipality will be liable.<sup>6</sup> The municipality will be charged with notice of conditions which have existed under the immediate observation of its officers for a sufficient time to have enabled it to correct

<sup>3</sup>*Molnery v. St. Josephs*, 45 Mo. App. 296; *Harper v. Milwaukee*, 30 Wis. 365; *Smith v. Alexandria*, 33 Gratt. 208, 36 Am. Rep. 788.

The owner of premises is entitled to recover damages for injuries to her property and health from a continuing nuisance created by the filling of streets and raising of catch-basins so as to render useless drains already established and paid for, causing to flow back upon such premises water which would otherwise have been carried off. *Toledo v. Lewis*, 17 Ohio C. C. 588.

<sup>4</sup>*Alton v. Hope*, 68 Ill. 167; *Wessman v. Brooklyn*, 40 N. Y. S. R. 698, 16 N. Y. Supp. 97; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Dallas v. Schults* (Tex. Civ. App.) 27 S. W. 292; *Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701; *Valparaiso v. Cartwright*, 8 Ind. App. 429, 35 N. E. 1051.

A municipal corporation is liable for the overflow of private property caused by the temporary obstruction of the entire width of a street by the construction of a sewer in an intersecting street, so as to prevent the escape of surface water along the drains provided for it, from which liability it is not relieved because the overflow occurred during an unusual storm, if it was such as might be reasonably anticipated and the drains provided would have been ample to conduct the waters harmlessly away if they had not been so obstructed. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

<sup>5</sup>*Effingham v. Surralls*, 77 Ill. App. 460.

A city which negligently permits a gutter and culvert connected with the public highway to become obstructed, whereby water is thrown back upon the plaintiff's land and dwelling house, is liable for the resulting damage, although the obstructed culvert is within the limits of a railroad crossing, and under the

care of a railroad. *Parker v. Nashua*, 59 N. H. 402.

A city may be held responsible for the injuries caused by water, resulting from the obstruction of a gutter with earth and other materials placed there in the construction of a sewer, although the expense of the sewer is borne by adjoining owners, and although the work was being done under a contract, where the city board of public works retained full and complete control of the mode and manner of doing the work. *Harper v. Milwaukee*, 30 Wis. 365.

A city is not relieved from liability for the unnecessary obstruction of the drains of an improved street by the negligent construction of a sewer in an intersecting street, because the contractor, to whom, as the lowest bidder, the work was let, as required by statute, was an independent contractor, as that relation does not exist where the city exercises a supervisory control over the work, and a discretionary power over the contract itself. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A city which allowed a culvert and gutter to be blocked, and permitted an excavation in the street to be left exposed to the water which the culvert and gutter should have carried away, is liable for the resulting damage, where the water from a heavy rain entered the trench and percolated therefrom into the basement of the adjoining buildings, although the storm was heavy and unexpected, when such a storm was likely to happen at any time. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773, Affirming 40 App. Div. 320, 57 N. Y. Supp. 968.

<sup>6</sup>*Woods v. Kansas*, 58 Mo. App. 272.

A turnpike company, in converting an open ditch which was of sufficient capacity to carry off the water from the road into a covered drain, is liable for con-

them.<sup>7</sup> But, to render the municipality liable, it must be shown to have assumed responsibility for the drain, and to have had notice of its insufficient condition, or to have been charged with such notice by the fact that it had existed for a sufficient time to require it to take such notice.<sup>8</sup> Therefore, the municipality is not liable for injuries caused by water escaping from a gutter because of wagon tracks cut into it by an abutting owner, of which it had no notice.<sup>9</sup> The liability of a township with respect to drains in its highways is not so strict as that of a municipal corporation with respect to those in its streets. The township has been held to be under no obligation to keep drains in its highways free from obstructions for the benefit of adjoining owners.<sup>10</sup> On the theory that the municipality is not liable for consequential injuries, it has been held that it is not liable for such injuries caused by the obstruction of a culvert under its street.<sup>11</sup> But the doctrine of consequential injuries is carried to an unreasonable extent in making such a ruling. A municipality is not relieved from liability for damages to adjoining premises by the overflowing thereof due to the obstruction of a gutter during the construction of a sewer, by a statute providing that it shall not be held liable for the damages or injuries incurred or happening "at" any place where work is being done and improvements made on streets under contract, as such injury cannot be said to have occurred at the place where the work was done, and the object of such statute is rather to restrict its statutory liability for injuries to the person or property of travelers in the streets.<sup>12</sup>

structing gratings and catch pits insufficient to enable the water to enter the drain, whereby land was flooded. *Whitehouse v. Felloes*, 30 L. J. C. P. N. S. 305, 10 C. B. N. S. 765, 4 L. T. N. S. 177, 9 Week. Rep. 557.

<sup>7</sup>A city is chargeable with actual notice of the obstruction of a gutter and culvert, and the unprotected condition of a trench, liable to be flooded in case of a storm, where such condition has existed for two days upon a much traveled street, and an inspector representing the city is on the spot, watching the progress of the work. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773.

<sup>8</sup>An action cannot be maintained against a city for negligently constructing a culvert under a public street, and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed,

where it appears that the culvert has existed for twenty years under a public street in the city, but it is not shown by or for whom it was made, or when the obstruction took place, or that it had been brought to the city's knowledge. *Bateman v. Hamilton*, 33 U. C. Q. B. 244.

When permission has been given to divert surface water from flowing from the highway onto private land by digging a ditch in the highway, it will not be presumed that the municipal corporation undertook to keep it open and in repair. *Eshleman v. Martie Twp.* 152 Pa. 68, 25 Atl. 178.

<sup>9</sup>*Pottner v. Minneapolis*, 41 Minn. 73, 42 N. W. 784.

<sup>10</sup>*Byrne v. Farmington*, 64 Conn. 307, 30 Atl. 138; *Murray v. Allen*, 20 R. I. 263, 38 Atl. 407.

<sup>11</sup>*Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811.

<sup>12</sup>*Harper v. Milwaukee*, 30 Wis. 365.

It is not the duty of the owner of land abutting on a street to keep free from obstruction a blind ditch covered with planking and soil, under an ordinance requiring abutting owners to keep all gutters opposite their premises in good repair and free from obstruction, so as to relieve the city from liability for damages to his lot and building from surface water occasioned by failure to keep the ditch free from obstruction, as such ordinance applies only to ordinary open gutters along the street.<sup>13</sup>

**191. Embankments.**—As has appeared in the preceding section, a municipality is liable for permitting drains to become obstructed to the injury of abutting property, and the question arises as to its liability for the obstruction of drains by permitting embankments, constructed for the roadbed of railways and other purposes, to be placed in its streets in such a way as to obstruct the flow of the water. Under such circumstances, there is no liability on the part of the municipality if the embankment is on private property. The liability in such cases rests entirely upon the one responsible for the obstruction.<sup>1</sup> But, if the embankment which obstructed the flow of the water is under the control of the municipality, it cannot escape liability for the resulting injury by the fact that it was constructed by another.<sup>2</sup> And the municipal corporation being responsible for the care and safety of its streets, it will be liable for injuries caused by the obstruction of drains by embankments which it authorizes to be placed in its streets, where it does not see that proper culverts are provided to carry off the water.<sup>3</sup> This is especially true if the municipality contributes to the injury.<sup>4</sup> Or if it does not require the corporation to comply with the conditions imposed.<sup>5</sup> And the fact that the statute makes the one

<sup>13</sup>*Gilluly v. Madison*, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137.

<sup>1</sup>A city is not liable for the negligence or wrong of a railroad company in so constructing its road upon private property that injury resulted to an adjoining owner by the collection and overflow of water, although it permitted the company to use one of its streets, and did not require the use of proper culverts. *Oallahen v. Des Moines*, 63 Iowa, 705, 17 N. W. 470.

<sup>2</sup>*Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282.

<sup>3</sup>*Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Damour v. Lyons City*, 44 Iowa, 276; *Peoria v. Adams*, 72 Ill. App. 662.

<sup>4</sup>A city is jointly liable with a railroad company for damages caused by the overflow of surface water, when it grant-

ed by ordinance the right to the railroad company to construct and maintain an embankment along a public street upon condition that it maintain culverts of sufficient size to carry away the accumulation of water, and then, although the culvert constructed was insufficient, the city maintained a drain leading to it, resulting in an accumulation of water which the outlet was insufficient in size to carry away. *Kelly v. Pittsburgh, C. C. & St. L. R. Co.* 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 235.

<sup>5</sup>Where a municipality permits a railroad company to construct its tracks above the surface of the street under an ordinance permitting it to "construct a track in the street," it is liable for injuries to adjoining property resulting from such elevated track diverting surface water onto the adjoining premises.

erecting the embankment liable for the injury will not relieve the municipality from liability.<sup>6</sup> The municipality is not liable if the injury is done by the wrongful action of an individual.<sup>7</sup> And some cases have held that merely granting permission to erect the embankment in the street will not render the municipality liable.<sup>8</sup> These decisions, however, lose sight of the fact that in almost every instance the municipality actively contributes to the wrong. It gathers the water and conducts it to the point where it is intercepted by the embankment, and the rule that it cannot gather water without providing an outlet for it renders it liable, notwithstanding it is not responsible for the obstruction. The one receiving permission to place an embankment in the street accepts the license, subject to the duty to refrain from obstructing the flow of surface water.<sup>9</sup> And he may be required to meet the added expense of drainage made necessary by his acts.<sup>10</sup>

**192. Effect of unusual storms.**— In changing the course of drainage, and making provision for the disposal of collected water, a municipal corporation is bound to provide only for the storms which are usual in the vicinity, and which may reasonably be expected to occur. An unprecedented storm is an event of the class which are called “an

*Torpey v. Independence*, 24 Mo. App. 288.

*Zanesville v. Fannan*, 53 Ohio St. 605, 33 Am. St. Rep. 664, 42 N. E. 703.

<sup>6</sup>A municipal corporation is not responsible for the damage done when a landowner constructs an embankment in a highway, for its convenient use as such, which ponds back surface water which he later precipitates on another's adjoining land, to its damage. *Bryce v. Loutit*, 21 Ont. App. Rep. 100.

<sup>7</sup>*Swenson v. Lexington*, 69 Mo. 157; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266.

In the absence of a legislative provision for damages, a municipal corporation is not liable for permitting the construction of a railroad track and plank road on a street, which results in such an elevation of the street as to cause water to flow upon premises abutting thereon, damaging the owner's houses, and materials and stock in trade in his carriage shop. *Roll v. Augusta*, 34 Ga. 320.

<sup>8</sup>*Kelly v. Pittsburgh, O. C. & St. L. R. Co.* 23 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233.

<sup>9</sup>*Lake Shore & M. S. R. Co. v. Wiley*, 193 Pa. 496, 44 Atl. 583.

The duty of a street railway company to “furnish, construct, put in place, and maintain” all necessary conduits and syphons for carrying surface water in the streets occupied by its tracks does not impose upon the company the duty of cleaning out syphons constructed by it in connection with conduits under the direction of the city, a failure to clean out which does not impair their use, or impede the flow of water through them. *Denver v. Denver City Cable R. Co.* 22 Colo. 565, 45 Pac. 439.

It is not within the police power of a city to hold a street railway company responsible for the unsanitary condition of syphons or catch-basins constructed by it in connection with culverts, under the direction of the city, for the carrying of surface water, where such syphons are not a part of the company's property or system, but are merely a part of the ordinary street improvements, in which the company has no more interest than others using the streets, and upon whom the duty of keeping such syphons clean was not imposed by its franchise, and is not necessary to the proper maintenance and operation of the culverts. *Ibid.*

act of God," and the injuries caused by it are regarded as inevitable accidents, the consequences of which must rest where they fall. Therefore, the municipality is not liable for injuries caused by the failure of drains provided by it to carry off the water in times of unprecedented storms, if they are sufficient for all ordinary storms.<sup>1</sup> There may be a liability for additional injury which is caused by the fact that the drains are obstructed or of insufficient capacity to carry the water which should have been expected; but, to warrant a recovery, the injury which was due to the lack of facilities which the municipality was required to furnish must be shown. The judgment of the municipal authorities as to the required capacity of the drain cannot be controlled by injunction.<sup>2</sup> Punitive damages are not recoverable against a city for the flooding of land with surface water from a storm overflow constructed in connection with its sewer system, where the flooding only occurs at long intervals and as a result of extraordinary storms.<sup>3</sup>

<sup>1</sup>*Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Keithsburg v. Simpson*, 70 Ill. App. 467; *Damour v. Lyons City*, 44 Iowa, 276; *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748, 9 N. W. 284; *Peoria v. Adams*, 72 Ill. App. 662.

In an early Kansas case it was held that a municipal corporation is responsible for damages to property from the grading of a street, causing to flow upon and accumulate thereon surface water diverted thereby out of its usual course, and from the insufficiency of a sewer to carry off such water in case of excessive rainfall; and the fact that, in the judgment of the municipal officers, the work on the street and sewer was properly and sufficiently done to answer the purposes intended is immaterial. *Leavenworth v. Casey*, McCahon, 124. The court says that a municipality is bound to make a sewer of sufficient size to guard against accidental obstructions and extraordinary freshets, and that it is no excuse for failure so to construct it that the engineer, or any other person who constructed it, thought it sufficient; and it is bound to exercise such caution and prudence in the construction and care of the work as a discreet and cautious individual would if the whole risk were to be his alone. The language of the opinion is criticised in *Atchison v. Challies*, 9 Kan. 603, the court saying that such has never been the law when applied to surface water as in the earlier case. But, although the

first decision seems, from the language of the opinion, to have been based more on the insufficient construction of the sewer than on anything else, from the allegations of the complaint there would seem to have been in the case the element of the grading of a street so as not merely to stop the flow of surface water from the premises in question, but so as to divert surface water from its natural course and cause it to flow upon the premises. In the later case a similar situation is stated in the complaint, and seems to be indicated by the statement of facts in the opinion: but the court intimates that liability would exist only where the flow of a natural water course is stopped, and not in the case of mere surface water, without seeming to consider to any extent the fact that the water was caused to flow where it would not otherwise have flowed. However, the evidence as to what really caused the injury, and as to its extent, was not fully presented to the court by the record. The questions specially before it on the rulings were as to the extent of capacity which a city must give to a drain for mere surface water where it actually does construct such a drain, and as to whether, having once constructed a drain, it may abandon it.

<sup>2</sup>*Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

<sup>3</sup>*Costich v. Rochester*, 68 App. Div. 623, 73 N. Y. Supp. 835.

**193. Right and duty of individual.**— An abutting owner is bound to use reasonable precautions to avoid injury from water which he knows is likely to be cast upon his property by the act of the municipality. If he knows that a gutter is obstructed, he must see that it is cleaned out, and must give notice of obstructions which he cannot remove himself. But he is not obliged to construct his buildings in such a manner as to render it impossible that they shall be injured by a possible overflow of the water.<sup>1</sup> The measure of the duty of the abutting owner is what can be done by ordinary care and reasonable expense.<sup>2</sup> He cannot hold the municipality liable for injuries caused by his own acts.<sup>3</sup> An owner of a lot adjacent to a street which is below grade must take notice of any exposure created by bringing the street to grade, and must exercise reasonable diligence to protect himself from water which may be cast upon his lot by bringing it to

<sup>1</sup>*Bartle v. Des Moines*, 38 Iowa, 414; *Johnson v. Cincinnati*, 20 Ohio C. C. 657; *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

A municipal corporation is not, in the absence of negligence, liable for the washing of earth from filled-in land by water from its gutters into excavations made by an adjoining lot owner with knowledge of the character of the adjacent land, if he did not take proper precautions in thus removing the lateral support thereof to provide against the falling of such earth, as it was not the duty of the municipality to make such a provision. *Curry v. Cincinnati*, 12 Ohio C. C. 736.

Assuming that a city is liable for negligently allowing a drain across a street for carrying off surface water to become filled up, the damages to be recovered by the owner of land overflowed must be confined to such as were directly occasioned by the fact that the escape of the water was thus prevented, and the city is not liable for damages caused by neglect of the landowner to protect his property as far as possible. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446.

The owner of premises abutting on a street will not be guilty of negligence in storing groceries in the cellar, which will prevent his recovering for their loss from the city, which negligently permits an embankment to be erected in the street so as to turn surface water into the cellar. *Damour v. Lyons City*, 44 Iowa, 276.

A city which negligently permits a gutter and culvert to become obstructed, whereby the premises of a property own-

er are flooded, cannot escape liability for the injury on the ground that the water was detained upon the premises longer than it would otherwise have been by an embankment raised by the property owner in constructing a sidewalk. *Parker v. Nashua*, 59 N. H. 402.

<sup>2</sup>*Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *Simpson v. Keokuk*, 34 Iowa, 568; *Toledo v. Lewis*, 17 Ohio C. C. 588.

<sup>3</sup>*Frederick v. Lansdale*, 156 Pa. 613, 27 Atl. 563; *Paris v. Cracraft*, 85 Ill. 294.

A municipal corporation is not liable to an occupant for injury to a building caused by the flowing of water through open gratings left in the sidewalk and maintained by the occupant for his own benefit, without which no considerable quantity of water would have flowed into the cellar. *Peoria v. Adams*, 72 Ill. App. 662.

Damages suffered by the owner of land who makes an erection in a position to be injured by a natural and accustomed flow of water from streets are attributable to his own act, and not to a breach of duty by the municipality, as its duty, prescribed by charter, of keeping the streets in repair, does not exact the performance of such acts as are necessary to protect adjacent lands from the natural flow of water, or to cure a fault of such lands. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

A municipal corporation cannot be held liable for water flowing through the bottom of a gutter and a retaining wall of the street upon property lying below grade, where the gutter, under the munic-



grade.<sup>4</sup> An injunction will not be granted a landowner to restrain the continuance of a nuisance by a city, caused by the erection and maintenance of an embankment, obstructing a natural water course for the carrying of surface water, where, by his refusal to permit the connection of his premises with a sewer for the purpose of draining them, he thwarts the efforts of the city to redress in a proper manner the injury done.<sup>5</sup> The question as to what constitutes reasonable care and means to prevent the injury is for the jury.<sup>6</sup>

**193a. Casting water into street.**—The ordinary rules governing surface water apply in favor of the private owner in dealing with land abutting on a street. He may raise the grade of his land in such a way as to change the course of surface drainage between the street and his land so that it will run from his land into the street.<sup>1</sup> He cannot interfere with natural drains, but he may raise embankments and prevent the flow onto his land of water which has been collected and concentrated in the street adjacent thereto.<sup>2</sup> The mere obstruction of such flow does not necessarily and *per se* constitute a nuisance.<sup>3</sup> But the rights of the private owner in dealing with accumulated water are limited by a duty imposed upon him not to do anything to in-

ipal ordinance, was laid by the abutting owner, and the retaining wall was laid of dry stone after the contractor had offered to lay it with cement if the abutting owner would pay for it, which he refused to do. *Watson v. Kingston*, 114 N. Y. 88, 21 N. E. 102, Affirming 43 Hun, 367.

A municipal corporation is not liable for damages to goods in the basement of a store from the flooding thereof by water overflowing the sidewalks because of the manner of grading of a street and the insufficiency of sewer facilities to carry off accumulated surface water during ordinary, hard rains, where the damages would not have occurred but for excavations made by the owners, for their own benefit, under the sidewalk, in making which, the fee of the sidewalks being in the city as part of the streets, they are trespassers. *Guthrie v. Niz*, 5 Okla. 555, 49 Pac. 917.

<sup>4</sup>*Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274; *Gilfeather v. Council Bluffs*, 69 Iowa, 310, 28 N. W. 610.

<sup>5</sup>*Richardson v. Eureka*, 110 Cal. 441, 42 Pac. 965.

<sup>6</sup>Therefore, in an action against a city by a lot owner for causing an overflow by raising the grade of a street, it is error for the court to charge the jury that, as

it appeared that the owner of the lot could have prevented the injury by raising its level at an expense of \$500, the lot owner was not entitled to recover. *Cooper v. Dallas*, 83 Tex. 239, 29 Am. St. Rep. 645, 18 S. W. 565.

<sup>1</sup>*Bangor v. Lansil*, 51 Me. 521.

An abutting owner has the right to drain surface water from his land upon a highway, provided he does not thereby interfere with the use of the highway, rendering it less safe, useful, convenient, or excellent as a public thoroughfare. *Nelson v. Fehd*, 104 Ill. App. 114.

<sup>2</sup>*Sweetwater v. Pate* (Tenn. Ch. App.) 59 S. W. 480; *Flagg v. Worcester*, 13 Gray, 601; *Blakely Twp. v. Devine*, 36 Minn. 53, 29 N. W. 342.

The owner of land which adjoins a highway may lawfully do any acts upon his own land to prevent surface water from coming thereon from the highway, and may stop up the mouth of a culvert built by the selectmen across the highway for the purpose of conducting the surface water upon his land, provided he can do so without exceeding the limits of his own land. *Franklin v. Fisk*, 13 Allen, 211, 90 Am. Dec. 194; *Groves v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

<sup>3</sup>*State v. Wilson*, 106 N. C. 718, 11 S. E. 254.

jure the public. Although, as against other individuals, he would have a right to obstruct the flow of water wrongfully turned upon his property, he cannot do so with respect to water turned thereon by the public authorities, if the result will be to render the highway unsafe and injure life. In such cases he must seek his remedy at law, and cannot take the matter into his own hands for the purpose of relieving himself from the unlawful flow.<sup>4</sup> His right extends to the filling of natural depressions into which the municipality is attempting to turn water which does not naturally flow there.<sup>5</sup> He is not responsible for the further flow of the water after he has stopped its crossing his property.<sup>6</sup> If depressions which form natural drains lead from the abutting land to the highway, the abutting owner may make use of them, and the public authorities have no right to interfere with his act in so doing.<sup>7</sup> Conversely, he cannot stop up natural drains.<sup>8</sup> Nor can he collect water and turn it in a body onto the highway,<sup>9</sup> nor can he without authority dig ditches in the highway and carry water away from his property.<sup>10</sup>

<sup>4</sup>*State v. Wilson*, 107 N. C. 865, 12 S. E. 320. jured thereby. *Galbraith v. Yates*, 79 Minn. 436, 82 N. W. 683.

The owner of lands on one side of a highway cannot, to the impairment of the highway and hindrance of public travel, dam up a culvert through such highway for the purpose of protecting her land from overflow caused by the construction of a system of artificial ditches on lands on the other side of the highway, converging at a point near such culvert so as to discharge an unnatural quantity of surface water from such lands through such culvert onto her land; and is not entitled to an injunction to restrain the removal of such obstruction by highway officers. *Myers v. Nelson* (Cal.) 44 Pac. 801.

Evidence that one who filled up his land at the sides of the road so as to throw surface water back on the highway and wash it out acted under the advice of the road officers may be considered by the jury in trying an indictment for wilfully obstructing the highway. *People v. Crounse*, 51 Hun, 489, 4 N. Y. Supp. 266.

In one case it was held that, when a municipal corporation so constructs a highway drain as to throw onto lower lands, to their damage, an accumulated supply of surface water which would not naturally have flowed there, the injured person cannot, without lawful authority, construct a dam across such ditch if an adjoining landowner be in-

jured thereby. *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585.

<sup>5</sup>*Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200.

<sup>6</sup>*Davis v. Highway Comrs.* 143 Ill. 9, 33 N. E. 58; *Young v. Leedom*, 67 Pa. 351.

But the value of benefits resulting to one's land on account of the fact that a road which is caused to be located over it will incidentally drain it and thus increase its value may not be deducted from the actual damage to which the owner is otherwise entitled under art. 1, § 18, of the Iowa Constitution, providing that advantages shall not be taken into consideration. *Frederick v. Shane*, 32 Iowa, 254.

<sup>7</sup>A municipal corporation may maintain a suit to enjoin a private individual from obstructing a culvert in a highway for conducting surface water, where the natural depression of the earth's surface is such that all surface water would accumulate and flow across the place where such culvert is located, if no highway were there, and the obstruction of the culvert would cause the highway to become out of repair. *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200.

<sup>8</sup>*Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Brown v. Barrett*, 38 Ill. App. 248.

194. **Remedy for injury done.**— A municipal corporation may be enjoined from constructing a drain which will drain water upon adjoining property to its apparent injury;<sup>1</sup> but the landowner is not entitled to a mandamus to compel the restoration of the former condition where such restoration will not conduce to the best interests of the public.<sup>2</sup> If the statute provides a remedy it is exclusive, and the damages must be recovered by means of it, or not at all, if the statutory remedy is adequate.<sup>3</sup> But the wording of the statute may be

So, collecting water accustomed to flow over a wide surface of land, and bringing it to a point on his own premises a few feet from a highway, thereby resulting in injury to the same, is a "turning of a current of water" within the meaning of a law prohibiting such act so as to saturate or wash a public highway. *Ibid.*,

A municipal corporation is not liable to a property owner for not permitting water which had been accustomed to flow over his land to be turned down the gutters of a street in order to prevent its flowing in its former course, although the improvement of the street obstructs its flow in the direction in which it naturally ran, and a cut had to be made to carry it across the street and thence by means of a box sewer through his land at or near where it had formerly flowed over the surface. *Bush v. Portland*, 19 Or. 45, 20 Am. St. Rep. 789, 23 Pac. 667.

<sup>1</sup>*Nelson v. Fehd*, 104 Ill. App. 114.

The unauthorized digging of a ditch by an adjoining landowner within the limits of a highway for the flowage of water from his land is, *per se*, an injury or obstruction thereto within the meaning of a statute prohibiting an injury or obstruction to a public road by digging a ditch thereon, or by draining a current of water so as to saturate or wash the same. *Canoe Creek v. McEniry*, 23 Ill. App. 227.

<sup>2</sup>*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

But when neither the flow of water upon an adjoining owner's land, nor its force, is increased, by the fact that it is conducted near to it by a tile drain, the lower owner is not entitled to an injunction. *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 202.

<sup>3</sup>One whose estate, abutting on a highway, is injured by having surface water ponded in front of his premises as the result of an unauthorized change of the grade of such highway, caused or done

by the town council or surveyor of highways, is not entitled to a writ of mandamus to have the former grade restored; as in such a case it is doubtful as to whether the relator has the right to have the street restored to its former grade, and as the surveyor of highways is merely a ministerial officer who has no power to change the grade of the street or to incur indebtedness for the purpose of changing the grade, and as in such a case the relator has an adequate legal remedy. *Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326.

Neither a mandate, nor an injunction, will lie on behalf of a landowner against the superintendent of roads or the board of commissioners, who had, under a law providing for the construction of free gravel roads, appropriated a highway for that purpose, and constructed the road in such a manner as to cut through a natural ridge along the owner's land whereby it was flooded by the waters of a stream, in the absence of allegations that the proceedings under which the road was constructed were not regular and valid, and that full damages had not been duly assessed in his favor under a provision in the law providing for the assessing of such damages and affording landowners the opportunity to present claims. *State ex rel. Robinson v. Hanna*, 97 Ind. 469.

The supreme court will not grant a mandamus to compel county officials to comply with the decree of a district court, enjoining them from discharging drainage water through ditches on complainant's land, in the absence of anything to show that the duty will not be enforced by the district court in due course of law. *State ex rel. Hoppner v. Fillmore County*, 32 Neb. 870, 49 N. W. 769.

<sup>4</sup>*Broomhead v. Grant*, 83 Ga. 451, 10 S. E. 116; *Wheeler v. Worcester*, 10 Allen, 591; *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220; *Bartlett v. Bristol*, 66 N. H. 420, 24 Atl. 906.

such as to indicate that the remedy is intended to be cumulative only, and in such case the common-law action may be resorted to.<sup>4</sup> A landowner upon whose land surface water is caused to flow by the negligent performance, on the part of a highway commissioner, of a contract with such owner and his neighbors to lower and extend the ditches in the highways so as to relieve their lands of water, though entitled to sue upon contract, may bring an action in tort to recover the damages sustained by such negligence.<sup>5</sup>

**194a. Who may sue.**—A right of action for damages to land from the cutting of a ditch by a municipal corporation in the exercise of its legitimate governmental powers accrues to the person owning the land at the time of such cutting, and does not pass to his vendee on a subsequent sale of the land.<sup>1</sup> On the same principle, damage re-

If, in consequence of changes made by a municipal corporation in the surface of a highway for the purpose of making it safe for travel, the water accumulating upon the surface of the way by the fall of rain or melting of snow passes onto adjoining land in different places, or in somewhat greater quantities in particular places, than it otherwise would have done, that is to be considered as one of the natural, probable, or necessary consequences resulting from the establishment and maintenance of the way; and therefore no action will lie for such injuries as for a tort, but the damage must be regarded as a matter contemplated in the location of the road, and compensation sought for by the owner of the property in the way pointed out by statute. *Flagg v. Worcester*, 13 Gray, 601.

'The statute conferring upon the owner of a house which is injured by the ploughing of a ditch in the road the right to have damages assessed to him by selectmen, and paid by the town, does not take away his common-law remedy against the highway surveyor, but is cumulative thereto. *Adams v. Richardson*, 43 N. H. 212.

In an action against a city by the owner of a lot abutting on a street for the throwing of surface water on the lot and into the cellar and well of the plaintiff, the water having been collected to some extent from distant pools and puddles, the court held that, if the statute giving an abutting owner who is injured by any change in the grade of a street a peculiar statutory remedy could be considered as applicable, such remedy was cumulative only, and not exclusive.

*Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520. But that case was distinguished in *Almy v. Coggeshall*, 19 R. I. 549, 36 Atl. 1124, which held that, where a city changes the grade of a street on which the plaintiffs' land abuts so that the street, which had previously been lower than the surface of the plaintiff's land, is raised 2 feet higher than the surface, whereby the water falling on the land is prevented from flowing therefrom, and the water falling on the street is turned upon the lot and forms ponds thereon, and flows into the cellar of the plaintiffs' house,—as the turning of the surface water on to the plaintiffs' land is merely incidental to the change of grade, an action on the case cannot be maintained, for the remedy in such cases by appeal from the appraisal of damages by the board of aldermen, as provided by statute, is exclusive. The distinguishing feature was in the fact that the turning of surface water on abutting land in the *Inman Case* was not incidental to a change of grade; but surface water from other streets, which formerly flowed down the streets, and water from distant ponds, was turned on the land.

<sup>1</sup>*Fromm v. Ide*, 68 Hun, 310, 23 N. Y. Supp. 56.

<sup>4</sup>*Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984; *Ortwine v. Baltimore*, 16 Md. 387; *Elgin v. Welch*, 16 Ill. App. 483.

A municipal corporation is not liable to a subsequent purchaser of land for permanent injuries thereto from overflow and washing caused by the negligent manner in which the city devised the plan and executed the work of regrading an alley and constructing a gutter there-

sulting from a diversion of surface water from a highway into an alley can only be recovered by the owner of the land to which the right of an alley is appurtenant, and he cannot extend the right to other land afterward purchased.<sup>2</sup> A subsequent vendee can recover only in case the injury is not of a permanent character, and does not arise until after he obtains the title.<sup>3</sup> The action must be brought by the person whose interest is injured, and he can recover only to the extent of his injury.<sup>4</sup> A municipal corporation may maintain a suit to protect its interests from injury by the officials of other public corporations.<sup>5</sup>

**194b. Who is liable.**—To enable one to maintain an action for injuries done to his property by surface water cast upon it by a public corporation there must be authority to sue the defendant. The state itself is not liable for its acts, unless made so by the Constitution or express authority, and a like exemption extends to counties. No action can be maintained against them unless the statute expressly so provides.<sup>1</sup> Municipal corporations are, likewise, exempt from liability for acts performed by them in their governmental capacity, unless they are made liable by statute. But in most cases the statutes provide, generally, for a liability on the part of the municipality for acts performed by it in carrying on public improvements. If there is such general liability the municipality may be sued for acts performed under its authority;<sup>2</sup> and, in case the acts are performed without the authority of the municipality, the officers responsible for

in and a connecting culvert across a highway, since the improvement is of such a character that it cannot be abated, and an action therefor accrued to the owner at the time the work was done. *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912.

<sup>1</sup>*Kensington v. Wood*, 10 Pa. 93, 49 Am. Dec. 582.

<sup>2</sup>*Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

<sup>3</sup>Where the change in the grade of a street injures an abutting lot by casting surface water thereon, and the lot is held by a tenant for life, and another is entitled to the remainder in fee, and both of such persons interested in the lot are engaged in a mercantile business as partners, using a storeroom upon the lot, which storeroom is permanently injured by the surface water, such persons cannot recover in the same action for damage done to the life estate, the remainder, and the joint mercantile business by raising the grade of the street

and causing the surface water to flow on the lot. *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

<sup>4</sup>*Merritt Twp. v. Harp* (Mich.) 9 Det. L. N. 302, 91 N. W. 156; *Franklin v. Durges*, 71 N. H. 186, 58 L. R. A. 112, 51 Atl. 911.

<sup>5</sup>*Stocker v. Nemaha County* (Neb.) 93 N. W. 721; *Downing v. Mason County*, 87 Ky. 208, 12 Am. St. Rep. 473, 8 S. W. 264.

<sup>6</sup>*Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763.

In a Connecticut case it was held that a municipal corporation is not responsible for the acts of its street commissioner in turning water from the street onto the property of adjoining proprietors. *Judge v. Meriden*, 38 Conn. 90.

But that case is explained in *Mooney v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703, in a way to relieve it in part of its apparent conflict with the course of authorities elsewhere.

the act will be trespassers, and liable as such.<sup>3</sup> A municipality is not liable for acts performed by its officers without authority.<sup>4</sup>

**194c. Damages.**— In order to justify any recovery, facts must be alleged showing that there was a duty on the part of the municipality which was violated to the injury of the complainant;<sup>1</sup> and the only damages that can be recovered are those which naturally and proximately result from the wrongful act of the defendant.<sup>2</sup> Prospective damages cannot be allowed where the defect is easily remediable so that the injury must be regarded as temporary.<sup>3</sup> If the injury is permanent, all damages must be recovered in a single action.<sup>4</sup> The amount to be allowed is to be determined by the injury done.<sup>5</sup> If

<sup>1</sup>*Clay v. Board*, 85 Mo. App. 237.

<sup>2</sup>*Ofstie v. Hammond*, 78 Minn. 275, 80 N. W. 1123; *Atcheson v. Portage La Prairie Rural Municipality*, 10 Manitoba L. R. 39.

A municipal corporation is not liable for damages to property by the backing of surface water because of the damming of a well-defined channel through which such water was wont to flow, due to the grading of a street to a greater height than the official grade called for by the contract, although such increase of grade was made under the erroneous grade lines and levels furnished by the city engineer and surveyor, which the contractor followed, where neither contemplated nor called for by the supervisors; since the surveyor and state superintendent, deriving their powers as to the subject-matter from express provisions of law, and not from the order or direction of the board of supervisors, are the servants of the law, and not of the supervisors. *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687.

<sup>3</sup>A recovery cannot be had against a municipality for damages to land and crops from the overflow thereof by the waters of a ditch maintained by it, even if it is its duty to care for it, under a complaint alleging failure to keep the ditch cleaned out, to keep it in proper repair, and to erect an embankment or other work to confine the water within the ditch, in the absence of any facts showing that it was its legal duty to construct such embankment. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

A landowner cannot recover for injury to his land from flooding on the ground that township officers neglected to clean out a highway ditch through which his surface water naturally flowed, but opened another ditch causing an increased flow on his premises, where the

evidence fails to show that he was injured thereby. *Chittick v. Lake*, 43 Ill. App. 632.

<sup>4</sup>*Magarity v. Wilmington*, 5 Houst. (Del.) 530; *Benson v. Wilmington*, 9 Houst. (Del.) 359, 32 Atl. 1047; *Berry v. Vreeland*, 21 N. J. L. 183.

A municipal corporation is not liable for injury to the arm of an individual by scalding in hot water which he was using while picking chickens in a building that collapsed by reason of the flooding of the cellar with water, caused by a failure of the city to provide sufficient catch-basins and sewers to carry off the surface water. The collapse of the building under such circumstances was not such a result as could have reasonably been anticipated or foreseen, and the injury cannot be regarded as the proximate or natural result of such negligence. *Peoria v. Adams*, 72 Ill. App. 662.

In an action against a city for negligently allowing a lot to be flooded by surface water, evidence as to costs of repairs to houses thereon must be confined to repairs of defects directly caused by the water, and evidence of injuries and depredations by trespassers is irrelevant. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446.

<sup>5</sup>*Carson v. Springfield*, 53 Mo. App. 289.

<sup>6</sup>*North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821.

<sup>7</sup>*Princeton v. Gieske*, 93 Ind. 102.

It is for the jury to say, as best they can from the evidence, how much of the whole amount of damage to land from flooding was caused by the construction by a municipal corporation of a concrete sidewalk, as distinguished from that done by drainage in its natural course; and, in an action against the municipal corporation for such damages, it is not

the injury is caused by the overflow of plaintiff's land, the measure of damages is the difference in market value immediately before and immediately after the act which causes the injury.<sup>6</sup> But in *Podhaisky v. Cedar Rapids*<sup>7</sup> it is said that the measure of damages for the act of a city in turning drains for surface water into a ditch which had been washed out in a public highway, and removing an obstruction therein in such a manner that the ditch was washed wider and undermined property of an abutting owner, is the injury which was caused by its negligence or wrongful acts, and not the difference in the value of the property before the acts were committed and at any time during a series of years afterwards.<sup>8</sup> The plaintiff is limited to the damages which he has sustained, and cannot recover those sustained by even his tenants.<sup>9</sup> Damages for breach of contract on the part of a municipality to care for the water cannot be recovered in an action for wrongfully throwing water onto the plaintiff's premises.<sup>10</sup> In an action for damages to land from the overflowing thereof by rain water, due partly to the grading of the street and partly to the unskilful and negligent construction of a sewer, the increased value of the land from the grading of the street may be set off against the damages occasioned by such grade, but cannot be set off against the damages occasioned by the sewer.<sup>11</sup>

**195. Limitation of actions.**— Rights in the drainage of surface water may be acquired by and against a municipal corporation by an

proper to include any portion due to the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation, in the absence of proof that the damage done was permanent or irreparable.

*McCray v. Fairmont*, 46 W. Va. 442, 33 S. E. 245.

The measure of damages to the owner of lands from the failure of a village to plan for an extension to the full width of a highway, on completion of its improvement, of a culvert previously placed therein on a partial improvement thereof, thus shutting off the natural drainage of adjoining lands so as to flood them, is the difference and diminution in value of such lands in the condition in which they were before such improvement, and their fair value as they will be when the improvement is completed. *Martin v. Bond Hill*, 7 Ohio C. C. 271.

<sup>6</sup> 106 Iowa, 543, 76 N. W. 847.

<sup>7</sup> In an action for injury to an owner's property caused by overflow from a ditch constructed by a municipal corporation in a street, he is entitled to recover only such a sum as will put his premises in as good condition as before

*Keithsburg v. Simpson*, 70 Ill. App. 467.

<sup>8</sup> The owner of a building damaged by the flowing of water in the basement thereof caused by the raising of the grade of the street in front by the city without providing a proper sewer is not entitled to recover damages for the inconvenience to tenants occupying such building or injury to their personal property, but is limited in his recovery to the injury to the building or premises, or loss sustained by him in consequence of the flowage of the water. *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591.

<sup>9</sup> *Bloomington v. Burke*, 12 Ill. App. 314.

<sup>10</sup> *Atlanta v. Word*, 78 Ga. 276; *Cornington v. Ulrich*, 14 Ky. L. Rep. 302; *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321; *Allen v. Paris*, 1 Tex. App. Civ. Cas. (White & W.) § 885, p. 506.

enjoyment of the right for the time prescribed by the statute of limitations. But, in order to give a municipal corporation a right to use the land of a private owner for drainage purposes without paying for it, the use of it for that purpose under a claim of right for the statutory period must appear.<sup>1</sup> The right to damages for the casting of water upon private property may be barred before the title of the municipal corporation to maintain the drain is complete.<sup>2</sup> The statute begins to run at the completion of the improvement which causes the water to flow onto the property of the complainant;<sup>3</sup> but, if the forcing of the water onto the abutting property is not the necessary result of the improvement, the action will not accrue until the injury results.<sup>4</sup> And, if the injury is not of a permanent character, but recurs from time to time, the barring of one cause of action will not prevent suit upon those which subsequently accrue.<sup>5</sup>

#### V. ESTABLISHMENT OF SURFACE DRAINS.

**196. Method of effecting drainage.**— It being settled that drainage is a thing which may properly be undertaken by the government, and that it can exercise for that purpose its taxing power and the power of eminent domain, it becomes a very important question to the person whose property is to be taken for a right of way, to the person who is to be charged with the expense, and to the public, what procedure is necessary to acquire the right of way, and to charge the tax-

<sup>1</sup>Highway commissioners cannot prevent a landowner from filling up an artificial ditch upon his premises adjoining a highway where the public has no easement to drain the highway over his land, although such ditch has been in existence, and has been kept open and maintained by highway commissioners, for a period of thirteen years, and an occupant of the land, though not the owner, has been paid from public funds for improving it under a contract with the commissioners. *Simpson v. Wright*, 21 Ill. App. 67.

In a suit against commissioners of highways for changing the flow of surface water, the commissioners cannot plead prescriptive rights as to the flow of the water existing in the owners of adjoining land who are neither parties to the suit nor asking for any relief in the premises. *Jewett v. Sweet*, 178 Ill. 96. 52 N. E. 962.

<sup>2</sup>The California statute of limitations applicable to a trespass on real estate governs in case of the overflowing of lands by the stopping up by a highway

of a natural water course carrying off surface water. *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41.

<sup>3</sup>*Hay v. Lexington*, 24 Ky. L. Rep. 1495, 71 S. W. 867.

<sup>4</sup>*Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1036; *Kansas City v. Frohwerk*, 10 Kan. App. 120, 62 Pac. 432.

<sup>5</sup>*Kansas City v. Frohwerk*, 10 Kan. App. 120, 62 Pac. 432.

An action for injury to land from overflow caused by the overtaking of a main drain constructed by a municipal corporation as an outlet for surface waters, by the subsequent construction of lateral drains and the grade of streets, is not barred by the statute of limitations, where it does not appear that the lateral drains and other improvements were constructed six years prior to the commencement of the action, although a longer time has elapsed since the construction of the main ditch. *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844.



payer with the expense. In general, the procedure is prescribed by statute, and the decisions will not be sufficient to indicate fully what must be done. The various local statutes cannot be set out in this place because of lack of space, and, even if they could be, it would be of little advantage, since they are to be found in the local statute books where they are at all times available, and the one which controls in any particular case can be referred to at will, and the practitioner can always be sure that he has before him the latest expression of the legislative will on the subject; whereas, should an attempt be made to collect the statutes here, there would be little more than an aggregation of provisions which on their face would appear to be diverse, with no certainty that the statutes set out would, at the time they were needed, represent the law upon the subject. But the principles which govern the application of such statutes are uniform and universally applicable; and they will apply to whatever statute is under consideration. The statute frequently needs harmonizing with the Constitution, and needs supplementing where constitutional rights are not protected. Furthermore, while the statutory plan is to be followed, certain steps are regarded as essential, so that without them the proceedings will be of no avail; while others are merely directory, and may be dispensed with and the taxpayer still be held liable. All these matters are to be determined by the law as it has been laid down by the courts, and, therefore, when that law is stated, all that remains to be done is to apply it to the statute whose provisions are sought to be enforced.

When proceedings for drainage first came into notice in the history of the common law they appear to have been under the direct supervision of the Crown,<sup>1</sup> and to have been carried on by the commissioners of sewers. These men were appointees of the Crown, and were given very large powers in determining what drainage was necessary and the manner of executing it. Statutes were from time to time passed to govern their acts, and they were in most cases given power to act in their discretion; but that discretion when given must be legally exercised. They had no absolute power, but were obliged to proceed according to fixed rules of law;<sup>2</sup> and, if the statute requiring a local authority to drain its district provided a remedy for breach of the duty, such remedy was exclusive, and a private indi-

<sup>1</sup> All the powers given to the commissioners of sewers were, before the creation of the commission, vested in the Crown as far as these powers are incident to, and necessary to the defense of, the realm. *Newcastle v. Clark*, 2 J. B. Moore, 666, 8 Taunt. 602, 20 Revised Rep. 583.

<sup>2</sup> *Hetley v. Boyer*, 2 Bulstr. 197; *Rooke's Case*, 5 Coke, 100.

vidual could not require the commissioners to proceed to act by mandamus;<sup>3</sup> nor could he maintain an action for injuries inflicted upon him by such failure.<sup>4</sup> The territorial jurisdiction of the commissioners depended upon the terms of the statute;<sup>5</sup> and they had no such property in works constructed by them in navigable waters as would entitle them to maintain trespass against harbor commissioners for destroying the works.<sup>6</sup> But commissioners must act for the public good, and proceedings taken by them with a view to private benefit would be void.<sup>7</sup>

In this country proceedings for the drainage of land and the methods by which they were instituted have been of various kinds. Drainage is so far a necessity that the courts will not interfere to restrain the sale of a portion of a tract of land dedicated to public use for the purpose of raising funds to drain the remainder.<sup>8</sup> But the right of drainage is not paramount to other public rights; and, therefore, merely conferring authority on a municipal corporation to drain will not authorize it to do so in such a manner as to destroy the navigability of a water course.<sup>9</sup> The primary object of drainage is for the benefit of public health; and, therefore, if the object may be best effectuated by flooding marshes rather than to attempt to drain them,

<sup>3</sup>*Peebles v. Oswaldtwistle* [1897] 1 Q. B. 625, 66 L. J. Q. B. N. S. 392, 76 L. T. N. S. 315, 61 J. P. 308, 45 Week. Rep. 454.

<sup>4</sup>*Robinson v. Workington* [1897] 1 Q. B. 619, 66 L. J. Q. B. N. S. 388, 75 L. T. N. S. 674, 61 J. P. 164, 45 Week. Rep. 453.

<sup>5</sup>The commissioners of sewers have no power to create and cause to be maintained new rivers which did not exist at the time of Magna Charta. *Isle of Ely's Case*, 10 Coke, 141.

The commissioners of sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if the place over which the jurisdiction is exercised be or be not likely to be benefited by it. *Dore v. Gray*, 2 T. R. 366.

The effect of stat. 3 James I., chap. 14, which subjects all sewers within 2 miles of London to the jurisdiction of the commission of sewers, amounts to a legislative construction of stat. 23 Hen. VIII., creating the commission of sewers by its recital that "no stream or sewers are within the statute of Henry VIII., unless the same are navigable;" and hence, the only streams within the

jurisdiction of the commission of sewers are navigable streams and all streams within 2 miles of London. *Yeaw v. Holland*, 2 W. Bl. 717.

<sup>6</sup>*Newcastle v. Olark*, 2 J. B. Moore, 666, 8 Taunt. 602, 20 Revised Rep. 583.

<sup>7</sup>The commissioners of sewers cannot make an assessment for the erection of a tumbling buoy in a navigable river for the purpose of preventing any inconvenience from a lock constructed for private benefit, as it is their duty to remove the lock if it constitutes a nuisance. *Queen v. Westham*, 10 Mod. 159.

<sup>8</sup>An injunction will not be granted to restrain the sale of a portion of land dedicated for public purposes to raise funds for the drainage of the remainder of the tract in favor of the representatives of the grantor on the ground that the trust did not authorize a sale of the property for private uses, but the former owners will be left to assert their claims to a reverter because of misapplication of the property in an action at law to recover defendant's possession. *Van Ness v. United States*, 2 Cranch C. C. 376; Fed. Cas. No. 16,868.

<sup>9</sup>*Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800.

that may be done.<sup>10</sup> The state may undertake the work of draining swamp lands, so that, when the work shall be completed, the title to the land acquired in its performance shall be in the state.<sup>11</sup> Proceedings for the construction of sewers in municipal corporations are usually instituted by ordinances or resolution of the common council; and, for the drainage of rural districts, the proceedings may be instituted by petition of the landowner interested, or by the organization of drainage districts; or highway commissioners and other local officers may be given authority over drainage proceedings.<sup>12</sup> To

\* Since public interest of a local character may be affected by the drainage of wet lands, the raising of water over low and marshy places near the shores of an inland lake by the construction of a dam to raise the level of the lake may be in the interest of public health and paid for by special assessments upon benefited property. *McGee v. Hennepin County*, 84 Minn. 472, 88 N. W. 6.

<sup>11</sup> *Re Swan*, 35 Hun, 625.

<sup>12</sup> The legislative power to drain swamps may be exercised through the intervention of a company created for that purpose. *Re New Orleans Drainage Co.* 11 La. Ann. 338.

Highway commissioners, exercising the special and added authority of drainage commissioners, do so, in contemplation of the law authorizing it, not as highway commissioners, but as a body of men to whom are delegated the power and authority of commissioners of the drainage districts organized by and under the statute. *People ex rel. Hardy v. Dist. No. 1, Drainage Comrs.* 143 Ill. 417, 32 N. E. 688.

The right of highway commissioners in each town in the several counties adopting township organization to be a corporate body as drainage commissioners, under the drainage laws giving them that right, is a franchise. *People v. O'Hair*, 128 Ill. 20, 21 N. E. 211, Reversing 29 Ill. App. 239.

A provision in the drainage law of Illinois making the commissioners of highways of a town also the drainage commissioners thereof is not invalid as an assumption of an appointing power which the legislature does not possess, but is the imposing by law of new duties, merely statutory, upon officers already chosen, and is by no means the appointment or selection of such officers by the legislative department. *Kilgour v. Drainage Comrs.* 111 Ill. 342.

A drainage act is not unconstitutional

as violating the constitutional provision prohibiting the legislature from appointing or electing any person to an office because it provides that the county commissioners shall be the drainage commissioners of their respective counties. No new office is created, but new duties are added to an office already created and whose officers are elected by the people, and, being the corporate authorities before the passage of that act, the addition of new duties, and declaring that, as to such duties, such corporation shall be known by a different name, do not change the constituents thereof. *Owners of Lands v. People*, 113 Ill. 296.

Under a provision in the Constitution authorizing the general assembly to pass laws permitting the owners of lands to construct drains, etc., for agricultural, sanitary, or mining purposes, across the lands of others, and to provide for the organization of drainage districts, and to vest the corporate authorities thereof with power to construct and maintain drains, etc., by special assessments upon the property benefited thereby, the general assembly may pass a law making the corporate authorities of cities and villages the drainage commissioners thereof with power to determine what portion of the lands within such cities or villages shall be drained, which portion, when so determined, thereby becomes a drainage district, and vesting in such corporate authorities the power to construct and maintain such drains and pumping works as are necessary for the purpose of draining the lands in such district, and to levy special assessments for the cost thereof upon the lands benefited thereby. *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

Although the Constitution providing that the legislature may vest cities, towns, and villages with the power to make local improvements by special as-

make the proceedings lawful, not only must the statutory requirements be complied with, but the constitutional rights of the citizens must be observed. But a single statute may provide for the construction, reparation, and perfection of drains, ditches, and levees, since they are all parts of one system of improvement.<sup>13</sup> The basis upon which drainage rests is that it shall be for public utility, and that question is for the jury to determine; and the court cannot interfere with its conclusion unless there are no facts to support it.<sup>14</sup> Although the power to drain has been conferred upon highway commissioners, a private citizen cannot enforce the performance of the act so as to furnish drainage to his land to a greater extent than existed in a state of nature; all that he can ask is that his lands be not flowed to a greater extent than existed before.<sup>15</sup>

**197. Definitions.**— The words which are used to describe the various kinds of drains have undergone some change by the lapse of time. Originally it seems that the distinction between a sewer and gutter or drain was that the sewer was constructed by and under the control of the public, which the public generally had a right to use, while the latter was a private means of disposing of surplus water.<sup>1</sup> In *Wetmore v. Fiske*,<sup>2</sup> it is said: Formerly the word "sewer" was used for a fresh-water trench, compassed in on both sides with a bank; a small current or little river. So, the statute 25 Hen. VIII. chap. 5., *Concerning commissioners of sewers*, was to remedy damage from the "flowing surges and course of the sea in and upon marsh grounds;" also land waters and springs upon meadows, and other water courses. More recently, however, and probably from the appropriation of the word, in acts and ordinances, to the common conduits of liquid filth, it is usually associated with such a use. Thus, Webster defines "sewers:" "A drain or passage to convey off water and filth underground." For "drain" he gives: "A water course; a sewer." Kent speaks of the right of drainage<sup>3</sup> as a "right to convey water in pipes through or over the estate of another." In *Goldthwait v. East*

assessments of the cost upon property benefited does not mention counties, an act of the legislature authorizing counties to construct drains by levying the cost upon lands benefited is not void as violative of the Constitution. *Dorst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

<sup>1</sup>*Blake v. People*, 109 Ill. 504.

<sup>2</sup>*Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782.

<sup>3</sup>*Johnson v. Rea*, 12 Ill. App. 331.

<sup>4</sup>A sewer is a common public stream,

and a gutter is a straight, private running water. Callis', *Sewers*, 80.

So, the statute of 23 Hen. VIII., which was passed for reclamation of marsh lands, and which provided for a system of drainage, did not provide for a system of sewers in the modern sense in which the word "sewers" is used. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

<sup>5</sup>15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

<sup>6</sup>3 Com. \*436.

*Bridgewater*<sup>4</sup> the court says: "The words 'ditch' and 'drain' have no technical or exact meaning. They both may mean a hollow space in the ground, natural or artificial, where water is collected or passes off." So, in *Queen v. Godmanchester Local Bd. of Health*<sup>5</sup> a distinction is made between a drain and a sewer, but the distinction is based upon a statute. In modern usage sewers are covered or closed water ways, usually for the conveyance of refuse as well as water, and ditches are drains which are or may be open, and so arranged as to take surface water;<sup>6</sup> although the word "drain" may be broad enough to include sewers.<sup>7</sup> The word "gutter," in modern usage, so far as it is applied to drainage matters, is usually confined to paved channels for carrying water along the sides of streets.<sup>8</sup> A culvert is an arched and covered drain running across and under the road to carry the water across from one side of the road to the other.<sup>9</sup>

198. Institution of proceedings by petition of landowner.—The needs of a particular section of country for drainage are better known to those living in or about it than they can possibly be to a person living at a distance; therefore, it is just that they should be allowed to take the initiative if proceedings for such drainage are necessary. The simplest way of instituting such a proceeding is a petition, signed by a majority of the property owners interested within the district, asking permission to take the proper steps to effect the drainage.<sup>1</sup> The number of persons who must sign the petition will depend upon the provision of the statute. If it requires a signature by the greater part of the residents "in interest," the signature must be by the proprietors having the greatest interest in value, and not merely by those

<sup>4</sup> 5 Gray, 61.

<sup>5</sup> 5 Best & S. 886, 34 L. J. Q. B. N. S. 13, 11 Jur. N. S. 63, 13 Week. Rep. 155.

<sup>6</sup> *State ex rel. State Bd. of Health v. Jersey City*, 55 N. J. Eq. 116, 35 Atl. 835.

A structure under ground, constructed by a city, not only to carry off the sewage from the streets and houses, but also to divert the water of a brook, is a common sewer within the meaning of a statute authorizing the city to lay out common sewers. *Bennett v. New Bedford*, 110 Mass. 433.

<sup>7</sup> *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985.

<sup>8</sup> Gutters are a part of the street rather than the sidewalk, the construction of which by special assessment is in violation of the constitutional provision requiring uniformity of taxation, under the doctrine of *stare decisis* estab-

lishing the rule that the police power of the state, by virtue of which public improvements by special assessment are made, includes the sidewalk, but excludes the street, although the gutters may be necessary to carry off the filth from the streets. *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901.

<sup>9</sup> *Kowalka v. St. Joseph*, 73 Mich. 322, 41 N. W. 416.

A covered drain which runs along the side or outer edge of a street where it serves the purpose of a gutter is not a culvert, although it forms part of the sidewalk. *Ibid.*

<sup>1</sup> A constitutional clause authorizing the passing of laws permitting the owners or occupants of lands to construct drains or ditches for agricultural or sanitary purposes across the lands of others implies that the community whose property is to be taxed may have the right

having the greatest territorial area.<sup>2</sup> Or the requirement may be of a majority of the persons residing in the district without regard to their property interest.<sup>3</sup> The statute may also designate the number who must sign the petition.<sup>4</sup> The filing of the petition as required by statute is jurisdictional, and no proceeding can be had until that requirement is complied with.<sup>5</sup> If the petition is required by the statute to be filed by landowners, the fact that the petitioners are landowners must appear to make the proceeding valid.<sup>6</sup> And, in case the petition is to be signed by owners, it is not sufficient if signed by a mere tenant at will;<sup>7</sup> nor by a lessee with option to purchase.<sup>8</sup> The fact that the proceedings are to be instituted by persons interested will not defeat them on the ground that they are not for the public benefit, where they cannot be carried on unless they are found to be for the public interest.<sup>9</sup> The place where the petitioners reside with-

of election in the matter, and a law authorizing a drainage system and the imposition of a special tax or special assessments therefor, without any previous vote of the persons affected thereby, is unconstitutional. *Updike v. Wright*, 81 Ill. 49.

<sup>2</sup>*Henry v. Thomas*, 119 Mass. 583.

<sup>3</sup>*Patterson v. Baumer*, 43 Iowa, 477.

<sup>4</sup>In Michigan a township-drain tax is illegal and void where it does not appear that five freeholders residing in the township presented a petition for its construction as required by statute. *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705.

However, a statutory provision that the petition to establish a drain must be signed by not less than five freeholders of the township or townships in which the drain or lands to be drained thereby may be situated does not require the signatures of five freeholders of each township. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

<sup>5</sup>*State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216; *Palmer v. Rich*, 12 Mich. 414.

<sup>6</sup>When it sufficiently appears by the record of the county board in a drain case that there was a petition signed by one or more landowners who would be affected by the proposed ditch; that an undertaking was signed by them, as required by the statute, that the proposed improvement is necessary and will be conducive to the convenience, health, and welfare of the public; and that the statutory notice has been given,—the board has sufficient jurisdiction, al-

though it does not find expressly that the petitioners are owners of land which will be benefited by the ditch, when that fact may be gathered from the petition, and is not made jurisdictional by the statute. *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211.

<sup>7</sup>*Osgoode Twp. v. York*, 24 Can. S. C. 282.

<sup>8</sup>*McKillop Twp. v. Logan Twp.* 29 Can. S. C. 702.

<sup>9</sup>*Ross v. Davis*, 97 Ind. 79.

But a drainage act is unconstitutional, as permitting the taking of private property for private purposes, where it allows condemnation of land for a ditch or drain upon the petition of two or more landowners if it is found that the construction of the ditch will be conducive to the general welfare of the landowners so petitioning. *Nickey v. Stearns Ranchos Co.* 126 Cal. 150, 58 Pac. 459.

The trial court held in a case reversed in 49 L. R. A. 781, that the right of eminent domain for drainage purposes for the benefit of private owners of agricultural lands, conferred by N. Y. Const. 1894, art. 1, § 7, may be exercised by any number of landowners against all the parties affected to secure the drainage of an enlarged area; that the provision that general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain, for the drainage thereof, necessary drains, ditches, and dikes upon the lands of others under proper restrictions upon payment of just compensation authorizes the passage of gen-

in the district is immaterial if the proceedings cannot be carried on unless it is found that they will be for the benefit of the entire district.<sup>10</sup> If the legislature does not provide that a rejection of one petition shall be conclusive of the necessity of the drain the granting of a petition cannot be defeated by pleading a former adjudication upon a petition for the establishment of the same drain.<sup>11</sup> If, in response to a petition, contracts are made and work is done which proves to be of no benefit to any property, so that no assessment can be made, the contractors can hold the petitioners who institute the proceedings liable for the value of their work; but they cannot recover against the drainage commissioners or nonpetitioning landowners.<sup>12</sup>

**199. By organization of drainage district.**— In some states the drainage proceedings are carried on by drainage districts, which are a form of governmental corporation with very limited powers. Provision is made for the organization of the district, and, after it is once organized, its officers take charge of the collection of the funds, and perform the necessary work.<sup>1</sup> The legislature may authorize the organization of these districts to take charge of the drainage under its police power.<sup>2</sup> A district carved out of two or more towns, over

eral drainage laws which would permit the drainage of more or less extended area upon the application of one or more persons and without the consent of others, but at the expense of all who may be affected thereby. *Re Tuthill*, 50 N. Y. Supp. 410.

That decision would have done away with the well-settled rule that the drainage must be for public benefit to authorize the proceedings; but the court, on appeal, held that the Constitution contemplated that the expense should be borne by the petitioner, and Judge Gray went further, and held that the provisions for the drainage of private property violated the provision of the Federal Constitution against depriving a person of his property without due process of law, holding that drainage for private benefit was a taking of private property for private benefit.

"It is no legal ground for the dismissal of ditch proceedings that all the land of the petitioners affected by it is situate within a comparatively short distance from its mouth or outlet, leaving the larger proportion of its length to be constructed at the cost of persons opposed to its establishment, and along the line of which is an old ditch suffi-

cient to drain their lands if repaired; as the question as to whether the proposed ditch is more comprehensive, or embraces or affects more land, than is necessary to accomplish the drainage in the cheapest and best manner, is one exclusively for the viewers, and is not reviewable by the courts. *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56.

"*Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

"*Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589.

"The effect of an amendment to the Illinois Constitution authorizing the creation of drainage districts and the levy of special assessments for the construction of the drainage therein is to invest drainage districts with power to make local improvements by special assessments, which prior to such amendment was confined to towns, cities, and villages; and the power of the legislature to authorize the formation of sanitary districts, and to invest other corporate authorities with power to levy and collect general taxes for sanitary purposes, is unaffected by such amendment. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

"*O'Reiley v. Kankakee Valley Draining*

which a statutory commission, to be continued by elections, is constituted, with power to repair, work, and grade streets, to regulate the width and grade of sidewalks, the manner of paving streets, and constructing sewers, to borrow money, appoint superintendents of roads, establish a fire department, and purchase fire apparatus and land and engine houses, and to impose taxes to carry out the purposes of the act constituting them,—is a political division, and not a mere taxing district of narrower bounds, and the commission is invested with political and governmental powers and functions; hence, it has the legal power to levy an assessment for sewers.<sup>3</sup> The legislature may provide for the organization of the district itself, and not commit the initiative of the proceedings to the landowners.<sup>4</sup> A drainage district is a public corporation, and may be created by special law, or by mere recognition of the organization by the legislature.<sup>5</sup> To make the district legal it must, however, be for a public purpose, and not merely to effect drainage for private benefit.<sup>6</sup> Requiring certain

*Co. 32 Ind. 169; Wilson v. Sanitary Dist. 133 Ill. 443, 27 N. E. 203.*

The legislature of California has power, under the Constitution of the state, to authorize the formation of districts for the reclamation of swamp lands within the state, irrespective of the source from, or channel through, which the title to the lands was derived. *Reclamation Dist. No. 108 v. Hagar, 6 Sawy. 567, 4 Fed. 366; People v. Hagar, 52 Cal. 171.*

An act authorizing the creation of a corporation for the purpose of constructing drains and levees for the public benefit, with power to exercise the right of eminent domain, and taxation for that purpose, leaving it for the court to determine in each particular case whether the levee or drain in that case is for public use or benefit, is constitutional and valid. *Anderson v. Kerns Draining Co. 14 Ind. 199, 77 Am. Dec. 63.*

But an act of the legislature authorizing the drainage of wet land in certain townships of a county, and constituting certain persons therein named a corporation with power to levy a tax, under the name of an assessment, upon the lands therein deemed by the corporation to be benefited by the proposed improvement, is unconstitutional and void as being contrary to the constitutional provisions prohibiting the levying of a local tax by other than the corporate authorities—such corporation not being “corporate authorities” because its members were neither directly

elected by the inhabitants of the district nor appointed in some mode to which they had given their assent. *Hessler v. Drainage Comrs. 53 Ill. 105.*

*State, Auryansen, Prosecutor, v. Hackensack Improvement Commission, 45 N. J. L. 113.*

*Blake v. People, 109 Ill. 504.*

*People v. Reclamation Dist. No. 108, 53 Cal. 346; Reclamation Dist. No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779.*

*Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; State, Kean, Prosecutor, v. Driggs Drainage Co. 45 N. J. L. 91.*

Merely because the channel of a sanitary district, when constructed, will be capable of answering the purpose of navigation, and the driving of machinery does not imply that the scheme was undertaken with the view of constructing a navigable waterway, and of creating a water power, as well as that of promoting and preserving the public health by furnishing a suitable and efficient means of carrying off the drainage and sewage of the district; and that a statute, creating such district, provides for the three subjects does not render the creation of such sanitary district unconstitutional because the other two subjects are not expressed in the title, since they may be disregarded without affecting the legality of the drainage district. *People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217.*

A statute providing that any number of persons not less than three, owners



facts to be found by the court before the district can be created does not impose legislative duties upon the court, or destroy the validity of the law. If the Constitution does not require the officers to be elected by the people, they may be appointed by the legislature, or under its direction.<sup>7</sup> A charter of a drainage district may be changed or repealed by the legislature at its pleasure.<sup>8</sup> Persons who will be affected by the organization of the district have a right to insist that the requirements as to petition, notice, and the various steps necessary to make the organization legal shall be complied with.<sup>9</sup> What shall be embraced within the district, so long as the rights of individuals are not affected, is within the discretion of the legislature;<sup>10</sup> and one district may be organized within the limits of another.<sup>11</sup> The right to trial by jury does not extend to proceedings for the organization of drainage districts;<sup>12</sup> and the organization

of land wet and liable to be overflowed, may organize a company for the purpose of draining such lands, and authorizing the assessment of benefits along the line of the drain, and permitting the company, upon payment of compensation, to appropriate any land, stone, timber, gravel, or other material necessary for the right of way for the construction, maintenance, or improvement of the work because it permits an entry upon the lands and construction of drains whenever the private interest of the corporation requires it without reference to the public welfare,—is an infringement of the right of private property, and is void. *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547.

<sup>7</sup>*Huston v. Clark*, 112 Ill. 344; *Owners of Lands v. People*, 113 Ill. 296.

<sup>8</sup>*Smith v. People*, 140 Ill. 355, 29 N. E. 676, Affirming 39 Ill. App. 238.

<sup>9</sup>A landowner may object to the consideration of a petition for the organization of a drainage district by the commissioners upon the express ground that the statutory notice had not been given all the landowners whose lands are proposed to be included within the boundary of the district, and may insist that such organization shall be valid as a whole. *Sanner v. Union Drainage Dist.* 175 Ill. 575, 51 N. E. 857.

In Indiana it has been held that it is a good defense to an action by a ditching company to collect an assessment against lands for benefits conferred by a drain that the company was not legally organized, and is not a corporation. *Errelesior Draining Co. v. Brown*, 47 Ind. 19.

<sup>10</sup>A statute creating a corporation including both city and county, and investing it with power to secure public health by means of sewers and channels and drains, is valid. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

The general assembly has the power, under a constitutional clause authorizing the formation of drainage districts, to provide for the organization of such districts embracing territory already within the boundary of a pre-existing municipal corporation, where the same is so constituted as to require a combined system of drainage. *People ex rel. Scheuber v. Nibbe*, 150 Ill. 269, 37 N. E. 217.

The drainage laws of Illinois do not authorize the organization into one drainage district of lands so related with respect to drainage as to require four main ditches as outlets to four separate areas of low and wet land, having divides or swells of higher land between them, each ditch having a different direction, the construction of which necessarily does not benefit the lands of the other three areas, and in effect being four entirely separate and independent drainage districts under one organization,—especially where such district also includes an incorporated village, having by law independent powers of its own in respect to drainage, also much land needing no drainage, and that will not be drained by any of the proposed systems. *Klinger v. People*, 130 Ill. 509, 22 N. E. 600, Affirming 28 Ill. App. 575.

<sup>11</sup>*People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119.

<sup>12</sup>*Mound City Land & Stock Co. v. Mil-*

of the district cannot be collaterally attacked.<sup>13</sup> The remedy provided by statute for questioning the legality of the organization must be followed.<sup>14</sup> The voting power of the district may be based on acreage, rather than on membership.<sup>15</sup> The drainage district, being a public corporation, is not liable for damages, unless expressly made so; and the remedy of the individual who is injured is to restrain the acts of the officers, and not to attempt to recover damages from the district, unless the statute gives him a right of action.<sup>16</sup> The district, being a public corporation and authorized to levy assessments only for the construction of its works, is within a constitutional exemption of state property from taxation, since a liability to taxation might lead to a sale of its works and an ultimate destruction of the undertaking.<sup>17</sup> But lands outside the district, which are used as an outlet for the district drains, are not "public grounds used exclusively for public purposes," within the meaning of a statute exempting such lands from taxation, although such channel, when completed, will become a navigable stream for general public use.<sup>18</sup>

**199a. Inclusion or exclusion of lands.**—Since the assessment which will be laid for the construction of the drain will bear in some proportion upon everyone who is included within the district, the owner of land which is not subject to assessment has a right to insist that his property shall not be included. The question of who may or may not be included within the district is primarily a matter for the legislature to determine;<sup>1</sup> and the general principle upon which the legis-

lar, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721.

<sup>13</sup>*Tucker v. People*, 156 Ill. 108, 40 N. E. 451; *Morrell v. Union Drainage Dist. No. 1*, 118 Ill. 139, 8 N. E. 675; *Reclamation Dist. No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779; *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

<sup>14</sup>A landowner within a drainage district cannot resort to the common-law writ of certiorari for the purpose of determining the legality of the organization of such district, especially where, by statute, a complete remedy by quo warranto is provided. *Lees v. Drainage Comrs.* 125 Ill. 47, 16 N. E. 915, Affirming 24 Ill. App. 487.

<sup>15</sup>*Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721.

<sup>16</sup>*Sels v. Greene*, 81 Fed. 555, 88 Fed. 129.

<sup>17</sup>A judgment against a drainage district can only be satisfied by special as-

essment upon the property within the same; and, therefore, to entitle a party to a judgment against a drainage district, it must appear that he has a legal claim, not only against the commissioners, but against the real estate of the district as well. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170.

<sup>18</sup>*Reclamation Dist. No. 551 v. Sacramento County*, 134 Cal. 477, 66 Pac. 668.

<sup>19</sup>*Sanitary Dist. v. Martin*, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201.

The fact that the state itself might have constructed a drain for a sanitary district outside the limits of the same, instead of delegating such power to the sanitary district, does not make it the property of the state or exempt it from taxation in the absence of express statutory provisions to that effect. *Ibid.*

<sup>20</sup>*Allman v. Lumsden*, 48 Ill. App. 17.

A statute providing for the drainage of lands in a certain county, and clearly indicating the nature and extent of such

lature should act is that the owner of all land which will be benefited by the improvement shall be included, and all others excluded. Land which is benefited by the drains of one district may be added to it, although it lies in another district.<sup>2</sup> If the owner of land is given a day in court, before he is included within a district, he is not deprived of his property without due process of law by being included.<sup>3</sup> The land may not only be included at the time of the organization of the district, but the owner may be included in the district, either upon his own application, or by taking advantage of the conditions offered by the district.<sup>4</sup>

**200. In what tribunal must proceedings be instituted.**—The question of what body shall have jurisdiction over the proceedings to establish a drain is for the legislature to determine. Whether the petition must be presented to and acted upon by the supervisors of the county, or the road commissioners, or a judicial tribunal, is within the discretion of the legislature. The acquisition of jurisdiction lies at the foundation of the proceeding, and no valid steps can be taken unless the district has been properly constituted by a tribunal having the authority so to do.<sup>1</sup> The legislature may confer the authority

drainage, and delegating to drainage commissioners the power to determine what lands shall be drained and what lands assessed therefor, is not invalid as a delegation to them of the legislative power of creating and defining districts for drainage purposes. *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947.

The legislature is not prevented from granting to a board of drainage commissioners by a special act authority to exercise the police power of the state for the drainage of lands of a county, by a constitutional provision prohibiting it from enacting a special or private law granting corporate powers or privileges except to cities. *Ibid.*

<sup>1</sup>*Allman v. Lumsden*, 55 Ill. App. 21.

<sup>2</sup>*Mound City Lake & Stock Co. v. Miller*, 170 Mo. 240, 60 L. R. A. 190, 70 S. W. 721.

Property owners who receive notice and have an opportunity to appear and offer evidence and have a trial on the question whether or not a public purpose is to be subserved, and the land benefited, cannot complain of a proceeding for the creation of a drainage district as lacking due process of law. *Stone v. Little Yellow Drainage Dist.* (Wis.) 95 N. W. 405.

Landowners who have connected drains on their lands with those of a drainage district, thereby voluntarily applying to be included within the district, cannot, in a quo warranto proceeding against the drainage commissioners, be heard to say that such connection was of no benefit to their lands. *People ex rel. Caldwell v. Wild Cat Drainage Dist.* 181 Ill. 177, 54 N. E. 923.

Though the act of owners of lands lying outside of a drainage district in connecting their lands by ditches with the ditches of the district amounts to an application for their lands to be taken into the district, and the commissioners of the district may make an order annexing such lands, still one landowner, by making a ditch across his land which carries water from the lands of a third person to the district ditch, cannot thereby give the district jurisdiction over the lands of such third person. *People ex rel. Phillips v. Drainage Dist. No. 5*, 191 Ill. 623, 61 N. E. 381.

<sup>3</sup>The statutory provision that the collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment confirming and establishing the

upon town supervisors, or overseers of highways,<sup>2</sup> or upon police juries.<sup>3</sup> It may also make direct provision for the drainage by appointing the commissioners itself, and require them to obtain authority from the voters within the district before proceeding with the undertaking.<sup>4</sup> The tribunal to which the petition is presented must be legally organized to make its acts valid.<sup>5</sup> Under a statute authorizing the board of supervisors to appoint drain commissioners, and to supervise their action, the board has no right to appoint its own members as drain commissioners, and such appointment, as well as the drain tax levied by such commissioners, is void.<sup>6</sup>

**200a. How far a judicial matter.**— The establishment of drains being a governmental duty, some question has been raised as to the right of the legislature to impose the duty of supervision upon the courts. But it is generally held that such course is proper if the performance of the work is in the hands of the political officers, and the only duty imposed upon the court is to see that such officers are properly selected and that the legal rights of the citizens are properly guarded. As said in *Scott v. Brackett*,<sup>1</sup> a drainage act does not impose legislative and executive duties upon the court because the commissioners upon whom such duties are imposed are appointed by the court, report to and are liable to removal by the court, as such act does not render them mere agents of the court, nor impose upon it the duties discharged by them, so as to render the act unconstitutional for that reason.<sup>2</sup>

**200b. When jurisdiction is acquired.**— The filing of a petition for

assessment, but that such judgment shall be conclusive of the legality thereof, is not applicable to the proceedings that confer jurisdiction. *Scott v. Brackett*, 89 Ind. 413.

<sup>2</sup>*Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403.

<sup>3</sup>*Avery v. Police Jury*, 12 La. Ann. 554.

<sup>4</sup>Commissioners appointed by an act of the legislature to levy special taxes upon lands lying in a designated district for the purpose of drainage, such act providing that the same shall be submitted to a vote of the inhabitants of such district, and that, unless adopted, it shall be of no force, if the act is adopted by the voters, as required, may be regarded as corporate authorities, and have the power, under the Constitution, to assess and collect taxes for the cost of such drainage. *Lee v. Ruggles*, 62 Ill. 427.

<sup>5</sup>Two members of the board of county commissioners have no authority to order

the construction of a drain upon a consideration by them of a petition therefor in a meeting with the county surveyor on a day to which the commissioners had not adjourned, and when a special session had not been called; and the special assessments for the ditch are absolutely void. *Morris v. Merrell*, 44 Neb. 423, 62 N. W. 865.

<sup>6</sup>*Kinyon v. Duchene*, 21 Mich. 498.

<sup>1</sup>89 Ind. 413.

<sup>2</sup>*Huston v. Clark*, 112 Ill. 344.

<sup>3</sup>That the court determines whether the proposed work shall be undertaken, and that such judicial determination is the foundation of the assessment made by the commissioners upon the land benefited by a drainage system, cannot be said to be a direct exercise by the court of the power of taxation which will render void the act providing for such drainage system as attempting to confer such power upon the court. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

the establishment of a drain brings the matter before the proper tribunal to authorize it to proceed with the undertaking;<sup>1</sup> and a withdrawal of names from the petition after it has been filed, or a remonstrance by the petitioners, although proper to be taken into consideration by the supervisors, does not deprive them of jurisdiction to proceed,<sup>2</sup>—at least after expense has been incurred on the faith of the petition.<sup>3</sup> And after jurisdiction of the proceedings has been acquired, and the plan completed and filed, the district is established, and the officers then have jurisdiction to proceed to the levying of the assessment.<sup>4</sup> A proceeding under the county drain law to determine the necessity of a drain and to assess damages is void where it appears that a person not appointed as a commissioner by the court acted as such, although the person who served was the one the court intended to appoint, but was mistaken as to his name.<sup>5</sup> It is not a ground of objection to commissioners to assess for drainage as being interested that they are only shown to own lands not far from the drainage ditch and to share in the benefits accruing to the neighborhood from increased healthfulness; they must be shown to own lands directly and certainly benefited by the drainage alone.<sup>6</sup> Unless limited by statute, the construction of one ditch does not exhaust the authority of the officers if it is not sufficient to accomplish the purpose for which they were appointed;<sup>7</sup> but they are limited strictly to the authority conferred by the statute, and an express grant of power to them will be an exclusion of any implied power.<sup>8</sup> If the facts necessary to render the drain legal are not found, the officers lose

<sup>1</sup>*Butts v. Monona County*, 100 Iowa, 74, 69 N. W. 284.

<sup>2</sup>*Seibert v. Lovell*, 92 Iowa, 567, 61 N. W. 197.

But in a Canadian case it was held that after the presentation of a petition for the construction of a drain by a majority of those to be benefited thereby, and after surveys and estimates, followed by a withdrawal of enough of the petitioners to bring the number remaining below a majority, a by-law passed by the council after it had altered the original plans, reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans, should be quashed, as the council had no power to authorize the undertaking of any work other than that petitioned for, and, a sufficient number of the petitioners having withdrawn to reduce the number below the majority,

the by-law, in reciting that a majority petitioned, was untrue. *Misener v. Wainfleet Twp.* 46 U. C. Q. B. 457.

<sup>3</sup>*Carr v. Boone*, 108 Ind. 241, 9 N. E. 110.

<sup>4</sup>*Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983.

<sup>5</sup>*Bench v. Otis*, 25 Mich. 29.

<sup>6</sup>*State, Shinkle, Prosecutor, v. Clinton*, 39 N. J. L. 656.

<sup>7</sup>*Miller v. Weber*, 1 Ohio C. C. 130.

<sup>8</sup>Power given drainage commissioners to continue a main ditch for the drainage of swamp lands through lands adjoining the swamp if necessary does not permit them to construct a ditch through the swamp to a pond or reservoir used for a water supply, and then lower the outlet of the pond so as to drain it and the surrounding swamp to the destruction of mill sites located on it. *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548.

their authority to proceed.<sup>9</sup> The authority of a tribunal which has assumed jurisdiction cannot be collaterally attacked.<sup>10</sup>

**200c. Conflicting authority.**— The drainage of land is an undertaking distinct from any of the other operations of government, and officers charged with duties with respect to other matters have no authority over drainage unless it is expressly given them by statute, except so far as the drainage may be necessary to the performance of the work with which they are charged. Thus, highway commissioners, although they may by statute be given authority over drainage proceedings, have no such authority unless it is expressly granted, and they will not be permitted to encroach upon the proper prerogatives of the drainage commissioners.<sup>1</sup> And county commissioners cannot, under their general powers, engage in drainage improvements.<sup>2</sup> Municipal boundaries need not be recognized in creating drainage districts;<sup>3</sup> and the authority of one municipal subdivision cannot object that the officers of another are given authority over drainage proceedings which will extend within the limits of their territory.<sup>4</sup> But the authorities of a drainage district will not be permitted to include other territory without express legislative permission;<sup>5</sup> and, if the

<sup>9</sup>*Oathout v. Seabrooke*, 159 Ind. 529, 65 N. E. 521.

<sup>10</sup>*Keigwin v. Drainage Comrs.* 115 Ill. 347, 5 N. E. 575; *Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670.

The jurisdiction of a court of general jurisdiction to establish a public drain partly within the corporate limits of a city cannot be collaterally attacked in a proceeding to enforce the assessment levied on lands within the municipality for the construction of the ditch, where the court, having exclusive jurisdiction of the drainage proceedings by virtue of the act under which it was prosecuted, had jurisdiction of the cause and authority to determine what property was subject to assessment, although its judgment establishing the ditch within the corporate limits might be erroneous. *State ex rel. Wilcox v. Jackson*, 118 Ind. 553, 21 N. E. 321.

<sup>1</sup>*Conrad v. Smith*, 32 Mich. 429.

<sup>2</sup>*Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392.

<sup>3</sup>*Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945.

<sup>4</sup>The establishment of a township ditch by the trustees of the township, further action in reference to which cannot be taken by them of their own volition, but only on petition presented therefor, does not give them such a continuing and exclusive jurisdiction of the

line thereof as to prevent the establishment of a county ditch over the same line where necessary for drainage purposes and conducive to public health, convenience, or welfare. *Marsh v. Clark County*, 11 Ohio Dec. Reprint, 290.

The legislature has the power to give the circuit court jurisdiction to construct drains partly within a city's limits, notwithstanding the exclusive jurisdiction of cities over drainage within their limits, since their jurisdiction is subject to legislative withdrawal or modification; and furthermore, the matter of drainage in county and city conjointly is a new subject-matter previously unprovided for. *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397.

As to the authority to construct drains or ditches, or change water courses, as possessed by the board of supervisors under Iowa Code 1873, § 1207, has not been conferred on incorporated towns, and as its exercise is not inimical or repugnant to any of the powers granted to such corporations, it was not the purpose of the legislature to restrict such authority, by implication or otherwise, to that portion of the county outside of their limits. *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

<sup>5</sup>*Anderson v. Endicutt*, 101 Ind. 539.

County commissioners have no authority to construct a ditch beyond the

extension of the drain into another township is authorized by statute upon petition signed by a majority of the owners of property to be benefited thereby, the extension cannot be made in the absence of such petition.<sup>6</sup> A drain may extend through several counties, and the court of one of them may be given jurisdiction over its entire length;<sup>7</sup> but commissioners appointed in one county have no jurisdiction over a portion of the system located in another county which is in fact a separate branch distinct from the main ditch.<sup>8</sup> Where no suitable outlet for a sewer can be found in the town making the same, its extension into an adjoining town to a proper outlet cannot be regarded as a violation of a statute against the assessment of property in one town for the making of local improvements in another town. Such extension cannot be regarded as a local improvement in another town.<sup>9</sup> If the drain properly extends into more than one county the court having jurisdiction of the proceedings may levy assessments upon land lying in the other county.<sup>10</sup> Where the statute does not authorize the extension of a drainage district beyond the county or municipal boundaries the local authorities have no power to make the extension.<sup>11</sup> A drainage district organized under the drainage laws of Illinois must be deemed to be existing and located, for all purposes of jurisdiction, in every part of its territory; and the fact that the original organization of the district was effected in one county, or that the custodian of the records thereof resides in that county, will not affect the jurisdiction of the courts of another county in which the boundaries of such district extend.<sup>12</sup>

**200d. Procedure.**— If the steps necessary to acquire jurisdiction have been properly taken, and all constitutional and statutory rights of the persons to be affected by the drainage are protected, the pro-

boundaries of their own county, in the absence of a clear and unmistakable grant of such right by the legislature, and jurisdiction for that purpose cannot be conferred by the mere waiver or voluntary entry of appearance by land-owners in another county. *Sohamp v. Kennedy*, 16 Ohio C. C. 604.

<sup>6</sup>*Chatham Twp. v. Dover Twp.* 12 Can. S. C. 321.

<sup>7</sup>*Shaw v. State*, 97 Ind. 23.

The fact that lands affected and assessed for the construction of a ditch lie in two or more counties does not affect the authority and duty of the commissioner appointed by the court of the county where the proceedings were instituted to construct the ditch in its entirety, and assess all lands affected, whether in that or adjoining counties,

in accordance with a provision of the drainage law under which the ditch is established. *Crist v. State*, 97 Ind. 389; *Meranda v. Spurlin*, 100 Ind. 380; *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390; *Undergraff v. Palmer*, 107 Ind. 181, 6 N. E. 353; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

<sup>8</sup>*Bondurant v. Armoey*, 152 Ind. 244, 53 N. E. 169.

<sup>9</sup>*Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815.

<sup>10</sup>*Buchanan v. Rader*, 97 Ind. 605.

<sup>11</sup>*Alger v. Slaght*, 64 Mich. 589, 31 N. W. 531; *Hubbell v. Robertson*, 65 Mich. 538, 32 N. W. 811; *Robertson v. Barker*, 57 Mich. 127, 23 N. W. 711.

<sup>12</sup>*Mason & T. Special Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995.

ceedings cannot be defeated for mere technical errors of procedure.<sup>1</sup> Even the fact that one of the jurors was not a freeholder is not available where the person raising the objection was present at the hearing and declared himself satisfied with the panel.<sup>2</sup> There is no taking of property without compensation, nor any excess of the taxing power in the formation of a drainage district, where the statute requires that, before proceeding to assessment, it must be determined that benefits will equal the cost of the work.<sup>3</sup> Under a statute providing that, on filing application for a drain, the commissioners shall examine its route, and if, on survey, they find the drain to be practicable, they shall within ninety days make their first order of determination, the ninety days date from the survey.<sup>4</sup>

**201. Necessity must be shown to make establishment legal.**—Since drainage proceedings cannot be undertaken unless they are necessary to the public welfare, before the officers can proceed to act upon a petition for the establishment of a drain it must be made to appear that the drain is necessary, so as to make its establishment proper.<sup>1</sup> Therefore, if the object of the proceedings is merely to drain the farm of an individual to render it more valuable to him, there is no authority to proceed.<sup>2</sup> The findings conferring the jurisdiction must appear affirmatively upon the face of the proceedings.<sup>3</sup> But a statement in a petition for the establishment of a ditch that its construction would be "conducive to the public health, convenience, and welfare," would be "of public benefit and utility," is a sufficient "setting forth of the necessity" of the ditch to comply with the statute making that a requirement.<sup>4</sup> Evidence tending to show that a drain sought to be established would, among other things, carry off water from the vicinity of a public schoolhouse is sufficient to support a finding and judgment of the court that the ditch would improve the public health

<sup>1</sup>*Dunning v. Township Drainage Commissioner*, 44 Mich. 518, 7 N. W. 239; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

<sup>2</sup>*Clark v. Teller*, 50 Mich. 618, 16 N. W. 167.

<sup>3</sup>*Stone v. Little Yellow Drainage Dist.* (Wis.) 95 N. W. 405.

<sup>4</sup>*Flynn Twp. v. Woolman* (Mich.) 10 Det. L. N. 274, 95 N. W. 567.

<sup>1</sup>*Burk v. Ayers*, 19 Hun, 17; *Rice v. Wellman*, 5 Ohio C. C. 334; *Chaplin v. Wheatland Highway Comrs.* 129 Ill. 651, 22 N. E. 484; *Caldwell v. Harrison*, 2 Op. 2 Ohio C. C. 10; *Miller v. Graham*, 17 Ohio St. 1.

Ditching proceedings, under a statute not requiring the proposed drain to be

of public utility, not alleging or proving that fact, are, nevertheless, invalid and illegal, where by a later statute in effect at the date of such proceedings and declared to be in addition to other draining laws, power is given to establish drains "when the same shall be conducive to the public health, convenience, or welfare, or where the same will be of public benefit or utility." *Deisner v. Simpson*, 72 Ind. 435.

<sup>2</sup>*Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63.

<sup>3</sup>*Bass v. Elliott*, 105 Ind. 517, 5 N. E. 863; *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475; *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 613.

<sup>4</sup>*Corey v. Scagger*, 74 Ind. 211.



and be of public utility.<sup>5</sup> The fact that an owner's land is not noxious to the public health, or that the same will not be promoted by draining his land, does not make a statute authorizing the organization of a company to construct a drain for the public benefit through his land, and to assess the benefits and injuries thereto, void, where the drain must of necessity pass through his land.<sup>6</sup> In *Engle v. Defiance County*<sup>7</sup> it was held that the joint action, under the Ohio statutes, of the several boards of commissioners of adjoining counties in establishing a ditch which is partly located in each of their respective counties is equivalent to a finding of a jury as to the necessity and conduciveness to public health, convenience, and welfare, and is final. A finding by a board of supervisors in an order establishing a drainage ditch that "all the requirements of the law have been fully complied with," and that the ditch be declared established, necessarily involves a determination of the necessity for the establishment of the ditch, under a statute providing that such a ditch shall be established if determined by the board to be conducive to the public health;<sup>8</sup> and, if such finding is regarded as conclusive, it cannot be attacked unless there is manifest error.<sup>9</sup> The benefit to be conferred, rather than the length of the ditch, will determine the question of necessity.<sup>10</sup> The drain may be found to be necessary if it will benefit a highway.<sup>11</sup> Absolute necessity need not be found, but it will be sufficient if the drain will be conducive to the public health, convenience, or welfare.<sup>12</sup> The opinion of witnesses as to the necessity of the ditch is not admissible.<sup>13</sup>

**201a. Also to uphold assessment.**— If a legal drain cannot be established unless the necessity for it appears, an assessment cannot be enforced unless that fact appears.<sup>1</sup> But the drainage need not be shown to be necessary to the property assessed in order to uphold the assess-

<sup>5</sup>*Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91.

<sup>6</sup>*O'Reiley v. Kankakee Valley Drainage Co.* 32 Ind. 169.

<sup>7</sup>25 Ohio St. 425.

<sup>8</sup>*Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.

<sup>9</sup>*Hulse v. Coffland*, 7 Ohio Dec. Reprint, 611.

<sup>10</sup>*Zimmerman v. Canfield*, 42 Ohio St. 463.

<sup>11</sup>The turnpike road of a corporation is a public highway within the meaning of a provision in the drainage act authorizing the establishment of drains if the same will be of benefit to one or more public highways. *Neff v. Reed*, 98 Ind. 341.

<sup>12</sup>*Miller v. Weber*, 1 Ohio C. C. 130: *Blizzard v. Riley*, 83 Ind. 300.

<sup>13</sup>*Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156.

A witness who has stated in detail the number of acres in the vicinity of a ditch, and who has given its size and location, may testify, in an action to establish the ditch, as to how many acres of land would be benefited by its construction; and he may also give his opinion as to what effect the drainage of the wet land would have upon the public health of the community, although he is not an expert. *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78.

<sup>1</sup>*Tillman v. Kircher*, 64 Ind. 104; *Bate v. Sheets*, 64 Ind. 209.

ment.<sup>2</sup> And, if the drain can be completed and confer a benefit on the property assessed without the necessity of exercising the power of eminent domain, the assessment may be upheld to the extent of the benefit conferred.<sup>3</sup> An assessment on lands for the construction of a ditch is void where the same was made pending an appeal from an order of the county commissioners finding the proposed ditch of public utility and establishing the same, and the fact that subsequently the appellate court, upon a trial *de novo*, rendered a judgment similar to that appealed from, does not reinstate the former judgment so as to render the proceedings had thereunder valid.<sup>4</sup>

**202. Who is to determine necessity.**—The question of the necessity of the drain is to be determined by the tribunal to which it has been committed by the legislature. If the question is committed to the board of county commissioners, or to the officers of the drainage district, either decision is binding on all parties, and cannot be reviewed by the courts in the absence of fraud on their part.<sup>1</sup> But the statement in a special finding in a ditch proceeding that the ditch would benefit the public health is a statement of ultimate fact, and not a mere conclusion of law, since there is no standard by which it can be determined, as a pure matter of law, that a ditch will promote the public health; and such a finding is sufficient to sustain a judgment establishing the ditch and the assessment of land specially benefited by its construction for the cost thereof.<sup>2</sup> A general drainage act which

<sup>1</sup>Neither the Constitution providing drainage for agricultural and sanitary purposes, nor the drainage laws of Illinois, require that the benefits the lands in a drainage district may receive by reason of such drainage shall be for agricultural or sanitary purposes in the sense that such benefits shall consist alone in improving the capacity to produce agricultural crops or the efficiency of the property for sanitary uses. They require that the districts shall be organized for those purposes; but the only limitation in respect to benefits is, that the drains, etc., shall be constructed and maintained by "special assessments upon the property benefited thereby. *Colfax Highway Comrs. v. East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206.

<sup>2</sup>*Homan v. Schulte*, 166 Mo. 409, 66 S. W. 163.

<sup>3</sup>*Meehan v. Wiles*, 93 Ind. 52.

<sup>4</sup>*Marshall v. Gill*, 77 Ind. 402; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677; *Bow v. Smith*, 9 Mod. 94.

County commissioners, in determining

the preliminary question as to whether a ditch or drain is necessary or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route, are called to the exercise of political, and not judicial, powers, it being a question of public policy, and not of private rights. *Zimmerman v. Canfield*, 42 Ohio St. 463.

In *Fuller v. Haff*, 4 Ohio C. D. 164, it is said that, whether a ditch will be conducive to public health, etc., is to be submitted (under the Ohio statutes) to the commissioners or trustees; and, while the courts of error will supervise if the records disclose affirmatively that an erroneous construction of the statute has been followed, courts of equity will not, ordinarily at least, set aside their conclusion of fact upon such questions, nor grant the right to tile a ditch where such permission has been refused by township trustees merely because the court might think that from the facts disclosed, the privilege or right to tile ought to have been granted.

<sup>2</sup>*Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

gives to a board of commissioners full discretion and power to determine the necessity for the drainage of any particular section of the state, the creation and organization of drainage districts, and to provide ways and means for the accomplishment of the purpose, is void as an unconstitutional delegation to executive officers of solely legislative powers.<sup>3</sup> A statute giving the commissioners the final power to decide the necessity for the drainage within their own district does not deprive a taxpayer of his property without due process of law.<sup>4</sup> The courts have no power to enjoin the completion of a drain on the theory that it is injurious to the public health, such power being placed exclusively in those tribunals established by law for the sole purpose of determining the question of necessity and of eminent domain.<sup>5</sup> The landowner has no right to have the questions arising in drainage proceedings submitted to a jury.<sup>6</sup> And the legislature may also provide that the agreement of less than the whole number of jurors shall be sufficient.<sup>7</sup> A decision of the state court that a special statutory proceeding to establish a drain is not a civil suit or action is not binding on the Federal court in determining whether the proceeding is a civil suit in law or equity within the meaning of the act relating to the removal of causes.<sup>8</sup>

#### VI. ESTABLISHMENT OF SEWERS.

**203. Authority of municipal corporation.**—A municipal corporation has no implied authority to establish and construct sewers within its limits. It is not one of the functions for which governmental powers are conferred on it.<sup>1</sup> But, since drainage is a matter to which the state may give its attention, it may delegate the power to the municipality, and generally does so, either by the municipal charter, or by special statutory provisions.<sup>2</sup> Municipal corporations may be classified with respect to their population, and particular provisions

<sup>1</sup>*People v. Parks*, 58 Cal. 624; *Doane v. Weil*, 58 Cal. 334.

<sup>2</sup>*State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947.

<sup>3</sup>*Swan Creek Twp. v. Brown* (Mich.) 9 Det. L. N. 52, 90 N. W. 38.

<sup>4</sup>*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Ross v. Davis*, 97 Ind. 79; *Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613; *Baltimore & O. & C. R. Co. v. Ketring*, 122 Ind. 5, 23 N. E. 527; *Mound City Land & Stock Co. v. Miller* (Mo.) 70 S. W. 721; *Re Bradley*, 108 Iowa, 476, 79 N. W. 280.

<sup>5</sup>*Thomas v. County Comrs.* 5 Ohio N. P. 453; *Emig v. County Comrs.* 5 Ohio N. P. 471.

<sup>6</sup>*Re Jarnecke Ditch*, 69 Fed. 161.

<sup>7</sup>Sewers erected prior to legislative authorization for the erection of sewers by municipalities are private drains, even though constructed in a street, or though subsequently repaired by the municipality under legislative grant. *Bangor v. Lansil*, 51 Me. 521.

<sup>8</sup>*Re Zborowski*, 68 N. Y. 88.

But the power of the legislature to regulate the construction of public sewers cannot be foreclosed by a contract of a municipal corporation. *Re Protestant*

as to sewers may be made applicable to each class.<sup>3</sup> A constitutional provision forbidding the passage of local acts for the drainage of premises does not apply to the construction of sewers.<sup>4</sup> The modes of procedure pointed out by the statute must be followed, so that, if the construction of the sewer can be undertaken only upon petition of the taxpayers, no valid proceedings can be taken without such petition.<sup>5</sup> And, if the sewer can be constructed only when it is necessary, the municipal authorities cannot proceed unless it is necessary. But when they decide that the sewer ought to be constructed, and proceed with the work, they presumably determine that the necessity exists, and need not say so in express terms, since public officers will be presumed to act rightfully.<sup>6</sup> The decision of the municipal authorities that the sewer is necessary is conclusive, and cannot be reviewed by the courts.<sup>7</sup>

**203a. For private benefit.**—Drainage is for the good of the public, and not for the benefit of private individuals; therefore, a municipal corporation has no authority to contract to construct and keep in repair a drain for the benefit of a parcel of private property.<sup>1</sup> Such

*Episcopal Public School*, 46 N. Y. 178, Reversing 58 Barb. 161.

An act of the legislature vesting the corporate authorities of cities and villages with power to construct, maintain, and keep in repair drains, ditches, levees, dykes, and pumping works for drainage purposes, and to levy special assessments upon the property benefited thereby for the cost thereof, is not in contravention of any of the provisions of the Illinois Constitution. *McChesney v. Hyde Park* (Ill.) 28 N. E. 1102.

<sup>1</sup>*Rutherford v. Heddens*, 82 Mo. 388.

But a provision in a system of legislation regulating the construction of sewers, requiring action by the municipality only upon the presentation of a petition of the taxpayers, cannot be dispensed with by the legislature only in cities having a certain specified population, such legislation being special within the meaning of the Constitution. *State, Tyler, Prosecutor, v. Plainfield*, 54 N. J. L. 529, 24 Atl. 494.

<sup>2</sup>*Swickhard v. Michels*, 81 Hun, 325, 29 N. Y. Supp. 777, 30 N. Y. Supp. 1135.

<sup>3</sup>But petitioners for a public sewer cannot complain if the council exceeds their request by extending the desired sewer onto another street, as their individual liability is not increased thereby, and some latitude must necessarily be allowed public officials in doing such

work. *Re Maple Ave. & G. Street Sewer*, 30 Pitts. L. J. N. S. 377.

<sup>4</sup>*State, Van Vorst, Prosecutor, v. Jersey City*, 27 N. J. L. 493; *Miller v. Anheuser*, 2 Mo. App. 168.

A recommendation by the board of public improvements of the passage by the municipal council of an ordinance authorizing the construction of a sewer is equivalent to a declaration that it is necessary, under a charter authorizing the construction of a sewer whenever such board shall recommend it as necessary. *Sheehan v. Martin*, 10 Mo. App. 285.

<sup>5</sup>*Re Fowler*, 53 N. Y. 60.

<sup>6</sup>*Peru v. Gleason*, 91 Ind. 566.

A contract to build a sewer for the exclusive use of a state institution located outside the corporate limits, in consideration of the location of the institution at that place, is *ultra vires*, and cannot be enforced against the municipal corporation making it. *Kankakee v. Illinois Eastern Hospital*, 66 Ill. App. 112.

A municipal corporation is not liable for failure to carry out its contract with the owners of certain wet and swampy lands inside and outside the corporate limits, to make a ditch on a public street within the city limits to serve as an outlet for a ditch to be constructed by the

a contract cannot be made, even in consideration of a grant of a right of way for the ditch.<sup>2</sup> So, the municipality has no authority to contract that its drain shall cause no injury to private property.<sup>3</sup> But the presumption is that a municipal corporation, when constructing a sewer in its corporate capacity, acts for a public purpose, and for the benefit of the community at large or the people generally in the locality of the improvement, and not merely in the interest of a particular individual who may petition for such improvement, and who may be specially benefited thereby.<sup>4</sup>

**204. Procedure.**— There is less reason for giving the taxpayer the initiative in the case of sewers than in that of farm drainage. A sewer in a particular locality is usually merely a part of a general system for the drainage of an entire municipal corporation, and the municipality may be regarded as having better knowledge of the need of it than the abutting owner. The right to institute the proceedings may be given to the taxpayers, but when the sewer is urgently needed for the public good the municipal authorities may be empowered to construct it, even against the protest of those upon whom the burden will fall.<sup>1</sup> Since, under a municipal charter authorizing the construction of a sewer wherever the board of public improvements recommends it as necessary for sanitary or other purposes, a sewer may be constructed for purposes other than sanitary, it is not necessary that

several owners on their own land so as to drain the same, which would be of public benefit and make such lands valuable, although the landowners have performed their part of the agreement by constructing their portion of the ditch, and the breach on the part of the municipality has prevented their lands being drained as well as they otherwise would be. Such a contract is not binding on the city because it is an attempt to control its discretionary right to the future exercise of its legislative power. *Peru v. Gleason*, 91 Ind. 566.

<sup>2</sup>*Hamilton v. Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007.

A clause in a deed to the right of way for a sewer pipe, requiring the city to construct the sewer with a suitable valve so as to prevent water from flowing back onto the grantor's premises, assumes to insure the grantor against damages from that cause, and, in the absence of express charter power, is *ultra vires*. *Nashville v. Sutherland*, 92 Tenn. 335, 19 L. R. A. 619, 36 Am. St. Rep. 88, 21 S. W. 674.

<sup>3</sup>A contract on the part of a municipal corporation insuring or guarantee-

ing a person from water flowing back upon his lands, through a sewer constructed by said municipal corporation, is *ultra vires* in the absence of express charter power so to contract, and will create no greater liability than exists in the absence of any contract,—namely, the duty to construct such sewer without negligence. *Nashville v. Sutherland*, 92 Tenn. 335, 19 L. R. A. 619, 36 Am. St. Rep. 88, 21 S. W. 674.

<sup>4</sup>*McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. 1011.

<sup>1</sup>Abutting owners cannot object to the construction of a sewer forming part of a general system on the ground that all the owners on the street have already made sufficient private arrangements for carrying off sewage from their premises, since § 2385 of the Ohio statutes justifies such contention only where the person has already, by steps taken by the municipal corporation, and to the construction of which his land was contributed, been entirely or in part supplied with drainage. *Johnson v. Arondale*, 1 Ohio C. C. 229.

An assessment for the cost of constructing a sewer cannot be defeated on

the recommendation should state the purpose of the sewer.<sup>2</sup> In case the authority rests with the municipality, the proper method of instituting the proceedings is the passage of an ordinance by the common council designating the improvement which will be required, and making provision for the construction of the work.<sup>3</sup> The ordinance must be adopted with all the formalities required in the passage of valid ordinances generally; but it cannot be declared void for immaterial irregularities.<sup>4</sup> The acts of the council are, in the absence of fraud, conclusive on the courts.<sup>5</sup> The details of the undertaking are to be worked out by the municipal authorities as in their judgment the public good requires.<sup>6</sup> In the absence of a statute confer-

the ground that there was no necessity for its construction, a previously constructed sewer extending over substantially the same territory, where such sewer is an extension of a general plan of sewerage existing in the city, and it appears that the original sewer was intended to be only a temporary one, and was not constructed along the lines of the streets, but followed natural drains, and was so situated as to render it difficult to be tapped, and its construction, so far as the city was concerned, seems to have been permissive only. *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106.

<sup>2</sup>*Eyerman v. Blaksley*, 78 Mo. 145.

<sup>3</sup>An order to construct sewers is a legislative act within the meaning of a charter requiring such acts to be adopted by ordinance; a mere resolution is insufficient. *State ex rel. Paterson v. Barnett*, 46 N. J. L. 62.

But a sewer built in pursuance of a resolution of the city council, and paid for out of money in the city treasury provided for that purpose, is a public sewer in law, as much as if it had originally been established by ordinance. *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536.

<sup>4</sup>It is not a valid objection to a resolution of the Jersey City common council for a proposed sewer that it was not signed by the mayor, as the charter only requires that official to sign resolutions affecting the interest of the city, and, as the city at large pays no part of the expenses for the improvement, but these are borne by the property benefited, the city's interests are not affected. *State, Pierd, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

An ordinance authorizing the construction of a sewer, adopted at a special meeting, is not rendered invalid by

reason of the fact that the mayor, in his message submitted at such meeting, declared the purpose of the meeting to be the consideration of an ordinance to establish a sewer district, and made no reference to the construction of the sewer, where it was clear that he intended to include such construction in the purpose of the meeting. *Dollar Sav. Bank v. Ridge*, 62 Mo. App. 324.

The fact that an ordinance authorizing the construction of a sewer took effect at the same time as an ordinance establishing the district in which it was to be constructed did not invalidate it, although the municipal charter authorized the construction of sewers only in established districts. *Eyerman v. Blaksley*, 78 Mo. 145.

A sewer which receives the drainage of sewers from intersecting streets is a trunk sewer and not a local sewer, within the Ohio statutes declaring a local sewer to be one intended for and used exclusively for the drainage and accommodation of lots abutting thereon, assessments for which are valid without a resolution of the council declaring the necessity of the improvements, under a statute giving the board of public affairs exclusive jurisdiction in case of trunk sewers, and dispensing with any action or concurrence of the council in any of the proceedings. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

<sup>5</sup>*Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

<sup>6</sup>A power in a municipal corporation to create special improvement districts does not prohibit the inclusion of the whole municipality in one district. *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

ring the authority upon special boards, it rests with the common council, and cannot be exercised by boards organized to have charge of special interests of the municipality.<sup>7</sup> Equity will not restrain the construction of a sewer if there is an adequate remedy at law.<sup>8</sup>

## VII. PLANS AND SPECIFICATIONS.

**205. Practicable plans must be adopted.**—To make a drainage improvement of any benefit, it must be constructed on a plan that will be effective to the accomplishment of the end in view. Taxpayers have a right to demand that, before the enterprise is entered upon, it shall have been determined to be practicable, and that the general character of the improvement shall be designated. When they are entitled to pass upon the question whether or not the improvement shall be made, they can exercise no intelligent judgment until they know the plan; and, if they are entitled to no voice in the matter, they may make effective opposition in case the plan is defective. They also have a right to have the plans fixed so that no departure from them shall be effected during the progress of the work. The courts will not interfere with a plan which has been adopted in good faith, and which will effect the intended object, although it may not be the best that could be devised.<sup>1</sup> Equity will not interfere in any event if there is an adequate remedy

<sup>1</sup> Statutory authority to make assessments for the purpose of improving boulevards, etc., does not confer upon a park board the power to levy an assessment for sewers and water mains intended solely to supply sewer and water service to residents on a boulevard, and not for the purpose of draining or benefiting the boulevard itself. *West Chicago Park v. Baldwin*, 162 Ill. 87, 44 N. E. 404.

The laying of a sewer or a water main in a boulevard under the control of a park board for the supply of sewer and water service to residents on the boulevard is not an improvement to the boulevard, within the meaning of a statutory provision authorizing park boards to make assessments for the purpose of improving any boulevard, driveway, or street. *Lingle v. Chicago*, 172 Ill. 170, 60 N. E. 192.

<sup>2</sup> *Iron Works v. Borough*, 3 Lanc. L. Rev. 107; *Clapp v. Spokane*, 53 Fed. 515.

<sup>3</sup> *Bell v. Rochester*, 61 N. Y. S. R. 721, 30 N. Y. Supp. 365.

The owner of land sought to be taken for a sewer outlet cannot attack the determination of the trustees of a village as to the system of sewerage to be adopted on the ground that some other system would be better, where by statute, the trustees are empowered to adopt and establish a permanent system of waterworks subject to the approval of the state board of health, which was secured. *Re Long*, 34 N. Y. S. R. 778, 12 N. Y. Supp. 230.

The choice of the mode of drainage of a particular district of a village or city is within the legislative discretion of the corporate authorities thereof, with which the courts will not interfere unless it has been clearly abused; and the fact that a particular tract of land within that district is somewhat higher than the adjoining lands thereof, and could have been drained by the ordinary "gravity system," is no evidence of such abuse, where the system adopted appeared to be that best adapted to the drainage of the whole district and does not lessen the benefits such lands will

at law.<sup>2</sup> The mere fact that the construction of the sewer will result in some injury to abutting owners does not show that the plan is defective.<sup>3</sup> Improvements which are all part of the same general scheme must be executed under one general plan if it can be done in that way most economically and satisfactorily.<sup>4</sup> The kind of sewer which is necessary in a particular section of a municipality is a question for the determination of the proper authorities, not reviewable by the courts except under extraordinary circumstances.<sup>5</sup> If the plan adopted is plainly inadequate, and will not effect the purpose for which the improvement is intended, and which is the only thing that will justify an assessment upon abutting property, it is void, and cannot be put in force.<sup>6</sup>

**206. Choice of route.**— To be practicable a drain need not have the best route that can be obtained, but the route will be sufficient if by its adoption a sufficient fall and outlet can be obtained, and the drain will run sufficiently near the localities where the drainage is needed to remove the water from the property, and it can be constructed without serious difficulty, and, when constructed, the ditch will perform the office of a drain throughout its length.<sup>1</sup> The decision of the proper authorities, in the absence of fraud, is conclusive upon the courts;<sup>2</sup> therefore, evidence to show the practicability of another

receive by the construction of the sewer, and therefore cannot affect the amount of its assessment. *McChesney v. Hyde Park* (Ill.) 28 N. E. 1102, 151 Ill. 634, 37 N. E. 858.

Where a system of sewerage of the ordinary kind cannot be used to advantage for want of sufficient fall to carry away the contents of the mains and pipes by the force of gravitation, a municipal corporation, under a grant of power in its charter to construct main drains, sewers, etc., without any limitation or restriction as to the mode in which they shall be built or operated, has the power to construct pumping works, to be used as a necessary part of the plan adopted by the municipal authorities for the carrying away of the sewage. *Drevel v. Lake*, 127 Ill. 54, 20 N. E. 38.

<sup>1</sup>*Vornholt v. Gordon*, 30 Ohio L. J. 33.

<sup>2</sup>*Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

<sup>3</sup>*Gray v. Boston*, 139 Mass. 328, 31 N. E. 734.

An ordinance of a municipal corporation providing for the construction of a sewer and pumping works to be used in connection therewith, the latter being an essential and integral part of the sys-

tem adopted and necessary in order that the former may be made to serve its proper purpose, and providing for the levy of a special assessment to defray the expenses of the combined improvement, is not invalid as providing for two distinct improvements, or as being double. *Drevel v. Lake*, 127 Ill. 54, 20 N. E. 38.

<sup>4</sup>*Oil City v. Oil City Boiler Works*, 152 Pa. 348, 25 Atl. 549; *Philadelphia v. Thomas*, 152 Pa. 494, 25 Atl. 873.

<sup>5</sup>An ordinance for the construction of a box sewer 2 miles long, with no provision for intermediate openings between the beginning and terminating points, so as to drain the adjacent lands lying on each side, and failing to designate the territory to be drained, is void, both because deficient in description, and because unreasonable; being an attempt to assess the contiguous property without making provisions necessary to effect a drainage of the property. *Hyde Park v. Carlton*, 132 Ill. 100, 23 N. E. 590.

<sup>6</sup>*Thomas v. County Comrs.* 5 Ohio N. P. 449.

<sup>7</sup>*Anderson v. Baker*, 98 Ind. 587; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St.



route is inadmissible in a proceeding to contest one chosen.<sup>3</sup> If the commissioners are required to find that the route adopted is the best one before they can proceed, that fact must be entered upon their journals, since it is jurisdictional.<sup>4</sup> The adoption of the route is equally binding on those whose property is sought to be acquired for a right of way as upon those who will be assessed for the improvement.<sup>5</sup> The course of the natural flow of the water need not be followed.<sup>6</sup> And the fact that the route intersects natural water courses does not make it invalid;<sup>7</sup> nor does the fact that it follows that of a previous drain.<sup>8</sup> And, where the route of an old ditch is lawfully followed, the fact that no allowance of damages is made for the use of the old ditch does not invalidate the proceedings, since that fact goes only to the question of costs and benefits of the proposed work.<sup>9</sup> Although a statute prohibits the running of a sewer diagonally through property when it is practicable to construct it parallel to one of the exterior lines of the property, and the building of it through private property if it is practicable to construct it along a street, a strong case should be presented to justify the courts in interfering with the judgment of the municipal authorities upon that question.<sup>10</sup> The question whether or not a drain can be constructed in a better and cheaper manner on the land of a private individual does not determine the public or private character of the work.<sup>11</sup> An ordinance of a municipal corporation for the construction of a sewer is insufficient

Rep. 357, 22 N. E. 782; *Stout v. Hope-well*, 25 N. J. L. 202.

<sup>3</sup>*Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1000.

<sup>4</sup>*State ex rel. Union P. R. Co. v. Col-fax County*, 51 Neb. 28, 70 N. W. 500.

<sup>5</sup>*Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

<sup>6</sup>*Miller v. Weber*, 1 Ohio C. D. 77, 1 Ohio C. C. 130.

<sup>7</sup>*Goodrich v. Stangland*, 155 Ind. 279, 58 N. E. 148.

A public sewer may, with the owner's consent, be constructed across the course of a tidal creek, which had become private property, the mouth having been closed by permission of the legislature so as to destroy its utility, so that the taxpayers cannot defeat the assessment to pay for the sewer. *Herbert v. Bayonne*, 63 N. J. L. 532, 42 Atl. 833, Affirmed in 64 N. J. L. 548, 46 Atl. 608.

<sup>8</sup>*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841; *Miller v. Logan County*, 3 Ohio C. C. 617.

There is no constitutional or statutory inhibition against locating and constructing a new public drain along and

upon an old one. Landowners assessed for the construction of the former ditch did not thereby acquire vested rights that will prevent the location and construction of another ditch upon the same line. *Meranda v. Spurlin*, 100 Ind. 380.

But in Michigan it is held that a township drain commissioner has no jurisdiction to locate a township drain upon the line of a drain laid by the county drain commissioner, unless such first drain has been legally vacated or abandoned. *Zabel v. Harshman*, 68 Mich. 273, 42 N. W. 44; *Tomlin v. Newcomb*, 70 Mich. 358, 38 N. W. 315.

<sup>9</sup>*Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264.

Where neither a township nor any of its taxpayers are assessed for a drain, it cannot complain of a failure to vacate the drain before constructing any proposed drain over its route. *Flynn Twp. v. Woolman* (Mich.) 10 Det. L. N. 274, 95 N. W. 567.

<sup>10</sup>*Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

<sup>11</sup>*Anderson v. Baker*, 98 Ind. 587.

as a basis for a special assessment, where it provides for the location of the sewer in a designated street which does not exist, but is private property.<sup>12</sup>

**206a. Conversion of stream into drain.**—Frequently a natural stream flows in such a direction through a municipal corporation that its course can be utilized as a main or trunk sewer to carry the sewage of the city and furnish a constant means of flushing it and keeping it in sanitary condition. The legislature may authorize the deepening, widening, and straightening of such streams for that purpose upon providing for compensation to the riparian owners whose rights are thereby injured.<sup>1</sup> But a drainage district cannot appropriate a natural water course within the limits of a city, which has been previously appropriated and improved by the city, for a drainage outlet.<sup>2</sup> The channel of a natural stream may also be deepened for the purpose of furnishing better drainage to the country through which it flows. Equity will not restrain the erection of a sewer over a private water course polluted with sewage, when the work is urgently demanded for the protection of the public health, and the intention of the municipal corporation to appropriate the private property is evident, as the municipal power of taxation is sufficient security for payment of damages.<sup>3</sup> But the right to make such change must be expressly conferred by the legislature, and cannot be exercised by the local authorities in the absence of such authority. And the mere authority to improve a water course for drainage purposes does not authorize the changing of its course.<sup>4</sup> No additional easement is im-

<sup>12</sup>*Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710.

<sup>1</sup>*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

That a proposed drain is to be constructed for 19 miles along the line of an existing water course which is to be straightened, widened, and deepened, does not render the work an internal improvement forbidden by the Constitution. *Brady v. Haycard*, 114 Mich. 326, 72 N. W. 233.

<sup>2</sup>*Bishop v. People*, 200 Ill. 33, 65 N. E. 421.

<sup>3</sup>*Bromley v. Philadelphia*, 8 Pa. Co. Ct. 600.

<sup>4</sup>*Sauntman v. Mazicell*, 154 Ind. 114, 54 N. E. 397; *Coomes v. Burt*, 22 Pick. 422; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

No jurisdiction is conferred, in a proceeding to establish a ditch, to alter and change the channel of a water course, unless it is a method of drainage and

merely incident thereto, under a provision of the drainage act authorizing the court to determine that the method of drainage may be by removing obstructions from a water course, by deepening, widening, straightening, or changing its channel, etc.,—especially where a later statute confers upon another body the exclusive jurisdiction to straighten or change water courses to protect the banks of the stream where such change is the primary object to be accomplished. *Scruggs v. Reese*, 128 Ind. 399, 27 N. E. 748.

Under a petition to lay out a drain along the general course of a creek, the commissioner may include portions of it, and deepen, widen, or straighten the same, where the statute provides that, in cases where a natural water course shall need cleaning out, deepening, or widening, where no proceedings have been previously had to establish such water course, it shall be immaterial

posed by the arching over of a natural water course by a municipal corporation which had previously used it as a channel for carrying off surface water. Calling the drain a sewer after it is arched over does not change the nature of the easement.<sup>5</sup> If a municipal corporation adopts a stream as a sewer, and permits filth to escape therefrom, it cannot defend a suit for the injury caused thereby upon the ground that the overflowing of the water course prior to its use as a sewer occasioned as much damage because the upper proprietors had only a right to use the stream for surface water, and not to befoul it; and the use of it as an outlet for sewage imposes an additional burden upon it requiring compensation to the abutting owner when the sewage is thrown upon his property.<sup>6</sup> A prescriptive right which has been acquired, to deposit sewage in a natural water course, is not lost when the municipality diverts its flow into an artificial sewer.<sup>7</sup>

**207. Provision of outlet.**—As has been seen,<sup>1</sup> water cannot be gathered together by public authorities and left to find its way onto private property; nor can it be cast in a body onto such property. There is much less reason for recognizing a right to conduct sewage upon or near private property to its injury than there would be in case of mere surface water. In the case of sewage the abandonment of it in a place where it will be likely to prejudice the public health is a nuisance;<sup>2</sup> and a private individual may maintain an action for the injury caused to him by such deposit if it causes him special injury. Neither a city nor a county is privileged to discharge its sew-

whether the first proceedings shall be to clean, or lay out, deepen, or widen; but the commissioner shall take such steps as may be necessary to obtain a right of way, and go on with his proceedings in the manner provided by law. *Hausser v. Burbank*, 117 Mich. 463, 76 N. W. 109.

The fact that drainage commissioners have availed themselves of the benefits derived from the removal of a dam in a creek will not estop them from denying the validity of the contract entered into between them and the owner of such dam for its removal, which is void as exceeding the power and authority of the commissioners, where the owners of the land within the district are not estopped from denying the right of such owner to a judgment against the drainage district based upon such contract. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170, Affirming 42 Ill. App. 79.

<sup>5</sup>*Jeannette v. Eschallier*, 7 Pa. Dist. R. 268.

<sup>6</sup>*Winn v. Rutland*, 52 Vt. 481.

When a municipality adopts a stream as an open sewer, it is bound to keep open the channel and to remove accumulations of filth, ashes, or other material that obstruct the flow of the water, and throw it out of its banks upon the land of adjoining owners. *Blizzard v. Danville*, 175 Pa. 479, 34 Atl. 846; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858.

<sup>7</sup>*Masonic Temple Asso. v. Harris*, 79 Me. 250, 9 Atl. 737.

<sup>1</sup>§ 185, ante.

<sup>2</sup>*State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

Under a drainage act authorizing the county court to empower the owners of land to drain them across the lands of adjoining proprietors, the court has no authority to authorize the drainage in such a manner that it will be deposited and remain on the lands of such adjoining owners. *French v. White*, 24 Conn. 170.

age upon the land of a private individual to his injury,<sup>3</sup> although such right may be acquired by long-continued adverse use.<sup>4</sup> The unlawful discharge of sewage to the injury of a private individual may be enjoined.<sup>5</sup> In the case of a county, however, which is acting in its governmental capacity, and has not been made liable for its acts by statute, it is held that the action is not against the county, but against its officers, to abate the nuisance.<sup>6</sup> But where the act is done by a municipal corporation which, under the statutes, is subject to suit, it may be held liable for the injuries inflicted, even though the sewage is abandoned on its own property, but in such a way as to flow over onto adjoining property to its injury.<sup>7</sup> The damage to be recovered must be the proximate result of the injury, and must not extend beyond the commencement of the suit, because, the action being wrongful, the presumption is that it will cease.<sup>8</sup> It is no defense to the action that the drainage might be utilized as a fertilizer.<sup>9</sup>

It being thus settled that the sewage cannot be abandoned so as to injure the interests of the public or of private individuals, one of the essential elements of a drain is that it shall have an adequate outlet to dispose of the water and sewage collected by it.<sup>10</sup> Authority to

<sup>3</sup>*Pierce v. Gibson County*, 107 Tenn. 224, 53 L. R. A. 477, 89 Am. St. Rep. 946, 64 S. W. 33.

<sup>4</sup>Uninterrupted use is necessary to acquire a prescriptive right to empty a town drain on the land of an individual, and the drain must be continued all the time in the same condition. *Cotton v. Pocasset Mfg. Co.* 13 Met. 429.

Where a prescriptive right has been acquired to drain certain houses of a local district into its sewerage system, and thence into the system of an adjoining district, the local board cannot increase the burden thereby cast upon the adjoining district by draining or permitting other houses to be drained into its system, and then casting the increased sewage into the adjoining system. *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

<sup>5</sup>*Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

<sup>6</sup>*Lefrois v. Monroe County*, 162 N. Y. 563, 50 L. R. A. 206, 57 N. E. 185.

<sup>7</sup>The tenants of a municipal sewage farm, although not because of their position bound contractually to control the sewage and prevent it from producing injurious consequences, owe to the city the duty of refraining from such

interferences with the arrangements made by it for the disposition of the sewage as would cause an injury which would not otherwise have happened, and are liable to the city for a violation of that duty when they pollute a water course by throwing the sewage directly into it instead of into the filters. *San Antonio v. Smith*, 94 Tex. 266, 59 S. W. 1109.

But in an action against the city for damages resulting from the flow of the sewage from the farm, it cannot make the lessee a defendant for the purpose of enforcing contribution against him, where it does not appear that there was any contract between the city and its lessee binding the latter to consume the sewage on the farm. *Smith v. San Antonio* (Tex. Civ. App.) 57 S. W. 881.

<sup>8</sup>*Duryea v. New York*, 26 Hun, 120.

In an action against a city for permitting sewage to flow near plaintiff's land whereby sickness is caused to the plaintiff, the loss of seed as a result of the sickness is too remote an element of damage, and will not be considered in estimating the amount of the recovery. *Smith v. San Antonio* (Tex. Civ. App.) 57 S. W. 881.

<sup>9</sup>*Smith v. San Antonio* (Tex. Civ. App.) 57 S. W. 881.

<sup>10</sup>*Gage v. Chicago*, 191 Ill. 210, 60 N.

construct drains and sewers will include the power to acquire outlets for them;<sup>11</sup> and, if necessary, the outlet may be secured outside the district seeking to obtain it and the necessary rights of way and other facilities acquired to render it available.<sup>12</sup> One drainage district will not be permitted to turn its drainage into the system of another district, or into a private drain, without authority;<sup>13</sup> but authority to carry drainage out of the limits of the district does not include the right to carry it into another district and abandon it.<sup>14</sup> The right to find an outlet in the drainage system of another district will depend for the most part upon express statutory permission. The mere authority to find an outlet outside the limits of the district will not authorize the casting of the drainage into the system of another district if the result is to overload it; but, if necessary to make use of such system, the cost of enlarging it to make it adequate to the needs of both districts should be shared by the district seeking to make such use.<sup>15</sup>

*E. 896; Gillett v. Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044.

But the English public health act of 1875 does not prevent the local authority from accepting a sewer which has no outfall. *Hornsey Local Board v. Davis* [1893] 1 Q. B. 756, 62 L. J. Q. B. N. S. 427, 68 L. T. N. S. 503, 57 J. P. 612, 4 Reports, 322.

<sup>11</sup> A municipal corporation having the authority to construct sewers and drains for the protection and improvement of its streets, and, as incident thereto, the right to acquire land for that purpose, has the power to acquire an easement in the land from the termination of a street on a river bank down to low water mark for constructing a gutter as a drainage outlet, and to construct the gutter thereon. *Schipper v. Aurora*, 121 Ind. 154, 6 L. R. A. 318, 22 N. E. 878.

<sup>12</sup> *McBean v. Fresno*, 112 Cal. 159, 31 L. R. A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939; *Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

A city which, by its charter, is given general power over drainage, has implied authority to contract with a landowner beyond the corporate limits for permission to enlarge, straighten, and keep in repair the ditch through his premises so as to provide a sufficient outlet for the city sewage, where its charter further requires it to keep a

river which bounds it free from pollution, and there is no other outlet available, aside from the ditch, extending beyond its limits. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

<sup>13</sup> *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

But equity will not restrain a municipal corporation from connecting its street drains with a private sewer constructed to carry off surface water which naturally flowed through a gully on the same land, when the street formerly drained through the gully, and the natural flowage is not to be increased. *Keating v. Pittston*, 8 Kulp, 421.

<sup>14</sup> *Ellice Turp. v. Hiles*, 23 Can. S. C. 429.

An injunction will be granted against a city discharging sewage on lands of an adjacent town under provision of the statute authorizing a board of health to restrain by injunction such nuisance. *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275, Reversing 39 Hun, 70.

But in the case of *Atty. Gen. v. Clerkenwell* [1891] 3 Ch. 527, 60 L. J. Ch. N. S. 788, 65 L. T. N. S. 312, 40 Week. Rep. 185, an injunction was refused to restrain the discharge of sewage from one district into another, where the first district had authorized private connections with the sewer, the remedy being a private suit against the inhabitants.

<sup>15</sup> *Dawson v. Paver*, 5 Hare, 415, 16 L. J. Ch. N. S. 274, 11 Jur. 766.

The question now arises, What is the effect of failure to provide an outlet upon the validity of a plan for the drainage system, and who may take advantage of it? Unless the legislature has designated the outlet which is to be obtained, the question of outlet is within the discretion of the authorities having the improvement in charge, and a taxpayer cannot contest the validity of the improvement upon the ground that the outlet chosen is inadequate.<sup>16</sup> The question is one of fact, the decision of which rests primarily with the authorities in charge of the work, and it must be assumed that a proper outlet has been obtained, or will be obtained; and, therefore, even the fact that the discharge is made in an improper place cannot be taken advantage of to defeat an assessment for the cost of the drain.<sup>17</sup> The power to acquire the outlet is not exhausted with one attempt to exercise it, but, in case the one acquired proves inadequate, the mistake may be

See also § 174. *ante*.

Substantial damages need not be shown to entitle a board of public works to an injunction restraining the discharge of sewage into its sewage system by an adjoining district, where the wrong is done under a claim of right, not only to discharge such sewage, but to increase the number of drains, claiming such a right by prescription on behalf of all the inhabitants of the district. *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

But the court, in that case refused to restrain the discharge of sewage through drains already constructed, upon the ground of the plaintiff's delay in commencing the proceedings, and the great inconvenience that would be cast upon the defendant, while the plaintiff was not shown to be likely to suffer any substantial injury therefrom.

Where an arrangement was entered into whereby two municipalities were to connect with the sewers of a third, which in its turn was to connect with the sewers of Montreal, upon a guaranty by the third municipality against all damages which might result to Montreal, whether from the connection of said sewers, or works necessary in connection therewith, and, in case of the Montreal sewer becoming insufficient, to bear the proportional cost of new works, with similar guaranties from the first two municipalities to the third, such guaranty bound the three municipalities, not only for all damages resulting from the act of making the actual con-

nection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer: and the municipalities are not relieved from contributing to the cost of new works rendered necessary on account of the insufficiency of the sewer by the postponement of the construction of such works by the city of Montreal. *Montreal v. Ste. Cunégonde*, 32 Can. S. C. 135.

<sup>16</sup>*Gillison v. Cressman*, 100 Mich. 591, 59 N. W. 321; *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

Whether or not a "proper" outlet has been provided for a proposed sewer is a matter left to the discretion of the village authorities, with which the court will not interfere by injunction restraining the construction of the sewer, unless such discretion has been grossly abused. *Johnson v. Avondale*, 1 Ohio C. C. 229; *Church v. People*, 179 Ill. 205, 53 N. E. 554.

<sup>17</sup>The fact that a sewer built by a municipality discharges into a private stream, however it may affect the rights of the proprietors of that stream, does not relieve a person assessed for the construction of the sewer from liability on the assessment. *Cone v. Hartford*, 28 Conn. 363.

It is no defense to the levy of a special assessment upon contiguous lands for the construction of a sewer within a municipal corporation that the system adopted requires such drainage to be discharged into a lake, and is against public policy. The question as to whether the lands and lots of the city shall be

corrected at a subsequent period.<sup>18</sup> A different rule obtains when the legislature has designated the outlet into which the drain is to empty. In such case, unless the provisions of the statute are followed, the entire proceeding is void, and assessments cannot be enforced.<sup>19</sup> It need not, however, appear upon the face of the ordinance that a proper outlet has been adopted if it has in fact been.<sup>20</sup> If the tax bills

drained, and how and when it shall be done, are within the legislative discretion of the city authorities. *Rich v. Chicago*, 162 Ill. 18, 38 N. E. 255.

"An ordinance of a municipal corporation for the construction of a sewer is not invalid because it does not provide for obtaining the right to open the same in a branch or ravine which is on private property; and an assessment levied thereunder is valid. It is immaterial whether such right is obtained before or after the passage of the ordinance and making of the assessment. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

A municipal board has the power to contract for the construction of a sewer, although it has no outlet except through a plan or system of which it is a part but which cannot be completed; since it is open to the board to adopt plans to dispose of the sewage in some other mode, and it may gather it for that purpose. *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

The fact that an ordinance of a municipal corporation for a sewer provides for an outlet by a ditch running over private property is no reason, in a proceeding to confirm a special assessment for the cost of constructing such sewer, for declaring the ordinance void; although it might be a reason for enjoining proceedings thereunder until the right to use the ground over which the ditch passes is obtained by condemnation or otherwise. *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

An assessment for the construction of a sewer is not invalid because such sewer originally terminated in a certain street and did not afford a proper outlet, where, at the time such improvement was determined upon, the ultimate extension thereof to a river was contemplated, and such extension was made within a year so as to afford a proper outlet. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

"A charter provision that a district sewer shall connect with another district sewer, public sewer, or natural course of drainage, is a substantial mat-

ter, and must be followed in an ordinance establishing a sewer, or the cost of such sewer cannot be enforced by local assessment. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800; *Heman v. Payne*, 27 Mo. App. 481; *Kansas City use of Enright v. Ratekin*, 30 Mo. App. 416.

Under a charter provision requiring that district sewers must connect with a public sewer or another district sewer, or with the natural course of drainage, the municipality cannot construct a district sewer to connect with any natural course of drainage it may select, but it must connect with the natural course of drainage constituting the base or basis of some part of its sewer system; and a connection at a point about two blocks removed from a public sewer, with a stream or ravine which flows in the same general direction as the public sewer and empties into the same stream several hundred feet away, is improper, as the public sewer is the proper base for that part of the sewer system. *Bayha v. Taylor*, 36 Mo. App. 427.

Under a municipal charter declaring that district sewers shall connect with a public sewer or other district sewer, or with the natural course of drainage, an ordinance was invalid where it provided for the construction of a sewer to empty into the bed of a creek which had become filled up and obstructed so that it was a mere pond without an outlet; and special tax bills for work done under the ordinance could not be enforced. *Kansas use of Frear Stove & Pipe Mfg. Co. v. Swope*, 79 Mo. 446.

Under a municipal charter providing that district sewers shall connect with a public sewer or other natural source of drainage, an ordinance authorizing the construction of a district sewer is not invalid by reason of its authorizing a connection with a district sewer, where such sewer connects directly with a public sewer, and is of ample capacity for such purpose. *Eyerman v. Blakley*, 78 Mo. 145.

<sup>18</sup>*St. Joseph v. Wilshire*, 47 Mo. App. 125; *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536.

are void because of an improper outlet they cannot be rendered valid by subsequent correction of the error.<sup>21</sup> As will appear from the subsequent section, the property owner who is injured by the adoption of an inadequate or improper outlet may maintain an action to compel the adoption of a proper one, or for the injury which he has received. As has been already seen,<sup>22</sup> the rule is firmly established, contrary to the contention of the Indiana court in *Valparaiso v. Hagan*,<sup>23</sup> that mere legislative authority to procure an outlet for drainage does not include the right to use a natural stream for that purpose in such a way as to injure the rights of riparian owners. The use of land which has been acquired for a sewer outlet may be changed by the legislature.<sup>24</sup> So, where an urban authority acquires more land than necessary for the immediate disposal of sewage, but which will ultimately be required for that purpose, it need not sell the land, but may retain it, and may use it for some other lawful purpose, such as recreation ground or the like, provided nothing is done which will impair the usefulness of the land for the ultimate purpose to which it is to be devoted.<sup>25</sup>

**207a. Use of stream as outlet.**— As has already been seen,<sup>1</sup> the streams are the great drains which are provided by nature to carry off the rain which falls upon the earth, the water coming from melting snow, and the water which comes to the surface in the form of springs. The right to utilize these drains to carry the water which would naturally find its way into them, so far as they may be used without inflicting injury upon the riparian owner, is absolute. A municipal corporation or drainage district may make its drains so as to hasten the flow of water into the streams, and the landowner has no right to complain of such action so long as the municipality keeps within its rights;<sup>2</sup> but it has no right to gather water from a tract of land and carry it out of its natural course and throw it into a water course in such quantities that the capacity of the stream is exceeded, and injury is there-

<sup>1</sup>*Bayha v. Taylor*, 36 Mo. App. 427.

<sup>2</sup>§ 138, *ante*.

<sup>3</sup>153 Ind. 340, 48 L. R. A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062.

<sup>4</sup>*State, Millburn Twp., Prosecutors, v. South Orange*, 55 N. J. L. 254, 26 Atl. 75.

But a municipality that, by authority of a statute, has purchased land in an adjoining township for sewage disposal beds may make lawful use thereof, notwithstanding the enactment, before it begins, of a supplemental or amendatory act, requiring preliminary consent from the authorities of the township

containing such land, as the latter statute is not retroactive so as to impair acquired rights. *South Orange v. Millburn* (N. J. L.) 36 Atl. 29.

<sup>2</sup>*Atty. Gen. v. Teddington* [1898] 1 Ch. 66, 67 L. J. Ch. N. S. 23, 77 L. T. N. S. 426, 46 Weck. Rep. 88, 61 J. P. 825.

<sup>1</sup>§ 186, *ante*.

<sup>2</sup>*Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622.

A municipal corporation has a right to use a water course crossing streets, as laid out on a plot, as an outlet for the drainage water of the streets; and riparian owners on the stream will hold



by done to the riparian owner.<sup>3</sup> But this may be done so far as it is possible to do so without exceeding the capacity of the stream.<sup>4</sup> So, the flow of the water cannot be hastened so rapidly that the effect is to cast the water in a body onto the lower property to its injury.<sup>5</sup> The principle at the foundation of these decisions is the same that governs the dealing with surface water generally. One landowner is not permitted to relieve himself of a burden actually resting upon his land to the injury of his neighbor. *Sic utere tuo ut alienum non lædas* is the maxim which governs the relation with respect to surface water; and it is immaterial in its effect upon the liability of the wrongdoer whether the water is cast directly from the upper onto the lower ground, or whether it is cast into the stream in such quantities that the stream no longer can convey it, so that it spreads over the adjoining land to its injury. A few cases have lost sight of this principle, and held that there is no liability for this flooding of the lower land. Thus, in *Wheeler v. Worcester*<sup>6</sup> it was held that a municipal corporation is not liable to the owner of land upon a stream for the overflow of his property by the stream into which it has conducted its surface drainage, if no more than the natural amount of water finds its way into the stream, although the flow is hastened and a considerable amount of soil is washed into the stream, which to some extent obstructs its flow. And in *Cumberland v. Willison*<sup>7</sup> the court held that a municipal corporation is not liable for consequential dam-

their right subject thereto, so far as the increased flow of water is caused merely by improvements. *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

<sup>3</sup>*Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88; *O'Brien v. St. Paul*, 18 Minn. 182, Gil. 163; *McBride v. Akron*, 12 Ohio C. C. 610.

<sup>4</sup>*Kemper v. Widows' Home*, 6 Ohio Dec. Reprint, 1049.

In opening and paving streets and gutters a municipality performs a governmental duty; and the fact that the waters of a brook are considerably increased thereby does not render it liable for injuries caused by the overflow of the brook. *Wilson v. Waterbury*, 73 Conn. 416, 47 Atl. 687. And in that case it was held that where a municipality, by its charter, is given power to use any water course as a sewer, and, acting under such authority, adopts a plan for a sewerage system which provides for deepening and widening the channel of a brook, its subsequent conduct in carrying the plan only partially into execution, leaving the brook in its natural

condition, does not render it liable for injury to property caused by the overflow of the brook, where its waters are not increased by the part of the plan executed.

A municipal corporation has a right to pour its sewers and drains into a water course, without being under any obligation to keep it clear to its mouth on the private property through which it flows. This right is not lost when the water is conducted through a covered passageway. *Munn v. Pittsburgh*, 40 Pa. 364.

<sup>5</sup>*Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540.

An injunction will be granted at the suit of lower riparian proprietors to restrain absolutely the proposed introduction into a stream by a municipality of an artificial supply of water to the extent of 10,000,000 gallons every twenty-four hours. *Baltimore v. Appold*, 42 Md. 442.

<sup>6</sup>10 Allen, 603.

<sup>7</sup>50 Md. 138, 33 Am. Rep. 304.

ages from the draining of surface water into a stream by the extensive grading and paving of streets in the exercise of its powers, and with no want of reasonable care and skill in making the improvements, whereby the flow is increased to the injury of proprietors below. Both decisions lose sight of the fact that surface water cannot be gathered together in a body and cast onto the property of the lower owner, and both are in conflict with that fundamental rule. The municipal corporation, in hastening the flow of the water, is bound to take notice of the condition which it will thereby create, and it must see that all structures which it places over the stream are sufficient to carry all water which will be likely to flow in the stream.<sup>8</sup> An injunction will not be granted restraining drainage trustees from constructing a steam engine for the purpose of draining a particular district into a river upon the ground that the increased body of water will injure the navigation of the river and flood the adjacent lands, where it is uncertain whether the operation of the steam engine would have that effect, the proposed engine being of a nature easily controlled, the operation of which can be stopped on its becoming apparent that it is injurious, as it will be time enough at that time to grant the injunction; although the court said that if it had appeared that an engine could hardly be used without destroying the navigation and flooding the districts, it would have held that its erection would have amounted to a beginning of the injury, and would have restrained it.<sup>9</sup> It has been already seen<sup>10</sup> that the municipality has no right to turn its sewage into a stream. But in *Grey ex rel. Simmons v. Paterson*<sup>11</sup> the court held that a municipal corporation makes neither natural, nor reasonable use of a nontidal and non-navigable river when it discharges into it by its sewerage system vastly more than the natural

<sup>8</sup>*Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703.

A city is liable for each overflow of property caused by its diverting surface water into a stream without providing a sufficiently large culvert for its escape, as for a separate trespass; and the statute of limitations begins to run at the time of each trespass, and not at the time of the act of the city in diverting the water. *Finley v. Williamsburgh*, 24 Ky. L. Rep. 1336, 71 S. W. 502.

Whether an overflow was caused partly by reason of the insufficiency of a culvert, and partly by the diversion of surface water, and the proportionate part of the damage caused by the diversion, are not proper questions for the jury, in an action to recover damages

resulting from overflow caused by the diversion of surface water into a stream by a city without providing a sufficient culvert for its escape. *Ibid.*

But in *Biltz v. Ashland*, 3 Pa. Co. Ct. 412, an injunction was refused against concentrating sewage into an insufficient culvert so as to injure the plaintiff by its overflow, as these matters belonged to the discretion of the borough, and no negligence was charged, and there was adequate remedy at law; and the culvert was made by private parties along the water course.

<sup>9</sup>*Ripon v. Hobart*, 3 Myl. & K. 169, Coop. t. Brougham, 333, 3 L. J. Ch. N. S. 145.

<sup>10</sup> § 138, *ante*.

<sup>11</sup> 58 N. J. Eq. 1, 42 Atl. 749.

drainage of riparian owners. A city may use a stream for receipt of surface drainage from its streets without being liable to a lower riparian owner, although the effect is to drive the fish from the stream.<sup>12</sup>

**208. Liability for injuries caused by inadequacy or negligent location**

**outlet.**— Two distinct classes of people may be injured by the provision of an outlet which is insufficient or negligently located: First, those whose property is situated along the course of the drain, and which is either not drained, or is made to suffer by the overflow of water onto it by the insufficiency of the outlet; and second, those whose property is located at or below the outlet, and who are injured by the casting of the contents of the drain onto their property. An owner of land within the drainage district, who has been assessed for the cost of the drain, may compel the officers, by mandamus, to alter an outlet which has proved to be insufficient to drain his property so as to afford the drainage for which he has paid.<sup>1</sup> The inadequacy of an outlet is, however, the same as inadequacy of drainage generally; and, since the public is not bound to furnish drainage for the citizens, the latter have no right of action to recover for injuries caused by the fact that their property is not adequately drained. But, in case land along the drain is flooded by the overflow of the drain because of insufficient outlet, the owner may maintain an action for damages inflicted on him thereby;<sup>2</sup> and the outlet will be regarded as insufficient if the sewer empties into a stream the water of which in times of ordinary floods is likely to flow into the sewer to the injury of property owners unless some measures are taken to prevent such injury.<sup>3</sup> The action of a local authority in the execution of its statutory power in diverting sewage from one drain or sewer into another already surcharged with sewage, whereby damage is occasioned to an individual occupier of premises, is not a mere act of omission, but constitutes the commission of a legal wrong, in respect of which the occupier may maintain an action for the damage sustained.<sup>4</sup> Constructing a sewer

<sup>12</sup>*Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995.

<sup>1</sup>*Peotone & M. Union Drainage Dist. No. 1 v. Adams*, 163 Ill. 428, 45 N. E. 266, Affirming 61 Ill. App. 435.

<sup>2</sup>*Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287; *Netzer v. Crookston*, 59 Minn. 244, 61 N. W. 21; *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779; *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680.

<sup>3</sup>*Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093.

Borough improvement commissioners are guilty of negligence in connecting a new sewer with a sewer on plaintiff's premises without placing therein a penstock, which would have prevented water backing into the plaintiff's sewer, where the previous connection with the old sewer had such a penstock. *Euck v. Williams*, 3 Hurlst. & N. 308, 27 L. J. Exch. N. S. 357, 6 Week. Rep. 622.

<sup>4</sup>*Dent v. Bournemouth*, 66 L. J. Q. B. N. S. 395.

outlet so that it will deposit the contents of the sewer where it will be a menace to the public health is a nuisance. As said in *State v. Portland*,<sup>5</sup> a municipal corporation having the power to establish public sewers, at the same time acquires the corresponding duties and obligations growing out of the exercise of the power, and must, at its peril, make the outfall of its sewers where the deposits from them will be promptly removed by the influx of the tides, so that they will not create a nuisance either to public health or the right of navigation; or it must provide for their speedy removal in some other mode. The construction of a sewer outlet in such a way as to cast the contents of the sewer onto private property is a direct trespass which will be enjoined by equity,<sup>6</sup> and will give the landowner a right to recover damages thereby inflicted on him.<sup>7</sup> And ejectment will lie against a city which takes possession of the property of a riparian owner, and constructs thereon a sewer outlet into the river, and drives and maintains piles along the water front for the purpose of constructing the sewer.<sup>8</sup> A discharge of a sewer near private property so as to diminish its value will give the owner a right of action, and the fact that he had given his permission to do certain acts will not absolve the municipality from liability if the authority given was exceeded.<sup>9</sup> If the sewer is constructed by the municipal corporation the fact that the filth is thrown into it by private individuals without authority

<sup>5</sup> 74 Me. 268, 43 Am. Rep. 586.

<sup>6</sup> *New York O. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416.

Where a municipal corporation under statutory authority changes the channel of a brook for sewer purposes, it cannot empty sewage into the old channel to the injury of the owners of land through which it runs; and they will be entitled to an injunction to restrain such action. *Woodward v. Worcester*, 121 Mass. 245.

Where a railroad is carried through a deep cut or excavation under a street, which crosses it by a bridge, the city will not be allowed to construct, and equity will restrain it from constructing, a sewer which will discharge the water of the street into the cut, under the bridge, thereby endangering the excavation wall and the railroad station supported by it; and the fact that the construction of the railroad in an excavation intercepted the natural drainage of the municipality will not alter the case, where a drain can be constructed that will not injure the railroad, though at a greater, but not unreasonable, ex-

pense. *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109.

<sup>7</sup> *Jacksonville v. Lambert*, 62 Ill. 519; *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88; *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654; *Bradt v. Albany*, 5 Hun, 591.

<sup>8</sup> *Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641.

<sup>9</sup> *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172.

A city is liable for the damages sustained by a landowner by reason of its failure to complete a sewer entirely across his premises, the owner's consent to the construction of which was given on condition, agreed to by the city, that it should be so constructed, whereby it is allowed to discharge upon and overflow such premises. *McBride v. Akron*, 12 Ohio C. C. 610.

An owner of land may enjoin a municipal corporation and highway commissioners from extending an outlet for the sewage of the municipality along a highway in a direction different from that of the natural flow, and discharging the same at a point where it will flow

will not absolve the municipality from liability.<sup>10</sup> The fact that the act of the municipality was quasi judicial will not relieve it from liability.<sup>11</sup> The liability attaches in case the sewage is turned into a water way in such a way as to destroy access to wharves and piers.<sup>12</sup>

**209. Excessive cost.**— The estimated cost of the improvement enters to some extent into the question of the adequacy of the plan adopted. If the drainage is for the improvement of the health or the enhancement of the prosperity of the inhabitants of a particular section of country, the question of its desirability will be governed to some extent by the amount which must be paid for the improvement. If the cost will be so great that the inhabitants can better afford to leave their homes and seek a more healthful location rather than pay for the drainage it can hardly be said that the scheme is practicable. Therefore, in all cases where the local needs are the determining factors in deciding whether or not the drainage should be undertaken, cost must be taken into consideration. But where the property in its unfortunate condition constitutes a public nuisance the public may require the owner to drain it and thereby abate the nuisance, although the cost is greater than the value of the property. In such case the property owner must bear the burden of the unfortunate condition of his property. Except in the latter class of cases, the state should in every instance provide that the cost must not exceed the benefit to result from the improvement, and, in case it does not do so, such condition should be implied. The question of benefit is, however, a matter resting largely in the judgment of the officers to whom it is committed, and it is a question on which persons will differ. Therefore, when the matter is committed to a local tribunal its decision will be conclusive, and the court will not hear evidence to dispute its findings.<sup>1</sup> An assess-

across his land, where the injury resulting from the noxious odors therefrom is irreparable, and its continuance will permanently injure the property and health of such owner and his family. *Dierks v. Addison Twp. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

<sup>10</sup>*Close v. Woodstock*, 23 Ont. Rep. 99.

<sup>11</sup>*Beach v. Elmira*, 22 Hun, 158, 34 N. Y. S. R. 522, 11 N. Y. Supp. 913.

<sup>12</sup>*Slright v. Kingston*, 11 Hun, 594. Appeal dismissed in 73 N. Y. 592; *Hudson River R. Co. v. Loeb*, 7 Robt. 418; *Constitution Wharf Co. v. Boston*, 156 Mass. 397, 30 N. E. 1134; *Brayton v. Fall River*, 113 Mass. 229, 18 Am. Rep. 470; *Clark v. Peckham*, 9 R. I. 455.

So, a municipal corporation is liable for damage resulting from its negligence in so diverting surface water and

constructing its sewers as to destroy a marine railway by the sediment deposited around and upon it; and such result cannot be justified by a discretionary power to construct drains. *Cahill v. Baltimore*, 93 Md. 233, 48 Atl. 705.

But the provision of the 5th Amendment to the United States Constitution, that private property shall not be taken for public use without just compensation, does not apply to the act of a municipal corporation of a state in turning the flow of surface water into a public stream beside a wharf in such a way that the adjacent water was made shallow and the wharf rendered of no value. *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672.

<sup>1</sup>A proceeding for condemnation of a right of way for a drain cannot be de-

ment for a sewer is not invalid, although the city officers have no means of ascertaining what the improvement will cost, where it does not appear that the assessment is too large, or that the authorities have acted dishonestly in the matter.<sup>2</sup> All matters which are necessary adjuncts to the improvement may be considered as part of its cost, and paid for out of the assessment raised.<sup>3</sup>

**210. To what extent must plans be formulated and published.**— Knowledge of what is to be done is a necessary ingredient in passing judgment upon the feasibility of any plan for public improvement. Therefore, it is desirable that the details of an intended improvement should, so far as possible, be worked out and stated in a formal manner before the proposition of its adoption is submitted to the voters, or to the authorities to whom the matter is committed. The taxpayer has a right to have this done in order that he may know whether to acquiesce in the proceeding, or to take the steps to contest it. Statutes authorizing drainage improvements usually require that the proceedings for the establishment of a drain shall designate the plans, route, specifications, estimates, and all other matters necessary to distinguish the particular improvement contemplated, and to give persons whose property will be taken, or who will be taxed for it, all information which they may require in forming an intelligent judgment as to what attitude to assume towards the improvement. All these preliminary matters must be sufficiently definite to enable interested persons to act intelligently upon the matter.<sup>1</sup> An indefinite

feated on the ground that the statute authorizing it is unconstitutional because the tax for the improvement is void so far as it exceeds the benefit received, where the statute expressly provides that the benefit and cost shall be ascertained before any proceedings are taken, and that, if the cost exceeds the benefit, the commissioners can proceed no further with the enterprise. *Redmon v. Chacey*, 7 N. D. 231, 73 N. W. 1081.

Evidence that collectively the lands affected by the construction of a public ditch were of no more value with than without the proposed drainage is inadmissible to sustain a remonstrance that the cost of the ditch exceeds the aggregate benefits, where the aggregate benefits to lands, the owners of which are making no objections to the assessment, exceed the cost of the drain. *Earhart v. Farmers' Orcomery*, 148 Ind. 79, 47 N. E. 226.

*Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. Supp. 774.

<sup>1</sup>*McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

A bill by a landowner to enjoin drainage commissioners from making appropriations from the general fund to construct certain subordinate ditches not necessary for the general drainage of the whole district cannot be maintained in the absence of positive allegations that such ditches are not within the original purpose for which the corporate funds may be used, so that all lands within the district shall receive their proper and equal benefits, as contemplated when the lands were classified. *McFadden v. White*, 31 Ill. App. 109.

But attorneys' fees cannot be assessed, taxed up, and collected as a part of the expenses of the location or construction of a ditch from the landowners affected in the absence of a statutory provision therefor in the law authorizing the ditch. *Kersey v. Turner*, 99 Ind. 257.

<sup>2</sup>*State, Coar, Prosecutor, v. Jersey City*, 35 N. J. L. 404; *Sheehan v. Fitch-*

preliminary order cannot be aided by plans made at the time of construction.<sup>2</sup> A substantial compliance with the requirements to set out a description of the improvement is, however, sufficient.<sup>3</sup> An assessment is not invalidated by failure to make and record plans which had no relation to the assessment.<sup>4</sup> The lands which will be affected by the drain should be described,<sup>5</sup> as well as the territory to be drained.<sup>6</sup> The plan as published will be given a reasonable interpretation to effect this purpose, and it will not be defeated by mere clerical errors which did not affect the substantial rights of the parties.<sup>7</sup>

**211. Cost must be estimated.**—One of the most important factors in the problem of the desirability of a proposed drainage improvement is a knowledge of the cost. Therefore, that item should be correctly estimated from the best possible *data* which can be obtained; and, if the statute requires a detailed itemizing of cost to be obtained before proceeding with the improvement, a failure to do so renders the proceeding illegal, and the assessment void.<sup>1</sup> A provision in a ditching law authorizing persons desiring to make application under an act for the construction of a ditch to employ an engineer to enter upon such lands, over which the proposed ditch is to run, as far as necessary to make a survey and schedule and an estimate of the cost of construction, does not require the making of such survey and estimate before the making of the application, unless the same is necessary to state the facts required to be contained therein.<sup>2</sup> A provision limiting the cost

*burg*, 131 Mass. 523; *Kneeland v. Milwaukee*, 18 Wis. 412.

An assessment for the construction of sewers and other work, including cribbing, manholes, and flush tank, is void, when the description in the resolution of intention is insufficient as to the dimensions, nature, and character of the work and the materials to be used. *MoDonnell v. Gillon*, 134 Cal. 329, 66 Pac. 314.

<sup>3</sup>*Sheehan v. Fitchburg*, 131 Mass. 523.

<sup>4</sup>*Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

An ordinance of a municipal corporation for the construction of a sewer is not rendered uncertain by reason of the caption failing to state that its purpose in part was to provide for house connections with the sewer. The sewer catch-basins, manholes, and house connections are all parts of one improvement. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

<sup>5</sup>*Kelso v. Boston*, 120 Mass. 297.

<sup>6</sup>*Bennett v. Olney*, 56 Mich. 634, 23 N. W. 449.

<sup>7</sup>*Hyde Park v. Carton*, 132 Ill. 100, 23 N. E. 590.

<sup>1</sup>*Eyermann v. Provenchere*, 15 Mo. App. 256.

The word "fall," in a clause of an ordinance specifying the location and construction of a sewer, will be construed to mean "rise," where the effect of a literal interpretation would be the construction of a sewer with the outlet higher than the starting point, and it is evident from other sections of the ordinance and from the plans and specifications that the latter word was intended. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

<sup>2</sup>*Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897.

A contract for a sewer, executed by a municipal corporation before an estimate has been made of the probable expense of the work, is invalid, so that no charge can be created against abutting property thereunder. *People ex rel. Moore v. New York*, 5 Barb. 43.

<sup>3</sup>*Slusser v. Ransom*, 39 Ind. 506.

of the improvement to the amount of the appropriation based upon the preliminary estimate applies only to improvements paid for out of the general funds, and not to those paid for out of special assessments.<sup>3</sup> A tax for a sewer is not illegal, although neither the resolution ordering the sewer, nor the one that assesses the tax, in terms names the gross amount to be paid, or the amount of tax to be assessed upon each tract of land, and the owner thereof, when the resolution assessing the tax named the street through which the sewer was to be constructed and the terminal points, and ordered that the tax be assessed and levied on each lot, part of lot, or tract of ground in the sum and to the amount shown by the plat of the city engineer, which plat showed the amount to be assessed to each square foot, the number of square feet in each tract of ground, and the total assessment for each tract of ground subject to be assessed for the sewer.<sup>4</sup>

**212. Route should be described.**— To enable those who are to be affected by the construction of a sewer, either by being assessed for benefits conferred on their property, or by having land taken for a right of way, to protect their rights intelligently, the route should be described in the preliminary specifications with sufficient accuracy to enable them to know to what extent they will be affected by it. But the route which will ultimately be adopted need not be predetermined with absolute accuracy. It is sufficient if it and the termini are approximately indicated.<sup>1</sup> A petition to establish a drain sufficiently describes it where it contains a description of the line of the drain, together with a table showing the numbers of the stations and the depth and width, so that, if the line indicated be taken to mean the center line of the strip to be taken, the description is definite and certain.<sup>2</sup> If, however, a street through which a sewer is to pass is entirely omitted from the description of the route, no valid assessment

<sup>1</sup>*Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114.

Therefore, a judgment confirming a special assessment levied upon land in a drainage district cannot be attacked in a proceeding to foreclose the lien for the unpaid assessment, upon the ground that the whole assessment exceeds the estimated cost of the work and the expense of the assessment. *Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

<sup>2</sup>*Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895.

<sup>3</sup>*Hauser v. Burbank*, 117 Mich. 463, 76 N. W. 109; *State ex rel. Utick v. Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216.

A petition to lay out a township

drain is sufficient where it gives the terminal points and the direction which it is to run, with the distances. *Clark v. Teller*, 50 Mich. 618, 16 N. W. 167.

The description of a proposed drain to commence at a specified point upon a designated water course which is to be deepened, widened, and straightened through given sections terminating at a point indicated, sufficiently complies with a statutory provision requiring a general description of the beginning, the route, and the terminus of the drain. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

<sup>4</sup>*Anketell v. Hayward*, 119 Mich. 525, 78 N. W. 557.



can be made upon the owner of property located thereon.<sup>3</sup> A petition to lay out a drain is insufficient to confer jurisdiction upon the drain commissioner where the course of the proposed drain is left to the determination of the commissioner.<sup>4</sup> An application for the establishment of a drain, which gives its dimensions and describes a line between the termini, is insufficient where it fails to state which side of the line the land should be taken, or to give any *data* from which it can be ascertained.<sup>5</sup> A proceeding to lay out a public ditch will be quashed where the venire to summon the jury failed to give the dimensions of the ditch, or to indicate the line of it with any precision.<sup>6</sup>

**213. Dimensions should be fixed.**— If the amount of the tax which will be levied on abutting property will be affected by the dimensions of the proposed improvement, they should be stated in the preliminary proceedings with sufficient accuracy to inform the persons to be affected of the character of the improvement. But if the cost is to be estimated, or the amount to be charged against the abutting property is determined, so that the size of the improvement will have no effect, then the dimensions need be stated only so far as to indicate what the improvement is to be;<sup>1</sup> but even then such facts as the depth and width and estimated capacity should be stated.<sup>2</sup> If the statute requires the dimensions of the proposed sewer to be stated in the ordinance, the common council cannot delegate the power to determine them, and an attempt to do so will render the proceeding void.<sup>3</sup> Under a charter authorizing the construction of public and district sewers, the former to be paid for by the city and the latter by special tax upon the property located in the district, the district sewers to be constructed upon recommendation of the board of public improvement,

<sup>1</sup>*Cincinnati v. Honnigfort*, 32 Ohio L. J. 32.

<sup>2</sup>*Null v. Zierle*, 52 Mich. 540, 18 N. W. 348; *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705.

A view taken by the jury to determine the necessity for a public ditch is defective where it does not point out the line of the ditch, or specify its dimensions, but refers to it merely by name. *Chapman v. Clark*, 49 Mich. 305, 13 N. W. 601.

<sup>3</sup>*Bennett v. Olney*, 56 Mich. 634, 23 N. W. 449.

<sup>4</sup>*Chapman v. Clark*, 49 Mich. 305, 13 N. W. 601.

<sup>5</sup>*Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895.

<sup>6</sup>*Milton v. Wacker*, 40 Mich. 229.

An ordinance of a municipal corporation for the construction of a sewer is

void for uncertainty where the only description as to the depth and grade is that "said sewer shall be laid at a proper depth and grade to give proper fall and drainage." *Alton v. Middleton*, 158 Ill. 442, 41 N. E. 926.

<sup>1</sup>*St. Louis use of Murphy v. Olemens*, 43 Mo. 395, Overruling *St. Louis v. Oeters*, 36 Mo. 456.

But Judge Baker held that the failure of the city council to state, either in its notice of the passage of a resolution for the construction of a sewer, or in the resolution itself the size of the proposed sewer, as required by statute, does not deprive it of jurisdiction to order the improvement, and is not a ground for enjoining the collection of the assessment therefor. *Rickcords v. Hammond*, 67 Fed. 380.

and to be of such dimensions as it may prescribe, the character of a sewer constructed as a district sewer and of the prescribed dimensions is not open to attack in collateral proceedings to enforce the special tax, on the ground that its main stem, being 8 feet wide, constitutes a public sewer.<sup>4</sup> A culvert at a point where a street crosses a stream is not a street improvement within the provisions of a charter requiring the dimensions of the improvement to be determined by the city council.<sup>5</sup>

**214. Other details to be specified.**— The materials which are to be used in the construction of the improvement should also be specified, not so much for the information of the taxpayer, as for the purpose of forming a basis upon which contracts may be let and the execution of the work made possible.<sup>1</sup> An ordinance of a municipal corporation merely providing for the construction of a sewer, without providing for its being covered so as to protect the same, and furnishing no data for an estimate of the cost of such covering, is void, and a special assessment cannot be levied under it.<sup>2</sup> But the materials to be used in the construction of the sewer need not be specified in the ordinance providing for its construction if they are sufficiently identified by reference or otherwise to make it certain what they are to be.<sup>3</sup> The character of the materials to be used must be determined by the council itself, and that question cannot be delegated to subordinate officials.<sup>4</sup> Failure to comply with statutory requirements as to the description of materials will destroy the power to assess the cost of the improvement on abutting property.<sup>5</sup>

The number and approximate location of openings into the sewer

<sup>1</sup>*Heman v. Allen*, 156 Mo. 534, 57 S. W. 559. Affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

<sup>2</sup>*Young v. Kansas*, 27 Mo. App. 101.

<sup>3</sup>An ordinance directing the construction of several sewers sufficiently conforms to a provision of the municipal charter requiring it to designate the material of which the sewers are to be constructed where it provides that the first three be made of "vitrified clay pipe," and that one of the others be a "sewer made of pipe," and that each of the remaining ones be a "pipe sewer," as it will be presumed that the council intended that they should all be of vitrified clay,—the same material as that of the first three. *St. Joseph use of Easton Nat. Bank v. Landis*, 54 Mo. App. 315.

<sup>4</sup>*Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

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<sup>5</sup>*Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536.

<sup>6</sup>*St. Joseph v. Wilshire*, 47 Mo. App. 125.

But, although an ordinance providing for the construction of a sewer improperly delegated to the city engineer power to prescribe the material out of which the manhole and catch-basins were to be made, it did not thereby deprive the contractor of the right to recover on the special tax bills the amount due for the construction of the sewer less the amount charged for the manhole and catch-basins, where such amount could be determined from the contract. *Ibid.*

<sup>7</sup>*Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

must be specified with reasonable certainty, although the exact spot where they should be placed need not be predetermined.<sup>6</sup> And, if the character of the improvement is such that manholes and catch-basins are not required, no mention need be made of them.<sup>7</sup> Where a municipality is required by its charter to designate by ordinance the size of sewers to be constructed by it, but the charter is silent as to inlets, manholes, etc., and as to the material of which they are to be constructed, it may regard these appendages to the sewer as matters of detail not necessary to be inserted in the ordinance.<sup>8</sup>

**'215. Improvement must comply with statutory requirements.**—As far as the statute prescribes the details of the work to be performed it must be followed. The legislature has the ultimate power, and when it chooses to exercise it the local authorities must follow its mandates. But the statute will receive a liberal construction to effect the intended object, and the proceedings will not be defeated upon mere technicalities. Thus, an ordinance of a municipal corporation establishing a system of drainage and sewers for the entire village is not invalid as providing for a double improvement, although such system involves the construction of sewers in different streets.<sup>1</sup> Advantage of a departure from the statutory requirements must be taken by one hav-

<sup>6</sup>*Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

An ordinance of a municipal corporation authorizing the construction of a sewer is not void for uncertainty in the location of catch-basins provided for, where they are to be located on the curb lines of the street at such points as the engineer in charge shall direct. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

The word "necessary" in an ordinance providing for the construction of a sewer "with necessary manholes and inlets for surface drainage" should be taken as a restrictive term as respects the location of the manholes, going to show where they should be constructed;—that is, they are to be where it is necessary and proper that they should be; and is sufficient to enable a civil engineer to determine where they should be located. *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92.

<sup>7</sup>*Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901.

<sup>8</sup>*St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713.

<sup>1</sup>*Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

An ordinance of a municipal corpora-

tion for the construction of a main sewer with branches is not invalid as providing for more than one improvement. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

An ordinance of a municipal corporation for the construction of a sewer is not void as providing for a double improvement because it provides for the construction of more than one sewer, one having house connection and the others not, and not coming into actual connection with each other, where they are to be made of the same material and in the same way. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

The mere fact that the city council of a municipal corporation ordered a line of pipe sewers to be laid so that the outlet should be at an intermediate point instead of at either end does not convert the line into separate lines so as to render the ordinance providing for the improvement void because creating a double improvement. *Church v. People*, 179 Ill. 205, 53 N. E. 554.

A city ordinance providing for the construction of a sewer in a street in connection with the grading and paving thereof, and for a levy of one assessment for the entire improvement, is not void as embracing more than one sepa-

ing a right to raise the question, and it is not a valid defense to a prosecution for obstructing the drain.<sup>2</sup>

**216. Failure to follow specifications.**— It is not always possible to carry out the improvement in strict accordance with the specifications which were adopted as a working plan. An immaterial departure therefrom will not destroy the right to proceed with the improvement. Thus, the supervisors, in laying out a ditch under the drainage law, have the right to make any variation from the line thereof, in their discretion, provided they do not so far depart from the line proposed in the petition as to make materially another and a different line.<sup>1</sup> The commissioners of a drainage district, under the drainage laws of Illinois, may change the plan for the drainage of such district as originally adopted, and upon which the lands in the district were classified, and may make a second levy of assessments, if necessary to carry out the plans as changed, without giving notice to the owners of such lands either of the change of the plans or of the second levy, where such change is necessary effectually to drain all the lands of the district as contemplated when such classification was made; and in such case they need not complete the work under the original plan before making the change.<sup>2</sup> There is nothing in the law forbidding the

rate and distinct improvement, but is only one of several elements which, when united, constitute a single, whole improvement. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

*Freeman v. Weeks*, 48 Mich. 255, 12 N. W. 215.

In an action for damages for obstructing a ditch by which the land of one owner is drained over that of an adjoining owner, the proceeding, under a statute by which the ditch was established, being a final proceeding in a competent court having jurisdiction over the subject-matter and the parties to the record, cannot be collaterally attacked for irregularity by one who was a party to that proceeding. *Chambers v. Kyle*, 67 Ind. 206.

*Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. W. 496; *St. Joseph use of Saxton Nat. Bank v. Landis*, 54 Mo. App. 315; *Race v. State*, 131 Ind. 393, 31 N. E. 81; *Dodge County v. Acom*, 61 Neb. 376, 45 N. W. 292; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676; *Butts v. Manoma County*, 100 Iowa, 74, 69 N. W. 284.

The owner of a city lot cannot defeat a special assessment levied on the same

by the city for the construction of a sewer in the street upon which such lot fronts, on the ground that there was a deviation in the location thereof from that provided in the ordinance authorizing such improvement, where such change does not render the sewer less beneficial to his property. *Rossiter v. Lake Forest*, 151 Ill. 489, 38 N. E. 359.

In an action for damages and an order of sale against land for a special assessment for the construction of a sewer conceded to have been located on a different line than that designated in the ordinance providing for its construction, the burden of proof is upon the municipal corporation to show that the location of the completed sewer is substantially the location established by the ordinance, and that the deviation has not operated to the injury of the owners of property against which the judgment is sought, and that the sewer as constructed is not less beneficial to such property than it would have been if located in literal compliance with the terms of the ordinance. *Church v. People*, 174 Ill. 366, 51 N. E. 747.

*Reynolds v. Milk Grove Special Drainage Dist.*, 134 Ill. 268, 25 N. E. 516, Affirming 34 Ill. App. 302.

change, and the drainage of the lands would be greatly embarrassed if there were no power to correct mistakes. But there is no right to make such a departure as to constitute the improvement a different one from that which was described in the original plan. Thus, a sewer cannot be laid in another street from that described.<sup>3</sup> Nor can the route be changed so as to pass through property not originally mentioned.<sup>4</sup> And, after the damages have been assessed for the land to be taken, no departure can be made from the route paid for.<sup>5</sup> Persons interested in the improvement may, however, estop themselves from taking advantage of an illegal departure from the route chosen. It is no objection to a proceeding to establish a drain that it extends beyond the line of the lands described in the original application, where the plaintiff's lands are not injured thereby, nor his taxes increased by the extension, which is paid for by the owners whose lands it crosses.<sup>6</sup> A landowner is not entitled to equitable relief from a change in the line of a ditch affecting his lands, and for the construction of which a share is allotted thereto, where the change is not on his own lands, and in no way affects the drainage thereof.<sup>7</sup>

The failure of the one who has contracted to perform the work to comply with his contract is usually to be taken advantage of by the public authorities with whom the contract is made, and the taxpayer cannot escape liability for his assessment by the fact that the improvement was not completed in time, or does not fully comply with the requirements of the specification.<sup>8</sup> But, in case the payment is to be made directly to the contractor by the taxpayer, the contract may provide that, in case the contract is not complied with, the tax bill-

<sup>3</sup>*Re Drake*, 69 Hun, 95, 23 N. Y. Supp. 264.

<sup>4</sup>A municipal lien for the construction of a sewer cannot stand where the property abuts on the sewer as constructed, but not on the route as designated in the authorizing ordinance. *Scranton City v. Kingsbury*, 4 Pa. Dist. R. 555.

<sup>5</sup>*Rutledge v. Drainage Dist. No. 6*, 16 Ill. App. 655.

<sup>6</sup>*Davison v. Otis*, 24 Mich. 23.

One who knows of the proceedings to relocate a ditch, and takes a contract to dig it, and does dig part of it, is estopped from thereafter attacking the proceedings of the drain commissioner. *People ex rel. Roediger v. Drain Commissioners*, 40 Mich. 745.

<sup>7</sup>*Cooper v. Shaw*, 148 Ind. 313, 47 N. E. 679; *Roosevelt Hospital v. New York*, 84 N. Y. 108, Affirming 18 Hun, 582.

<sup>8</sup>*Farrell v. Kingessing & T. Meadow Co.* 2 Walk. (Pa.) 502.

The misconduct of a commissioner appointed by the court to construct a public ditch in failing to have the work performed in accordance with the plan and specifications does not affect the order of the court establishing the ditch and requiring its construction, so as to defeat the lien of an assessment on lands therefor, since the power of that court still remains to cause the work to be completed in accordance with the spirit and intention of the order made in the first instance. *Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

It is no defense to an action to enforce the collection of an assessment for the construction of a public ditch that the work was not completed or that it had not been or would not be done according to contract, where the law under which the ditch was established au-

should not be enforced, and then the contractor can have no redress upon the taxpayer in case he fails to comply with his contract.<sup>9</sup>

**216a. Change in materials or details of work.**—A municipal corporation has the power to make such minor changes in the construction of a sewer as are within the general scope of the original plan and necessary to render it at all effective, although not provided for in the ordinance under which the improvement is constructed. An iron door opening outward to permit the escape of sewage into the river, but closing in case of a flood so as to prevent backwater from getting into the sewer, is included within this category.<sup>1</sup> But no change can be made in carrying out the plan of the work which will make it in fact a different improvement from that specified;<sup>2</sup> nor can additional work be done not contemplated in the original ordinance.<sup>3</sup> If it is found nec-

thorizes the drainage commissioner to exercise a reasonable discretion in levying assessments to secure in advance money to pay for work in progress, and gives landowners adequate remedy to compel a performance of the work in accordance with the specifications. *Racer v. State*, 131 Ind. 393, 31 N. E. 81.

The acceptance of the work upon a sewer by the city council is conclusive in a proceeding for enforcing assessments therefor as to the necessity of the work and the manner of doing it; and a defense that the work was not done in accordance with the specifications cannot be interposed. *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106; *Allen County v. Silvers*, 22 Ind. 491.

So, the remedy where a city is about to pay contractors for sewer work not performed according to the contract is not to enjoin the collector from selling land for the payment of the assessment, but to ask that the city be restrained from thus improperly paying out the fund. *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171.

\*Where a contract for the construction of a sewer was forfeited by failure of the contractor to complete the work within the time stipulated therein, the tax bills issued in payment of the work were void, and were not validated by an ordinance extending the time to do the work, made after the forfeiture. *Neill v. Gates*, 152 Mo. 535, 54 S. W. 460.

The failure to construct a sewer within the time specified in the contract is not excused, so as to entitle the contractor to collect the special tax bills, by the fact that the delay was caused by an injunction, where it was sued out by a third person, and was not based on

the illegality of the work. *Whittemore v. Stills*, 76 Mo. App. 248.

But a contractor is not prevented from collecting the special tax bills for the construction of a sewer by the fact that, by reason of an injunction issued against the work, he failed to complete it within the time specified in the ordinance, where the ordinance referred to the plans and specifications as a part thereof, in which it was provided that the contractor should be entitled to additional time equal to the delay caused by a suspension of the work from any cause. *Ibid.*

<sup>1</sup>*People ex rel. McCornack v. McWeithy*, 177 Ill. 334, 52 N. E. 479.

An order to lay a sewer of 15 and 12 inch pipe, located as shown on a plan on file, is sufficiently complied with to uphold an assessment if the plan shows that a part of the pipe is to be 24 inch, which size is used where called for by the plan. *Bowditch v. Superintendent of Streets*, 168 Mass. 239, 46 N. E. 1026.

<sup>2</sup>*State, Hoboken, Prosecutor, v. Chamberlain*, 37 N. J. L. 51; *Columbus v. Storey*, 35 Ind. 97.

An assessment for the construction of a sewer system will not be rendered void by the fact that the sewer is not laid under two streets comprised in the system because they are not graded so as to be ready for a sewer, where the sewers to be laid in them are only laterals draining these streets alone, so that the whole benefit of the system would accrue to the owners of the property assessed, whether the sewers were constructed in such streets or not. *Werrell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

<sup>3</sup>The cost of extending the point of

essary to construct new work, instead of using old as was contemplated, such change may be made.<sup>4</sup> So, the grade and materials and size of the improvement may be changed as the progress shows it to be necessary, without destroying the right to proceed.<sup>5</sup> If the remedy for a departure from the plans is specified by the statute, that remedy must be followed, and there will be no right to claim relief from the assessment, or to enjoin the completion of the improvement. Thus, if the taxpayer is given a remedy by application to the court having the work in charge, he cannot permit the work to become completed and then object to paying his assessment.<sup>6</sup> So, it is no defense

discharge of a sewer out to the middle of a river by means of an iron pipe is not properly chargeable to the assessment fund for the construction of the sewer, under an ordinance which does not provide for such extension. *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479.

A municipal corporation has no power to construct extra sewers and additional catch-basins not provided for in the ordinance under which a sewer is constructed, although such changes make the sewer more beneficial than the one provided for; nor is the assessment fund collected for such improvement chargeable for their cost. *Ibid.*

The drainage commissioners of a district organized under the drainage laws of Illinois have no power to contract with an individual for the removal of his dam across a creek to afford better drainage facilities for the district, or to assess the lands of the district to pay the consideration agreed by them to be paid such individual, where such improvement was not described in the report and accompanying plans and profiles filed by them when the district was organized, and they did not, prior to the making of such contract, file a report recommending such improvement, so as to afford the owners of lands in the district an opportunity to be heard thereon. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170, Affirming 42 Ill. App. 79.

<sup>4</sup>*State, Piard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

<sup>5</sup>Sewer assessments in Jersey city, levied for a system reported by the water commissioners and adopted by the common council, providing for main sewers laid on an incline due to the difference between high and low water, connected with a canal into which water is admitted by automatic tide gates

for flushing them at intervals, and discharging into the river, the plans for which comprise many details relating to laterals, and prescribing form, materials, size, estimated cost, etc., will not be avoided because the main sewer was built before the canal (the common council being entitled to designate the time of building), or because alterations were made in the grade, form, dimensions, and materials, and allowances were made to contractors for extra work beyond the specifications; or because the sewer assessed for connect- with a sewer upon property already assessed and paid for; or because laterals were added not included in plan; or because of faulty, mistaken, or fraudulent construction by the contractor; or because the sewer was built through private property; or because it will not answer its expected purpose; or because of errors or omissions in the assessment roll: for the reason, that the statute empowers the commissioners to construct the canal, locks, sewers, and drains as planned, and to make all necessary or convenient changes during the progress of the work; and they also have the power to correct errors and omissions from the assessment roll, and to make an entirely new one if necessary. *State, Vanderbeck, Prosecutor, v. Jersey City*, 29 N. J. L. 441; *State, Piard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

<sup>6</sup>*Shrack v. Covault*, 144 Ind. 260, 43 N. E. 229; *Indianapolis & O. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316.

The question whether the commissioners of a drainage district, organized under the farm drainage act of Illinois, may lay tile deeper than proposed by the engineer's plans without entering a resolution to that effect of record cannot be raised on appeal by a landowner

to the collection of a drainage assessment that the ditch was being constructed contrary to the plans and specifications, and that the same would not be completed in accordance therewith, where the landowner has a remedy for such divergence by direct proceedings against the commissioners in the court having the work in charge.<sup>7</sup> It is no ground for the issuing of a writ of injunction restraining the collection of an assessment on an owner's land for the construction of a drain that the drain was not constructed as laid out and established, where the duty of determining that question is by law expressly devolved upon the board of commissioners, whose decision cannot be collaterally attacked solely upon that ground.<sup>8</sup> Damages for alleged failure to complete the improvement according to the specifications are not proper subjects, either of set-off or counterclaim.<sup>9</sup> A drainage commissioner is liable on his bond, given for the faithful discharge of his duties in constructing a public ditch, for damages resulting from an unauthorized deviation by him from the plans and specifications according to which the work was ordered by the court to be constructed, the measure of which is the amount necessary to complete the ditch in the manner ordered.<sup>10</sup>

### VIII. RIGHT OF WAY.

**217. Use of street for drain.**— Drainage being necessary for the safety of a highway, and being so closely connected with the purpose for which highways are opened, drains and sewers may be placed in and under them without imposing an additional servitude on the fee, or making an additional compensation to the abutting owner.<sup>1</sup> The

from an order of court confirming a special assessment upon his land. The only question that can be raised in such case is expressly declared by such act to be whether or not such tax is in excess of the benefits to accrue. *Sisson v. Drainage Dist. No. 1*, 163 Ill. 295, 45 N. E. 215.

<sup>7</sup>*Stafford v. State*, 12 Ind. App. 540, 40 N. E. 701; *Indianapolis & C. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316.

<sup>8</sup>*Munsey v. Joest*, 74 Ind. 409; *Wilson v. State*, 9 Ind. App. 696, 36 N. E. 546; *Lance v. State*, 9 Ind. App. 698, 36 N. E. 547.

<sup>9</sup>*Larerty v. State*, 100 Ind. 217, 9 N. E. 774.

<sup>10</sup>*Smith v. State*, 117 Ind. 167, 19 N. E. 744.

<sup>1</sup>*Re Yonkers*, 117 N. Y. 564, 23 N. E.

661; *Malone v. Toledo*, 28 Ohio St. 643; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Cone v. Hartford*, 28 Conn. 363; *Kelsey v. King*, 32 Barb. 410, Affirmed in 33 How. Pr. 39; *Theobald v. Louisville, N. O. & T. R. Co.*, 66 Miss. 279, 4 L. R. A. 735, 14 Am. St. Rep. 564, 6 So. 230.

It is the settled policy of the state of Michigan to permit the use of highways for drainage purposes; and it is within the power of the legislature to permit this, and to authorize the laying of drains in highways by other officers than those having the highways in charge. *Kiley v. Bond*, 114 Mich. 447, 72 N. W. 253.

Where it is clearly shown that a sewer, when constructed, will not interfere with the use of a highway along which it is to be built, and that, during



construction by the state of a metropolitan system of sewers under a highway in a town does not create an additional servitude for which damages can be claimed by the owner of the fee.<sup>2</sup> Even highways belonging to turnpike corporations may be used, without the consent of such corporations, for drainage purposes;<sup>3</sup> and this rule applies to highways in townships, as well as to city streets.<sup>4</sup> So, a private alleyway laid out for the common use of certain city lots must be supposed to be laid out and granted for the ordinary uses of a city alley, such as a place for sewer, water, and gas pipes.<sup>5</sup> It matters not whether title to the street was obtained by dedication or by condemnation proceedings.<sup>6</sup> But, in case the public has not acquired the right to use the street, the owner of the land may object to the placing of a sewer there. Therefore, an abutting property owner may recover damages consequential on the construction of a sewer in a platted, but unopened, street.<sup>7</sup> Even when the amount awarded for the highway

its construction, such use will not be seriously interrupted, it is not necessary to show that the new use is superior to the one to which the property is already appropriated, as required by the California statutes as a condition precedent to the right to take property for a public use, where already appropriated to some other public use. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

An injunction will not be granted to restrain the construction of a sewer under a sidewalk in front of an owner's property on the street, as such owner has no rights in the street which are not subject to the city's prior right to the use thereof for such improvements as may be necessary for the public good. His remedy is by a suit for damages. *Re Pavement*, 5 Ohio S. & C. P. Dec. 573.

<sup>2</sup>*Lincoln v. Com.* 164 Mass. 1, 41 N. E. 112.

<sup>3</sup>*Providence & A. Turnp. & P. Road Co. v. Flanagan*, 2 Lack. L. News, 101.

<sup>4</sup>*Boston v. Richardson*, 13 Allen, 146.

<sup>5</sup>*Foran v. McIntyre*, 26 Pittsb. L. J. N. S. 468.

<sup>6</sup>*Stoudinger v. Newark*, 28 N. J. Eq. 187; *Warren v. Grand Haven*, 30 Mich. 24.

Equity will not restrain the construction of a sewer in a street dedicated but not accepted as a highway, when the complainant will have undisturbed use of the 19-foot width of his half of the street, and can suffer but little inconvenience by the disturbance thereby of his easement in the other half. *O'Rourke v. Orange*, 51 N. J. Eq. 561, 26 Atl. 858.

But the New York court of appeals held that a dedication of a piece of land in a village or city to the use of the public for a street or highway does not authorize the use of the land for the construction of a sewer. *Kelsey v. King*, 33 How. Pr. 39.

Although the owner in fee of land dedicated to public use as a highway is entitled to only nominal damages for the additional burden upon the fee by reason of placing a sewer in the street. *Re Wells Avenue*, 22 N. Y. S. R. 648, 4 N. Y. Supp. 301.

*Re Spring Street Sewer*, 5 Pa. Dist. R. 373.

But assessments upon property abutting on the street used as a public highway, but owned by a private corporation at the time of the construction of a sewer therein, but subsequently acquired by the city in condemnation proceedings before the assessing ordinance, are not invalid, where no objection was made by such corporation to the construction thereof. *Cincinnati v. Honningfort*, 1 Ohio S. & C. P. Dec. 563.

So, where, at the time of the construction of a sewer in a street, it has been opened and graded by the adjoining owners, and used by all who wish to do so, and the municipality has constructed a dock at the foot of it, the assessment will not be set aside, although it has not been opened by legal proceedings, especially where it is legally opened before proceedings are taken to set aside the assessment, and the abutting owner makes no objection to the work during its progress. *Re McGowan*, 18 Hun, 434.

in condemnation proceedings has not been paid, and the owner has brought ejectment to recover possession of the land, equity will enjoin the owner, on terms of payment, from depriving the public of the use of the land for a sewer.<sup>8</sup> The fact that the abutting owner may object to the sewer will give the taxpayer a right to object to paying for it until the right to construct it has been acquired. But in an action to enforce the payment of an assessment on lands for the construction of a sewer by a municipal corporation, the question as to whether, at the time of the passage of the ordinance and the letting of the contract for its construction, the municipal corporation had such ownership or control of the street as properly authorized it to construct the sewer therein, is incompetent, where the statute authorizing municipal corporations to construct sewers, etc., provides that, on the trial of cases like this, "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council."<sup>9</sup> Equity will not forbid a municipal corporation to continue by the construction of a sewer the improvement of a highway which it has appropriated, at great expense, on private land without hindrance by the owner, who is shown to be guilty of laches.<sup>10</sup> Water may be turned into the sewers located in a street so long as their capacity is not exceeded, regardless of its source.<sup>11</sup> But the highway cannot be used for a purpose which is to be of no benefit to the municipality itself or its inhabitants. Therefore, a street in one municipality cannot be used for a sewer for the benefit of the inhabitants of another municipality, which in no way benefits the abutting owners, without making compensation to them.<sup>12</sup> The owners of the fee of country highways are not, however, subject to the burden of permitting drains to be placed in them for the conveyance of sewage. Whatever drains are placed there must be necessary for the disposition of water flowing on the highway, or the drainage of which is necessary to render the highway safe. The legislature may, however, delegate power to municipal corporations to make use of highways for the purpose of drainage, although

<sup>8</sup>*Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97.

<sup>9</sup>*McGill v. Bruner*, 65 Ind. 421.

<sup>10</sup>*Traphagen v. Jersey City*, 29 N. J. Eq. 206.

<sup>11</sup>*Stoudinger v. Newark*, 28 N. J. Eq. 446.

<sup>12</sup>*Van Brunt v. Flatbush*, 128 N. Y. 50, 27 N. E. 973, Reversing 59 Hun, 192, 13 N. Y. Supp. 545.

Where abutting owners own the fee of the land under a turnpike road, the

additional easement of a sewer thereunder, not for the benefit of the road, but for the purposes of city infirmity buildings, cannot be imposed by the consent of the turnpike company without the consent of the owners of the fee, and the laying of the sewer will be enjoined until the city obtains their consent, or appropriates the right to lay down a sewer by condemnation proceedings. *Cilley v. Cincinnati*, 7 Ohio Dec. Reprint,

527.

the same are outside the corporate limits.<sup>13</sup> The use to which the highway is put in such cases is, however, an additional servitude for which compensation must be made. Drains cannot be constructed along a public street so as to hinder the public use of it as a street, or constitute a nuisance to abutting owners.<sup>14</sup> Therefore, a municipal corporation which attempts to carry a drainage ditch across a highway must bridge it in such a way as to render the highway safe for ordinary travel.<sup>15</sup> The street cannot be converted into a mere conduit for water taken out of its ordinary course where such use is not necessary to the improvement of the street, and is an injury to private property.<sup>16</sup> The discretion as to how far the street shall be used for the purpose of drains and sewers rests with the corporate authorities.<sup>17</sup> A municipal corporation will not be enjoined from constructing a drain along a public street on the ground that lots abutting thereon will suffer damages by overflow, where it is not attempting to collect the water in one channel and cast it upon such lots in a body, but the damages, if any, will be merely consequential damages resulting from a careful and skilful performance of the work.<sup>18</sup> If special authority is needed to enable a municipal corporation to construct sewers in its streets such power is conferred by a statute authorizing it to regulate, grade, and otherwise improve it.<sup>19</sup> After

<sup>13</sup>*Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

An ordinance of a municipal corporation providing for the construction of a sewer with an outlet over a highway outside the corporate limits is not invalid because such city had not, prior to the passage of the ordinance, acquired the right to occupy and use such highway, where the statute authorizing the making of such improvements by municipal corporations does not so require. *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939.

The deepening and widening of a drain within the limits of a highway will not be enjoined where sufficient room will be left for public travel, and there is nothing to indicate that it cannot be made safe by the erection of fences and barriers. *Kiley v. Bond*, 114 Mich. 447, 72 N. E. 253.

<sup>14</sup>*Richardson v. Boston*, 19 How. 263, 15 L. ed. 639.

<sup>15</sup>*Odon v. Dobbs*, 25 Ind. App. 522, 58 N. E. 562.

<sup>16</sup>*Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615.

<sup>17</sup>*Daniels v. Denver*, 2 Colo. 669.

<sup>18</sup>*Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300.

<sup>19</sup>*Re Leake & Watts Orphan Home*, 92 N. Y. 116; *Cone v. Hartford*, 28 Conn. 363.

A city incorporated under a special charter, but which adopted an article of the general law in relation to cities, villages, and towns, has the power, under such article, to construct a sewer in a street, and to levy a special assessment for the cost thereof upon the property benefited, without regard to its powers in that respect as conferred by its special charter. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

Under a statute providing that the mayor and aldermen may lay off, make, and maintain all such drains or common sewers as they shall adjudge to be necessary through the land of any persons or corporations, they may construct a sewer in a public street. *Carr v. Doolley*, 122 Mass. 255.

Under a clause in its charter authorizing a city to construct sewers along its streets, etc., and to assess the cost of such construction upon the lands of the abutting owners, an assessment for a sewer in a street belonging to a turnpike company is valid and enforceable where such turnpike is within the corporate limits, and therefore is under the

a highway has been laid out and accepted, a sewer can be constructed in it without further notice or proceedings, although the highway itself has not been constructed.<sup>20</sup> A statute providing that, whenever a municipality shall lay out a sewer in whole or in part through or across the land of individuals, it shall cause to be appraised and paid to the owners of such land the damages thereto, and providing for the form of the proceedings to be had for such purpose, does not refer or apply to sewers constructed in public highways.<sup>21</sup>

**217a. For private drain.**— Where a municipal corporation owns the fee of its streets it may permit the placing of private drains in them when such use will be conducive to the public welfare. As said in *Boyden v. Walkley*,<sup>1</sup> a municipal corporation having no sewer system of its own may grant to a citizen, under proper circumstances and restrictions, the right to construct a private sewer at his own expense in the public streets, and he is entitled to use it without interference from others, except as he consents thereto.<sup>2</sup> But when the fee of the highway is in the abutting owner the public officers have no right to grant authority to place private drains therein against the will of such owner.<sup>3</sup> But a private individual cannot place a drain in a street without permission from the proper authorities;<sup>4</sup> unless the statute provides otherwise, however, the permission may be granted, not only by ordinance, but by private contract.<sup>5</sup> Since a

control of the city, and is within the taxing district designated by the ordinance for such sewer, and the turnpike company is not complaining, but consented to such construction. *Lewis v. Schmidt*, 19 Ky. L. Rep. 1315, 43 S. W. 433.

<sup>20</sup>*Lawrence v. Nahant*, 136 Mass. 479.

<sup>21</sup>*Cone v. Hartford*, 28 Conn. 363.

<sup>1</sup>113 Mich. 609, 71 N. W. 1099.

<sup>2</sup>*Wood v. McGrath*, 150 Pa. 451, 16 L. R. A. 715, 24 Atl. 682; *Kosmak v. New York*, 117 N. Y. 367, 22 N. E. 945; *McElhone v. McManes*, 118 Pa. 609, 12 Atl. 564.

Under a statute conferring upon the commissioners of highways the care and control of all highways in their respective towns, they have the power, by implication, to grant consent for the construction of a drain or sewer in a highway where the same will be of benefit thereto. *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939.

But in *Hutchinson v. State*, 39 N. J. Eq. 572, it is held that authority to construct sewers whenever the public good requires it does not give the common

council power to permit the construction of a private sewer along a public street.

<sup>3</sup>*Murray v. Gibson*, 21 Ill. App. 488;

*Johnson v. Rea*, 12 Ill. App. 331.

<sup>4</sup>*State, Hunt, Prosecutor, v. Lambertville*, 45 N. J. L. 279.

The obstruction of a highway by a drainage ditch dug by an abutting owner is, at common law, not only unlawful, but a nuisance. *Nelson v. Fehd*, 104 Ill. App. 114.

Until the contrary appears, an action may be prosecuted by a municipality for special injury as proprietor of a certain public road, against a railroad company for constructing drains in connection with its railway so negligently and unskillfully that large sums were necessarily expended in repairing the road in consequence thereof; for although, as a municipality, it was not a proprietor of the road, yet it might have purchased the same from a joint-stock company or otherwise. *Sarnia v. Great Western R. Co.*, 17 U. C. Q. B. 65.

<sup>5</sup>*Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227.

The rights of the owner of a private

right to maintain a drain in a street is the subject of grant, it may be acquired by prescription.<sup>6</sup> As has already appeared, an abutting owner has a right to make use of highway ditches so far as they are in the course of drainage and no injury is thereby done to the public interests.<sup>7</sup> Unless there is something to give the contract a more permanent character the right is a mere license which is revocable at pleasure.<sup>8</sup> When the sewer has been constructed at great expense the licensee will have a vested right to use it which cannot be interfered with unnecessarily;<sup>9</sup> but the license must be revoked when it appears to be detrimental to the public interests.<sup>10</sup> A license from the public authorities confers no rights as against the owner of the fee<sup>11</sup>

sewer are not lost because of a clerical error in the resolution of the common council authorizing him to construct the sewer, whereby its location is designated as on the westerly side of the street instead of on the easterly side, where it was built. *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099.

A municipal corporation does not contract with parties constructing a drain in a public alley by the adoption of a motion therefor uncontractual in purpose and simply permissive in terms. *Cumberland County v. Vale*, 18 Pa. Super. Ct. 501.

\*One who for twenty years has used a ditch crossing a highway, with the acquiescence of the township authorities, acquires a prescriptive right to maintain it. *Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612.

But in California it is held that an adjoining owner cannot acquire a prescriptive right to have and maintain a ditch constituting an artificial water course within the limits of a public highway so as to entitle him to an injunction restraining the filling up of the same by the board of supervisors so as to stop the flow of water therein, whereby his lands will be overflowed. *Grimes v. Linscott* (Cal.) 40 Pac. 421.

<sup>1</sup> § 193a, ante.

<sup>2</sup>*Ainley v. Hackensack Improvement Commission*, 64 N. J. L. 504, 45 Atl. 807; *Philadelphia use of Yost v. Odd Fellows Hall Asso.* 168 Pa. 105, 31 Atl. 917, Affirming 4 Pa. Dist. R. 3.

A landowner cannot maintain an action for damages against highway commissioners for their act in filling up a ditch along a highway by reason of which the water backed up and overflowed his land, where such ditch was dug by such landowner to drain a pond upon his land upon the license or per-

mission of one or more of the highway commissioners, and the filling up of the same did not increase the overflow more than it had been in a state of nature. *Johnson v. Rea*, 12 Ill. App. 331.

Permission given without consideration by a municipality to a lot owner to construct a drainpipe under a city street solely for his benefit for the purpose of draining his lot, which is subject to overflows from surface water constituting a public nuisance at times, and not in pursuance of any general plan or system of public drainage, nor under circumstances giving a lot owner any right to assume that it was intended as a permanent improvement, is a mere license which is revocable where the removal of the drain becomes necessary in the construction of a general and public system of sewerage; and no action lies against the city, either by the lot owner, or his tenants, for damages resulting from the accumulation of water upon the lot due to the removal thereof. *Ivey Bros. v. Macon*, 102 Ga. 141, 29 S. E. 151.

Where a turnpike has been located on a public highway the corporation has the same right to interfere or obstruct a private drain constructed therein by an abutting owner that the supervisors have when constructing a gutter for the drainage of the road. *Wenger v. Rohrer*, 3 Pa. Super. Ct. 596.

<sup>8</sup>*Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227; *De Grilleau v. Frauley*, 48 La. Ann. 184, 19 So. 151.

<sup>10</sup>*Cumberland County v. Vale*, 18 Pa. Super. Ct. 501.

<sup>11</sup>*Glasby v. Morris*, 18 N. J. Eq. 72.

Injunction will not lie against the construction and use of a private drain in a highway under license of the municipal corporation unless plaintiff has es-

The mere placing of a sewer in the street does not *per se* effect a dedication of it to public use.<sup>12</sup> Injunction, and not an action at law for damages, is the proper remedy for needless interference with the drain by the public authorities;<sup>13</sup> and the owner is entitled to injunctive relief against private individuals who attempt to make connections with the drain without permission, to the injury of the interests of the owner.<sup>14</sup>

**217b. Injury to abutting owners.**— The owners of land abutting on a highway have a right to access therefrom to their lands, and are entitled to object in case a drain is constructed in such a way as to interfere with such right of access. In *Adams v. Richardson*<sup>1</sup> it was held that, under the common law, a highway surveyor is liable, in an action of trespass, for damages caused to an adjoining owner by the flowing of a ditch in front of his dwelling house. Highway commissioners will be enjoined from causing a ditch to be dug on the side of the highway in front of the land of the complainant at a depth of from two to five feet, and of an average width of six feet, for the purpose of draining a swale, where the real motive is to benefit other lands, and it does not appear that the highway would be improved any, and the work would tend to set back water onto the lands of the complainant.<sup>2</sup> But the public needs must be considered; and, if a ditch is necessary for the drainage of a highway, and the abutting owner can, at small expense, construct a bridge to preserve his access, he may be required to do so, and cannot insist that it shall be done by the highway commissioners.<sup>3</sup> The distinction seems to be that the public authorities cannot make an unreasonable use of the highway in such a way as to destroy the valuable rights of the landowner. But a mere drainage ditch constructed along the side of the street in such a way that it forms no serious obstruction to the access, and which can be easily covered over at slight expense, is not such an interference with the rights of the owner as he has a right to complain of. If the statute provides a method by which the rights of the

established his right to relief in an action at law, or it is clear that a nuisance is created. *Wood v. McGrath*, 150 Pa. 451, 16 L. R. A. 715, 24 Atl. 682.

<sup>1</sup>*Oak Cliff Sewerage Co. v. Marsalis* (Tex. Civ. App.) 69 S. W. 176.

<sup>2</sup>*Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227.

<sup>3</sup>*Boyd v. Walkley*, 113 Mich. 609, 71 N. W. 1099.

<sup>4</sup>43 N. H. 212.

Under Me. Rev. Stat. chap. 18, § 67, the municipality was held liable in an action of *assumpsit* for the value of

alterations made, by direction of the selectmen, to a ditch constructed by surveyors of highways "by the side of a way so as to incommode" a person's house or other building. *Getchell v. Oakland*, 89 Me. 426, 36 Atl. 627.

<sup>1</sup>*Conrad v. Smith*, 32 Mich. 429.

<sup>2</sup>The landowner has no right to fill up the ditch, and is liable for such wilful obstruction of it. His remedy is the construction of a bridge, or passageway over it. *Eagle Twp. Highway Comrs. v. Ely*, 54 Mich. 173, 19 N. W. 940; *McGregor v. Boyle*, 34 Iowa, 268.

abutting owner can be protected, that method must be followed, so that, if he is entitled to complain to the selectmen in case the highway surveyor lays a ditch in front of his property, no action will lie against the surveyor who caused the injury;<sup>4</sup> and, in case the selectmen approve the action of the surveyor, recovery cannot be had against the surveyor upon the ground that he acted wantonly and with the intent of injuring the plaintiff, and that his acts were not necessary to the repair of the highway.<sup>5</sup> Eminent domain proceedings are not proper for the assessment of damages to an abutting owner by the laying of drains in the street.<sup>6</sup>

**218. Right to place drain on private property.**—Although water may be permitted to run along its natural channels, and the flow in its natural course may be hastened, there is no right to impose an additional burden on the servient estate by entering upon it to increase the capacity of the drainage facilities, or to construct artificial structures there for drainage purposes. Such act is a trespass which may be resisted by the landowner, and for that purpose all the machinery of the law is at his service.<sup>1</sup> But, as has already been seen,<sup>2</sup> drainage is a purpose for which it is permissible to exercise the power of eminent domain, and, therefore, the legislature may authorize the laying of drains and sewers through private property upon taking the proper steps to acquire the right so to do.<sup>3</sup> And the authority of a municipal corporation to acquire a right of way over private property may be implied from power expressly conferred.<sup>4</sup>

<sup>1</sup>*Elder v. Bemis*, 2 Met. 599; *Benjamin v. Wheeler*, 15 Gray, 486.

<sup>2</sup>*Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486.

<sup>3</sup>*Re Yonkers*, 117 N. Y. 564, 23 N. E. 661.

<sup>4</sup>*Re Rhineland*, 68 N. Y. 105; *Ward v. Peck*, 49 N. J. L. 42, 6 Atl. 805.

Without founding it on a law for the ascertainment and prepayment of damages to the owner of invaded property, a municipal corporation has no power to provide that it shall be lawful for the street committee, or its agent, to enter upon any lot, etc., of the borough, for the purpose of cutting or opening drains and ditches and of keeping them in repair. *Strasburg v. Bachman*, 21 W. N. C. 462.

<sup>5</sup> § 179, *ante*.

<sup>6</sup>*Hildreth v. Lowell*, 11 Gray, 345.

When a highway is constructed, a culvert may be put in notwithstanding any injury it may cause an adjoining owner by turning water upon his lands, pro-

vided he be compensated therefor. *Churchill v. Beeche*, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

<sup>4</sup> A municipal corporation having exclusive jurisdiction over all highways within its limits, and general power to construct sewers and drains, has, as an implied power, the right to acquire by lawful means private property necessary to be crossed in order to complete a sewer, especially to obtain an outlet therefor, and to pay for the same at the public expense, where there is no legislative grant of the power to acquire such property by special assessment. *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

A municipal corporation has authority, if necessary for the public health, to procure the right of way for the construction of a ditch to alter the course of a stream flowing through its limits, and may reimburse a private citizen who furnishes the money with which to pay for the land. But the mere determina-

Authority to construct a drain is not exhausted by an attempted exercise; but, if the drain as constructed proves inadequate, another entry may be made to enlarge it.<sup>5</sup> So, an existing drain may be put to additional uses if no additional injury is caused to the abutting owner.<sup>6</sup> The rule which prevents the construction of a drain over private property without authority extends to property which has been acquired for, and devoted to, public use.<sup>7</sup> So, the ditch may be extended upon or across the right of way of a railroad company;<sup>8</sup> but the company

tion to procure the right of way does not authorize the private citizen to go on and construct the ditch so as to require the municipality to reimburse him for the expenditure. *Stewart v. Council Bluffs*, 50 Iowa, 668.

But a municipal corporation has no power, in the absence of express statutory authority, to condemn and appropriate private property for the construction of a sewer; and that power will not be implied in the grant of authority to enforce ordinances to construct sewers and provide for the payment of the cost of the same. *Allen v. Jones*, 47 Ind. 438.

The statutory power conferred on a municipal corporation "to provide on what terms real estate in such city may be drained by means of surface or under drains over and across other real estate therein" does not authorize the condemnation and appropriation of private property for the construction of public sewers. *Ibid.*

*McLrose v. Hiland*, 163 Mass. 303, 39 N. E. 1031.

*Sturm v. Kelly*, 120 Mich. 685, 79 N. W. 930.

A lot owner who drains his property by a private drain leading under an adjoining street has no right of action against the municipal corporation for opening a connection with the drain to conduct surface water, although there may be a right of action in case the municipality obstructs the drain. *Emery v. Lowell*, 104 Mass. 13.

Commissioners have no jurisdiction to lay out a drainage ditch over a ditch already cut by an adjoining proprietor, and assess damages for the right of way, as the Oregon statute providing therefor contemplates such action only for the construction of a new ditch where there is none; but in such case the owner is to be compensated, under another provision of such statute giving compensation, by way of contribution, for the tapping of his ditch, in proportion to the mutual benefits derived by others

from its use in draining their lands. *Seely v. Sebastian*, 4 Or. 25.

Where a municipal corporation has taken property in fee for sewer purposes, its former owner cannot enjoin the municipality from contracting to permit the sewage from other cities to be turned into the sewer, either on the ground of possibility of reverter to him in case of abandonment of the sewer, or because of anticipated injury to his remaining property because of the increase in flow of water through the sewer. *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793.

A city, in improving its system of drainage, has no right to maintain a ditch so as to encroach upon the land of a canal company, ingress to and egress from which is thereby obstructed; but the city will be required to cover the ditch and the street crossings leading to the landing. *Carondelet Canal & Nav. Co. v. New Orleans*, 38 La. Ann. 308.

*Pittsburgh, C. C. & St. L. R. Co. v. Machler*, 158 Ind. 159, 63 N. E. 210.

A public drain may be established and placed on the right of way of a railroad company if it does not impair or destroy the use of such right of way by the railroad company. *Baltimore & O. S. W. R. Co. v. Jackson County*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

But in an earlier case it was held that the court has no jurisdiction or power to establish and order the construction of a public ditch longitudinally upon the right of way of a railroad company, especially where its use for that purpose would interfere with its public use for railroad purposes for which it was acquired by condemnation, in the absence, in the drainage law under which the ditch is established, of clear and express terms or necessary implication indicating a legislative intent to subject lands devoted to a public use already in exercise to drainage purposes. *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 480, 3 N. E. 144.



must be compensated for the extra expense thereby imposed upon it.<sup>9</sup> A sewer constructed on private property without authority constitutes a fixture, and belongs to the owner of the land, and will pass by a conveyance of it.<sup>10</sup> One across whose land the city constructed a canal through which it has for over six years drained sewage does not thereby suffer such an irreparable injury as will prevent the court from dissolving the temporary injunction pending suit.<sup>11</sup> The fact that the right to construct a drain over private property has not been secured will not defeat liability upon the tax bills, since the authorities have a right to procure a right of way at any time, and the taxpayer has no right to raise the question.<sup>12</sup> If the right to lay the drain across private property has been granted upon condition, the condition must be complied with or the right will be forfeited, and the landowner will be entitled to a remedy.<sup>13</sup> After the sewer easement has been abandoned for a consideration, it cannot be retaken for

In locating and constructing a drain across a railway, the taking, though presumably for a permanent use, is not of the fee, but of an easement not interfering with the use of the railroad for all consistent purposes. *Farmers' Loan & T. Co. v. McAndrews*, 48 C. C. A. 261, 109 Fed. 109.

\*A city is chargeable with the cost of alterations in the tracks of a railroad company, and of strengthening the side walls of a sewer to support the tracks as altered, necessitated by the construction of the sewer in a new street laid out across the company's right of way over the premises through which the street was opened without condemnation of its easement and expressly subject thereto. *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, 41 Atl. 900.

The construction by a municipal corporation of a ditch under and across the right of way of a railroad company across a highway, for the draining of water that does not naturally flow in that direction, constitutes a taking or damaging of the property of the railroad, within the meaning of the Constitution, for which compensation must be made. *Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615; *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

<sup>9</sup>*Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641.

<sup>10</sup>*Jefferson & L. P. R. Co. v. New Orleans*, 30 La. Ann. 970.

<sup>11</sup>§ 239, *post*.

<sup>12</sup>Where a city, in consideration of a

right of way across lands for a sewer, contracts with the landowner so to construct such sewer, with a suitable valve, as to prevent water from flowing back through it, in times of high water, into the premises of such landowner, it is the duty of the corporation to select such a valve or water trap as will be reasonably fit for the purposes for which it is to be used, and so to lay and cement the pipes as to make them effective to protect the landowner's premises from all overflow to which they had not previously been subjected; and such landowner does not waive or lose his rights because he fails to protest when he sees the work is being defectively done and an unsuitable valve is selected. *Nashville v. Sutherland*, 94 Tenn. 356, 29 S. W. 228.

A property owner who has consented to the enlargement of a ditch extending across his land so as to provide an outlet for the drainage of a city which agrees to maintain it so that the adjacent soil will not be overflowed or saturated, will be enjoined from filling up the ditch where the enlargement, when made, was satisfactory to the owner of the land, and the city has substantially complied with its obligation, and when any obstruction of the ditch will work irreparable mischief, and the contract between the city and landowner provides for an adjustment of disputes by arbitration. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

such use without the owner's consent, except by proceedings *de novo* under powers of eminent domain.<sup>14</sup>

**218a. Interference with property in street.**—The right granted to railway companies, telegraph companies, and telephone companies to place their structures in the streets of a municipal corporation is always subject to the needs of the public; so that, in case it becomes necessary to construct a sewer in the street, an injury which is necessarily inflicted upon such property must rest where it falls.<sup>1</sup> A provision in a charter of a street railway company that the municipality shall do no act "to hinder, delay, or obstruct the operation" of the route will give way to authority given to the municipality by a subsequent act to lay a sewer in the street through which the tracks are laid, so far as is necessary to interrupt the operation of the road by the laying of the sewer.<sup>2</sup> But the municipal corporation has no right to interfere needlessly with such private property. As said in *Clapp v. Spokane*,<sup>3</sup> the location by a municipality of a sewer in the center of a street so as to obstruct and suspend the travel upon a street railway is an unreasonable and unlawful exercise of its power, where there is ample room for the sewer elsewhere in the street; but the city is not required to incur any considerable or additional expense by having granted the railway the free right to the use of the street. The municipal corporation may make such changes in structures erected in the street as are necessary to accommodate its own works.<sup>4</sup> In a suit against a city by a street railway company for an injunction to restrain the city from laying sewer pipes along the center of its streets, where it is not alleged or shown that the city council acted arbitrarily or capriciously in directing the sewer pipes to be laid in the centers of the streets, the courts will not undertake to revise or control the honestly exercised discretion of the council, although the proof may tend strongly to show that there was no necessity for putting the sewer pipes in the center of the streets.<sup>5</sup>

**218b. Liability for wrongfully locating ditch.**—Although a landowner has the right to have his land remain free from any trespass on the part of the public authorities in the construction of a drain over it, yet he is not in all cases entitled to treat the public officials,

<sup>1</sup>*Strohl v. Ephrata*, 178 Pa. 50, 35 Atl. 713, Reversing 13 Lanc. L. Rev. 1.      <sup>2</sup>53 Fed. 515.  
<sup>3</sup>*San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 1, 39 S. W. 136;      <sup>4</sup>*Moore v. New Orleans Waterworks Co.* 114 Fed. 380.  
<sup>5</sup>*San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 1, 39 S. W. 136;      <sup>6</sup>*San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 1, 39 S. W. 136.  
Wash. 634, 32 Pac. 456.  
<sup>7</sup>*Dry Dock, E. B. & B. R. Co. v. New York*, 55 Barb. 298.  
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or the district responsible for their acts, as trespassers. There being a right on the part of the public to secure a right of way, the remedy is to take steps to compel the acquisition of such right, and not to treat them as trespassers and proceed against them as such. Thus, a municipal corporation is not liable in damages for the improper location of a ditch which it had authority to construct.<sup>1</sup> The wrongful discharge of water into a river through a sewer constructed on private property without permission does not amount to keeping the property owner out of possession so as to entitle him to maintain ejectment.<sup>2</sup> The property owner may be estopped from claiming compensation for the construction of a sewer over his land where he permits such construction without objection, and takes no steps to prevent it.<sup>3</sup> In case the acts are done by public officials without authority, the municipal corporation will not be liable for their acts.<sup>4</sup> The drainage commissioner, however, is personally liable as a trespasser for entering upon and constructing a ditch across the right of way of a turnpike company under authority of a judgment which is void as to the company because it was not made a party to the proceedings.<sup>5</sup> The landowner cannot be deprived of compensation for the land taken, and the municipality cannot plead irregularities in the proceedings to defeat its liability.<sup>6</sup> In case the sewer is laid through private property without authority of law, an action of tort may be maintained against the city;<sup>7</sup> and the landowner may, in such cases, ignore the sewer, and use the land as though it did not exist.<sup>8</sup> But ejectment will not lie against a city which claims to own a sewer it has constructed upon private property without the owner's permission, and

<sup>1</sup>*Wicks v. DeWitt*, 54 Iowa, 130, 6 N. W. 176.

A municipality is not liable for the acts of its officers and agents in laying a sewer pipe across private property under a statute authorizing it to perfect a sewerage system and to enter any premises in the municipality for that purpose, and, if necessary, to condemn private property; neither are the officers and agents liable if they acted in a prudent manner and without malice. *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540. <sup>2</sup>*Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641. <sup>3</sup>*Hyde Park v. Borden*, 94 Ill. 28.

<sup>4</sup>*Kreger v. Bismarck Twp.* 59 Minn. 3, 60 N. W. 675; *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170.

<sup>5</sup>*Cottingham v. Fortville & N. Turnp. Co.* 112 Ind. 522, 14 N. E. 479.

<sup>6</sup>A municipal corporation which has

located, built, and maintained a sewer, as laid out by an order of the board of aldermen, through the land of a person, cannot defeat liability for the damages by the fact that the order omitted the boundaries and measurements as required by the ordinance. *Saunders v. Lowell*, 131 Mass. 387.

<sup>7</sup>*Hildreth v. Lowell*, 11 Gray, 345.

Where a municipal corporation enters upon land for the construction of a sewer across it under an ordinance void because of noncompliance with the provision of the charter, it becomes a trespasser, and the landowner may hold it liable for the value of the land so illegally appropriated, without any allowance for the value of the improvements placed on it. *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. 406.

<sup>8</sup>*Ostrom v. Sills*, 28 Can. S. C. 485, Affirming 24 Ont. App. Rep. 526.

to have the right to discharge water through it, since there is nothing tangible or capable of being delivered to the plaintiff by the sheriff under a writ of possession.<sup>9</sup> An injunction will lie to restrain a city from laying a sewer through private property, when claiming to do it under a statute which allows cities to lay sewers through public streets. But in such a case, where the question as to whether the land in question is a public street is in doubt, the city may have an issue made to a jury to try the question, and the injunction will be withheld upon the city giving stipulation that it will proceed with all reasonable despatch to have the question determined, and upon the city giving a bond to pay damages.<sup>10</sup>

**219. Contracting for right of way.**—A municipal corporation having power to acquire property for a drainage ditch may do so by private contract, although it has also been given the power of eminent domain, unless the statute expressly deprives it of that right.<sup>1</sup> A contract for a right of way is for an interest in land within the statute of frauds;<sup>2</sup> and is subject to the operation of the registry laws.<sup>3</sup> Therefore, a license to construct such drain does not vest any title or give any interest in the land.<sup>4</sup> But a right of way may be released by an instrument in writing, although the instrument is not a formal release.<sup>5</sup> An oral promise by a property owner to sign a written consent to the construction of a ditch across his land provided the signature of an adjacent owner is obtained does not amount to a license, where, after the latter's signature is obtained, the party giving the

<sup>9</sup>*Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641.

<sup>10</sup>*Clark v. Providence*, 10 R. I. 437.

But equity will not restrain a municipal corporation from constructing a street ditch along land which it claims has been dedicated to the public, as the law furnishes adequate remedy if the land is private property. *Doughty v. Somerville*, 33 N. J. Eq. 1.

<sup>1</sup>*Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

<sup>2</sup>*Phillips v. Thompson*, 1 Johns. Ch. 131.

<sup>3</sup>The registry laws apply to the permission given by the owner of land to a municipality to construct a drain through his land, whether the agreement conveys the land, creates an easement, or is a mere license which has become irrevocable; so that, if there has been no by-law authorizing the land to be taken, the interest of the municipality therein would be invalid as against a registered deed executed by an assignee

of the owner, who was a purchaser for value without notice. *Toronto v. Jarvis*, 25 Can. S. C. 237.

<sup>4</sup>*Olmsted v. Dennis*, 77 N. Y. 378.

<sup>5</sup>*Sturm v. Kelly*, 120 Mich. 685, 79 N. W. 930.

But a release of the right of way for one drain cannot operate as a release for another. *Ibid.*

A written contract entered into between a landowner and a municipal corporation by which the former, in consideration of the dismissal of condemnation proceedings instituted by the latter to acquire the right of way for a sewer across his land, agreed to allow the municipal corporation to enter upon such premises and construct a drain without making him any further compensation, is a sufficient license for the entry by such municipal corporation and the construction of such drain. *Bloomington v. Burke*, 12 Ill. App. 314.

<sup>6</sup>*Hitchens v. Shaller*, 32 Mich. 496.

promise refuses to consent to the construction of the ditch.<sup>6</sup> To entitle the municipal corporation to proceed with its improvement, it must comply with the terms of its contract.<sup>7</sup> The landowner may, by his conduct, release the municipality from liability to make compensation and dedicate the right of way to public use.<sup>8</sup> He may estop himself from contesting the public right by acquiescence in what is done.<sup>9</sup> A grant to a municipal corporation of the right to dig and maintain all convenient and necessary sewers or drains from the upland to deep water across the grantor's land "according to law and the common and usual practice for the time being within the city," will give a right to construct for general use all drains which it may be the duty of the municipality to construct and maintain.<sup>10</sup> Permission to discharge sewage from a particular district over private land will not give the right to collect sewage from a larger district and discharge it over the property.<sup>11</sup> A common council authorized

<sup>6</sup> A landowner may enjoin the collection of a special assessment for the construction of a sewer across his land, where he was induced to withdraw valid objections to its confirmation by an agreement, entered into by the municipal corporation constructing such sewer, to condemn the right of way over his land for a street which it did, but, after the confirmation of the special assessment, vacated the condemnation judgment and dismissed the proceedings, by repealing the ordinance for laying out the street along such right of way. This conduct would warrant the inference that, having acquired possession, the city had no intention of laying out a street, but had a fraudulent design to disregard the agreement by which such landowner lost a substantial right. *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710.

<sup>7</sup> One who consents to the digging of a ditch over his property by a city cannot recover damages therefor, whether or not he agreed to look to other parties for his damages; art. 1, § 17, of the Constitution of Texas, which provides that no person's property shall be taken for public use without adequate compensation, unless by his consent, being sufficiently met by the consent irrespective of such agreement. *Dallas v. Beeman*, 18 Tex. Civ. App. 335, 45 S. W. 626.

The owner of land which is so situated as conveniently to receive surface water and sewage collected by a city and discharged from the sewer does not dedicate the land to such purpose by the payment of an assessment for the construction of the sewer,—especially where

he has repeatedly protested against the discharge of the sewage upon his premises. *Van Rensselaer v. Albany*, 15 Abb. N. C. 457.

<sup>8</sup> *Frceman v. Weeks*, 48 Mich. 255, 12 N. W. 215.

A petitioner for the construction of a ditch who released the right of way and all claim for damages, and entered into a contract to dig the ditch across his own lands, and agreed that the contract might be relet upon his failure to perform, waives all right to recover damages from parties who thereafter, in good faith, attempt to construct the ditch, if, at the time of the execution of the release, he knew, or by reasonable diligence could have known, of existing defects in the proceedings; but, if he only learned of them in the exercise of reasonable diligence after contracting to construct the ditch, he may recover damages. *Hopkins v. Briggs*, 41 Mich. 175, 2 N. W. 199.

It cannot be presumed that married women possessed of property in legal right consented to the use of such property in constructing a public sewer, under the rule that every presumption, fairly raised, will be indulged, and all reasonable equities applied, in favor of a tax levied for the construction of a sewer already built. *Johnson v. Duerr*, 115 Mo. 366, 21 S. W. 800.

<sup>9</sup> *Child v. Boston*, 4 Allen, 41, 61 Am. Dec. 680.

<sup>10</sup> *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416, Affirming 17 N. Y. S. R. 305, 1 N. Y. Supp. 456.

to construct sewers, purchase land therefor, establish the assessment district, and to fix finally the amount and apportionment of the assessment, may agree with a property owner who deeds the right of way, to exempt his land from assessment for the construction of the sewer, although the original assessment is, under the charter, levied by a board of commissioners. In such case the city, having enjoyed the fruits of the contract, is estopped from questioning the power of the council to make it.<sup>12</sup> An action to compel a village to purchase at a price to be fixed by the court land which it has unlawfully entered upon and appropriated to sewer purposes is of an unprecedented character, and cannot be maintained either at law or in equity.<sup>13</sup>

**220. Acquisition of right of way by eminent domain.**—Drainage being one of the purposes to which the government may turn its attention, it may utilize for the purpose the power of eminent domain.<sup>1</sup> But, to enable a local subdivision of the state to exercise the power, the right to do so must be expressly conferred upon it.<sup>2</sup> And a drainage district may be given authority to acquire rights of way for outlets outside of its territorial limits.<sup>3</sup> The power to exercise the right

Although the grant of an easement for a drainage canal contemplates its future enlargement, the grantor has his remedy if damaged by such change, if the capacity of the canal at its mouth is insufficient to vent the increased flowage, if the owners neglect to repair it, so that the water spreads over his land. *Norfolk v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787.

<sup>1</sup>*Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

<sup>2</sup>*Mitchell v. White Plains*, 91 Hun, 189, 36 N. Y. Supp. 204.

<sup>3</sup>§ 179, *ante*.

<sup>4</sup>*Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

Highway commissioners have no authority to exercise the power of eminent domain for the purpose of carrying over an adjoining farm the sewage which a municipal corporation may deposit upon the highway by drains or other appliances, under a statute authorizing them to enter upon any adjacent lands for the purpose of opening drains, etc., necessary to drain a highway, especially where the sewage is conducted in an unnatural direction. *Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

Where a right of way across private land for the purpose of constructing a sewer was condemned under a statute which had been previously repealed by

the adoption of a general statute covering the same subject, the proceedings had thereunder were void, and persons entering on the premises for the purpose of constructing the sewer were trespassers. *State v. Tenny*, 58 S. C. 215, 36 S. E. 555.

A city, having determined that a sewer is desirable, is only bound to prove that the taking of the property sought to be condemned is necessary for the construction of the sewer, where by statute sewerage has been declared a public use for which private property may be taken. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

<sup>5</sup>Drainage districts are authorized by the drainage laws of Illinois to obtain control of natural channels outside the districts which serve as outlets for such district, for the purpose of enlarging and deepening the same when necessary to render the drainage system available for the purpose for which the districts are organized, by condemnation under the eminent domain act, by which the same pass under the absolute control of the district authorities, and are as much subject to their control for the purpose for which they were condemned as any ditches within their districts. *Union Drainage Dist. v. O'Reilly*, 132 Ill. 631, 24 N. E. 426.

may be delegated, not only to municipalities and drainage districts, but to commissioners who are given charge of the drainage work.<sup>4</sup> The right to exercise the power of eminent domain is measured by the public necessities, and the right to determine this necessity in the first instance rests with the authorities upon whom the power is conferred; and the courts will not interfere with their acts in the absence of circumstances tending to show fraud or acts outside the scope of their authority. The condemnation of the right of way cannot be defeated on the ground that the sewer will constitute a nuisance.<sup>5</sup> The taking of land for a permanent drain includes a freehold.<sup>6</sup> Since the expression of the legislative will authorizing the taking of property for public purposes is of itself due process; and since the ditch act itself provides for notice to interested parties, and gives such parties a right to appeal in case they are aggrieved,—such act does not authorize the taking of property without due process of law.<sup>7</sup> Whether or not the purpose for which the property is to be taken is public is a question of law.<sup>8</sup> The fact that property has already been acquired for public use will not prevent the acquisition of a right of way for a drain over it under the power of eminent domain.<sup>9</sup>

**220a. Procedure.**— The method by which the title to a right of way for a drain is to be acquired is governed by the provisions of the statute; and proceedings for taking private property for the construction of a drainage ditch must be in strict compliance with the legislative enactments authorizing them.<sup>1</sup> If the statute requires the title to be obtained by condemnation proceedings, it cannot be ac-

<sup>4</sup>*Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *Palmer v. Harris County* (Tex. Civ. App.) 69 S. W. 229.

<sup>5</sup>*Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 804.

<sup>6</sup>*Dierks v. Highway Comrs.* 142 Ill. 197. 31 N. E. 496.

<sup>7</sup>*Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

<sup>8</sup>*McQuillen v. Hatton*, 42 Ohio St. 202.

In an action by a sanitary district, created under an act of legislature with ample power to condemn such a quantity of land as may reasonably be necessary to carry out the object of the district, to condemn a strip of land over a quarter of a mile wide for the purpose of its main channel, the owner thereof has the right to have the court determine whether or not the taking of so much land is an abuse of the power conferred by seeking to condemn more land than is rea-

sonably necessary for the purpose for which it was created, and for this the court has the power to prevent such abuse. *Tedens v. Sanitary Dist.* 149 Ill. 87, 36 N. E. 1033.

<sup>9</sup>*Steele v. Empsom*, 142 Ind. 397. 41 N. E. 822; *Northern Ohio R. Co. v. Hancock County*, 63 Ohio St. 32. 57 N. E. 1023.

But lands in Ohio appropriated and in use for railroad purposes cannot thereafter be condemned for public ditches or drains, where such use would prevent the construction of a side track or double track, or would interfere with the full enjoyment of the land for railroad purposes. *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945.

<sup>1</sup>*Nishnabotna Drainage Dist. v. Campbell*, 154 Mo. 151, 55 S. W. 276; *Tedens v. Sanitary Dist.* 149 Ill. 87, 36 N. E. 1033.

quired by special assessment.<sup>2</sup> So, if the statute requires a preliminary attempt by the municipality to agree with the landowner as to what land shall be taken, and the compensation that will be made therefor, condemnation proceedings cannot be instituted unless such attempt has been made. But a statute making such a requirement applicable in only certain cities in the state violates a constitutional prohibition of the passage of special laws when general laws may be made applicable.<sup>3</sup> Statutes permitting the taking of private property for a right of way are to be strictly construed in favor of the landowner.<sup>4</sup> The facts necessary to give the court jurisdiction must appear in the petition.<sup>5</sup> The description of the land to be taken should be as definite as is necessary in a deed.<sup>6</sup> The width of the property to be taken must be specified as well as the line which the improvement will follow.<sup>7</sup> The court should not divest the title of the owner of the land, but merely subject it to the use required.<sup>8</sup> An action to contest the proceedings must be brought by the person in interest.<sup>9</sup> Injunction will not lie to restrain construction of the

<sup>2</sup>*Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

<sup>3</sup>*Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Upon a proceeding by highway commissioners to condemn land for the digging of a ditch across the lands of another in pursuance of statute, it must appear from the record of the official proceedings of such commissioners that the digging of the ditch was necessary in order to carry off the water from the highway, and that they had negotiated with such owner for leave to take a part of his premises for the ditch, and had failed to obtain such consent upon a just compensation having been offered him therefor: and parol evidence that the digging of the ditch was necessary in order to carry off the water from the highway is incompetent. *Chaplin v. Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

A proceeding to lay out a drain will be quashed where the commissioner has not attempted to obtain, as required by statute, a release of the right of way and damages from the property owners through whose premises the drain is to pass. *Whisler v. Drain Commissioner*, 40 Mich. 591.

Proceedings to condemn land for a sewer are not void for failure to file a petition setting forth the inability of the parties to agree as to the compensation to be paid, where the statute leaves

the regulation of the proceedings to the municipal ordinance, and the evidence shows their inability to agree, which is all the ordinance requires. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

<sup>4</sup>*Bogart v. Castor*, 87 Ind. 244.

<sup>5</sup>*Re Marsh*, 71 N. Y. 315, Reversing 10 Hun. 49.

<sup>6</sup>*Mathias v. Carson*, 49 Mich. 465, 13 N. W. 818; *Lumbermen's Ins. Co. v. St. Paul*, 85 Minn. 234, 88 N. W. 749.

Whether or not a description of land taken for a sewer by words and reference to a map is "as certain as is required in a common conveyance of land" as required by statute is a question of fact. *Kohlhepp v. West Roxbury*, 120 Mass. 596.

But in proceedings to condemn a sewer route over a tract of land including platted lots which are a part thereof, it is not necessary to mention them if the description given as to the tract necessarily includes them. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

<sup>7</sup>*Mathias v. Carson*, 49 Mich. 465, 13 N. W. 818.

<sup>8</sup>*Palmer v. Harris County* (Tex. Civ. App.) 69 S. W. 229.

<sup>9</sup>A township owning no land, as a municipality, to be injuriously affected by the construction of a public drain, may not maintain a bill to enjoin its completion, in behalf of landowners in



sewer where the only question involved is the damage to be paid for the right.<sup>10</sup> The real owner of the property is entitled to receive the award made for the use of the right of way.<sup>11</sup> The only question upon which the landowner is entitled to a hearing is as to the compensation to be awarded.<sup>12</sup> But the determination of the amount which should be paid cannot be finally committed to the commissioners,<sup>13</sup> although the municipal corporation may, by its acts, be required to pay the amount awarded by them.<sup>14</sup> The provision for a

the township who do not claim to be injuriously affected. *Susan Creek Twp. v. Brown* (Mich.) 9 Det. L. N. 52, 90 N. W. 38.

<sup>10</sup>*Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

The owner of land whose right to appeal, and whose constitutional right to have his compensation for his lands sought to be appropriated assessed by the jury is, on the face of the records, cut off by the act of the county commissioners in making an award and entering it of record as of a date prior to the actual time of making, so that at the latter date the time for appeal appears on the record already to have expired, is entitled to an injunction against the orders and proceedings of the board on and after the date of such entry, but not against the proceedings had prior to that date. *Miller v. Logan County*, 3 Ohio C. C. 617.

<sup>11</sup>*Lumbermen's Ins. Co. v. St. Paul*, 82 Minn. 497, 85 N. W. 525.

A town which owns the fee in its streets is entitled to recover compensation as an individual for injury thereto by the construction of a county drain through them, under Iowa Code 1873. § 1210, which prescribes a procedure for persons claiming compensation for lands taken in the construction of a drain, ditch, or water course. *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

The construction of a sewer across a lot held by a husband and wife as tenants by the entirety will be enjoined at the suit of the wife, although the city has taken proceedings to condemn the right of way as against the husband, since the construction of the sewer would prejudice her rights in case she should survive him. *Grosser v. Rochester*, 60 Hun. 379, 15 N. Y. Supp. 62.

<sup>12</sup>*Zimmerman v. Canfield*, 42 Ohio St. 463.

<sup>13</sup>*Hessler v. Drainage Comrs.* 53 Ill. 105.

<sup>14</sup>A municipal corporation, having ap-

pointed appraisers to adjust the damages that would result to the property of an owner by reason of the flowing of water thereon by a proposed change in the grade of one of its streets, whose report awarding damages in a certain sum was duly approved and confirmed by the common council, cannot afterwards, after the work is completed, refuse to pay the assessment on the ground that it is powerless so to do until the damages to such land are ascertained under the eminent domain law, where such landowner had filed a bill for an injunction, which had been granted, and such adjustment of his damages was made in consideration of his not suing out the injunction, but allowing the work to proceed, and it appears from his bill for such injunction that his grounds therefor formed at least a claim for damages apparently just, which was a proper subject for adjustment and compromise. *Bloomington v. Brokaw*, 77 Ill. 194.

An award of the damages sustained by the owner of land for the cutting of a ditch across the same by a municipal corporation, having been made by arbitrators mutually chosen in pursuance of a resolution of the city council authorizing the submission of the controversy to arbitration, can be enforced against such municipality by an action in assumpsit, in the absence of positive law disabling it from submitting unsettled claims to arbitration. *Shawneetown v. Baker*, 85 Ill. 563.

But a municipal corporation is not liable to a landowner for the amount allotted him as the value of property proposed to be taken for the opening of a street because it constructs a sewer through such premises, where the condemnation proceedings for the opening of the street are subsequently dismissed upon motion of the landowner because of a failure on the part of the municipal corporation to pay the award; and such owner is not entitled to a sum

jury in the appellate court is sufficient.<sup>15</sup> Under the power of awarding damages for the location of a sewer outfall, a committee cannot determine whether a cesspool should or should not be constructed, and award annual damages to be paid in the future till such cesspool shall be built by the city.<sup>16</sup> If the municipal corporation has no power to institute the proceeding, it will be enjoined.<sup>17</sup> Where the location of a discharge for a city sewer is such as to constitute a nuisance to adjoining property, a recovery may be had for the entire damages in one action, if they are of a permanent character and go to the entire value of the estate affected; but, where the extent of the wrong may be apportioned from time to time, and does not go to the entire destruction of the estate or its beneficial use, separate actions must be brought for the damages.<sup>18</sup> A proceeding to condemn land for a drain, under a statute providing for the condemnation of land by a village for a drain, is not complete until such resolution or order is recorded, such recording being a condition precedent to the right to enter upon the land and construct the drain.<sup>19</sup> That the ditch was not legally laid out is not material where the landowner consented to the work done; nor is it important that the parties interested did not originally agree as to the exact line of the ditch, if they consented to what was done.<sup>20</sup> After the damages have been paid without the observance of the legal formalities no further damages can be recovered when the use of the sewer does not constitute a nuisance.<sup>21</sup> Refusal to allow damages exhausts the power of the municipal authorities, and they cannot subsequently entertain a new petition by the same landowner for the same laying out.<sup>22</sup>

**220b. Right remaining in landowner.**—The public right is limited by the public necessity, and no greater title passes than the needs of the public require, so that the residue remains in the former owner; and he may make such use of it as is not incompatible with the pub-

equal to the difference between the award and an assessment of the benefits levied against his land, deposited by the municipal corporation in court. *Pearce v. Chicago*, 176 Ill. 152, 52 N. E. 27.

<sup>15</sup>*Chesbrough v. Putnam & P. Counties*, 37 Ohio St. 508.

<sup>16</sup>*Jackson v. Portland*, 63 Me. 55.

<sup>17</sup>A proceeding in the nature of eminent domain brought in a state court by a village to obtain an easement over land for the flow of sewage after leaving its sewers will be enjoined, where the village has no power of eminent domain except as accessory to its power to make

public improvements, and it is not proposed to construct culverts, drains, sewers, or cesspools, but simply to throw the sewage upon complainant's land. *Colby v. La Grange*, 65 Fed. 554.

<sup>18</sup>*Scott v. Nevada City*, 56 Mo. App. 189.

<sup>19</sup>*Evans v. West Salem*, 114 Wis. 650, 91 N. W. 121.

<sup>20</sup>*Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904.

<sup>21</sup>*District of Columbia v. Hutchinson*, 1 App. D. C. 403.

<sup>22</sup>*Cambridge v. Middlesex*, 117 Mass. 79.

lic interest.<sup>1</sup> The acquisition of a right of way for a sewer will, therefore, unless the fee is required and expressly taken, pass only an easement, and the public has no authority to deal with the property as its own.<sup>2</sup> When a mere easement is taken the owner of the fee has the right to use the land in any way not inconsistent with the exercise of the easement taken, and may erect buildings over the sewer if he can do so without interfering with the reasonable rights of the public.<sup>3</sup> Therefore, where the right of access to a sewer, given to the municipality constructing it across land which does not belong to the municipality, is not expressly given by statute, but has to be implied, the implied right of access will be such only as will be reasonably necessary for permitting the repair of the sewer; and it cannot recover damages against a railroad company constructing an embankment which does not deprive it of an access, but renders it less convenient.<sup>4</sup> In *Sandgate Local Board v. Leney*,<sup>5</sup> which was an action to compel the pulling down of a shed erected over a sewer so as

<sup>1</sup>*Wilson v. Soranton*, 141 Pa. 621, 21 Atl. 779; *Clark v. Worcester*, 125 Mass. 226.

But a title in fee, and not merely an easement, will be acquired by a town in land taken under a statute giving the right to remove obstructions from a brook and alter its current for sewer purposes, to effect which it may "take or purchase land," and providing that the "title to land so taken shall vest in the municipality." *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851.

<sup>2</sup> Under statutory authority to take lands, water courses, rights of way, or easements, for the construction of a sewer, which is exercised by taking the right to carry and conduct under the lands, and to construct and operate and maintain a sewer, and to repair and renew the same, there is no right to remove the soil from one part of the system to another in repairing and renewing the sewer. *Butchers' Slaughtering & Melting Assn. v. Com.* 169 Mass. 116, 47 N. E. 599.

But the same court held that a municipal corporation which has authority to take land in different counties for the construction of a sewer system, making compensation to landowners for land taken, may remove the land excavated in the construction of the work in one county to another for use there, without being liable to the owner for conversion of it, although the municipality has not acquired the fee of the land. It acquires the right to dig up the surface

and appropriate the soil so far as is reasonably necessary to carry out the plan and construct the work contemplated. *Titus v. Boston*, 149 Mass. 164, 21 N. E. 310.

<sup>3</sup>*Butchers' Slaughtering & Melting Assn. v. Com.* 163 Mass. 386, 47 N. E. 599.

But where a brook is converted into a sewer under statutory authority, with nothing to limit it to a covered sewer, abutting owners may be restrained from placing buildings over it which will make the care of it more difficult. *Melrose v. Cutter*, 159 Mass. 461, 34 N. E. 695.

A natural stream is not changed into an artificial water course so as to prevent the application of the doctrine of *Bickett v. Morris*, L. R. 1 H. L. 47, 12 Jur. N. S. 803, 14 L. T. N. S. 835, entitling a riparian proprietor to restrain the building of a structure in the *alveus* of a stream likely to produce injury to him, by the fact that the bed of the stream has been improved by drainage commissioners acting under statutory authority, as, in the absence of authorized declarations to the contrary, it will be assumed that the improved bed of the stream is still subject to the pre-existing rights and duties so far as the same are capable of existing therein. *Palmer v. Perse*, Ir. Rep. 11 Eq. 616.

<sup>4</sup>*Birkenhead v. London & N. W. R. L.* R. 15 Q. B. Div. 572, 55 L. J. Q. B. N. S. 48, 50 J. P. 84.

<sup>5</sup>L. R. 25 Ch. Div. 183, note.

to interfere with the plaintiff's right of access to it, the court refused a mandatory injunction upon the ground that the interference with the right of access was not sufficient to warrant the issuance of a mandatory injunction, the utmost proved on the part of the plaintiff being that it might take an hour or two longer to cut down to the sewer. There being an adequate remedy at law in an action for damages, equity will not restrain a municipal corporation from tearing down a wall constructed by an abutting owner over a water course used as a sewer.<sup>6</sup>

**221. Compensation must be made.**—The constitutional provision that private property shall not be taken for public use without compensation applies with full force to proceedings to acquire a right of way for a sewer or drainage ditch;<sup>1</sup> and it is immaterial that an easement only is to be taken,<sup>2</sup> or that the right of way is across the property of a railroad company or other public-service corporation.<sup>3</sup> It

<sup>1</sup>*Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622.

<sup>2</sup>*Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812; *Re Cheesebrough*, 78 N. Y. 232; *People ex rel. Williams v. Haines*, 49 N. Y. 587; *Watson v. Pleasant Twp.* 21 Ohio St. 667; *People ex rel. Cook v. Vearing*, 27 N. Y. 306; *Chaplin v. Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

Land dry and free from nuisance cannot be permanently appropriated for drains for the benefit of other lands, or even for the general welfare, without compensation. *Re Church of Holy Sepulchre*, 61 How. Pr. 315; *Payson v. People*, 175 Ill. 267, 51 N. E. 588.

A drainage law which provides for the taking of private property for the right of way of ditches to drain swamps without condemnation proceedings, although providing for ascertaining and paying the owner's damages if he comes into court and files his claim, is contrary to the constitutional provision prohibiting the taking of private property without first having made compensation therefor: neither can the law be sustained as a proper exercise of the police power for the abatement of a nuisance, where the act does not require the nuisance to be of such imminent danger to the public welfare as to justify the taking of private property of others than those maintaining the nuisance without compensation. *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097.

The failure of a statute authorizing the construction of a sewer to provide

for the payment of compensation for the land taken does not render the statute unconstitutional, where it prescribes that, if the sewer commissioners cannot agree with the owners, they may proceed under the condemnation law of the state, which does not permit lands to be taken except upon payment of compensation. *Swikehard v. Michels*, 81 Hun. 325, 29 N. Y. Supp. 777, 30 N. Y. Supp. 1135.

<sup>3</sup>*Smith v. Atlanta*, 92 Ga. 119, 17 S. E. 981; *Reeves v. Wood County*, 8 Ohio St. 333.

\*The location and construction of a public ditch across or upon the right of way of a railroad company, though the ditch be constructed by tiling under the surface, is an appropriation of the company's property which entitles it to compensation for the value of the interest so taken. *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009.

A municipal corporation will be enjoined from constructing a ditch along a highway through a railroad embankment across such highway, until some provision is made for the payment of the damages sustained by the railroad company thereby, where the latter had a lawful right to the use of such street in the manner occupied by it subject to the rights of the public to all the ordinary and proper uses of a highway, and such ditch is to be constructed solely as a means of draining adjacent lands, thereby subjecting the street to a new

also applies to the appropriation of a private sewer for public use.<sup>4</sup> A statute providing for compensation is sufficient which provides for the assessment of such "damage" as the owner may sustain.<sup>5</sup> Under a drainage law making provision for compensation to an owner for land taken for ditches, and damages to land not taken, which are required to be paid before entry thereon, it would seem that where, by an enlargement of the drainage district, an additional burden of water is precipitated upon his land to its injury, the damages consequent thereto should be assessed and paid by the district prior to the discharge of such additional waters upon his land.<sup>6</sup> A landowner may waive his right to damages, or estop himself from demanding them;<sup>7</sup> and, in case he has received compensation, he cannot interfere with the drainage proceedings.<sup>8</sup> If the attempt is made to construct the ditch without compensating the landowner, equity will enjoin the proceeding.<sup>9</sup> A law is not unreasonable and void which fails to provide for the payment of damages from the construction of a drainage canal, suffered when no benefits have accrued, where the general law affords a remedy therefor against the corporation.<sup>10</sup> A constitutional provision in relation to drainage, which authorizes the passage of laws permitting the owners of land to construct drains across the lands of others, does not authorize the taking of private property for the purpose of drainage without making just compensation, merely because the constitutional provision is silent on the subject of compensation to the owners of the lands over which such drains are to be constructed.<sup>11</sup> It has been held that, where the statutes limit the right to apply for damages for the construction of a sewer to six months from the decision to take the land, no application can be made after that time, although the owner of the land injured had no notice of the taking until after the expiration of the six months.<sup>12</sup> That decision, however, plainly sanctions a taking without due process of law because notice is a necessary element of due process. Mere temporary injuries are not within the provisions of the constitutional re-

use to which such right of way is not subject. *Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615.

<sup>4</sup>*McDonald v. Cincinnati*, 4 Ohio N. P. 253.

<sup>5</sup>*Chaplin v. Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

<sup>6</sup>*Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010.

<sup>7</sup>No objection can be made to the laying out of a sewer on the ground that compensation has not been made, as required by the Constitution, by one who

assented to its laying out, and connected his private drain with it. *Haskell v. New Bedford*, 108 Mass. 208.

<sup>8</sup>*Oliver v. Monona County*, 117 Iowa. 43, 90 N. W. 510.

<sup>9</sup>*Zimmerman v. Canfield*, 42 Ohio St. 463.

<sup>10</sup>*Brown v. Keener*, 74 N. C. 714.

<sup>11</sup>*Payson v. People*, 175 Ill. 267, 51 N. E. 588.

<sup>12</sup>*Cambridge v. Middlesex County*, 6 Allen, 134.

quirement of compensation for property taken.<sup>13</sup> Nor does the fact that the sewer will be a nuisance to property near it constitute a taking.<sup>14</sup>

**222. When and how must compensation be made.**— When the Constitution provides that land cannot be taken for public use unless compensation is first made or secured, the ascertainment and making or securing of the compensation must be done before the property can be taken or the improvement proceed;<sup>1</sup> but, if there is no such constitutional provision, any provision which will eventually secure compensation to the landowner is sufficient, even though it is to be ascertained after the improvement is completed.<sup>2</sup> In such cases the failure of a board of supervisors to have damages to the property through which a drainage ditch is to pass appraised and paid or secured before locating the ditch is not a jurisdictional question, and cannot, therefore, be objected to in a collateral attack.<sup>3</sup> But the landowner has a right to have his damages paid within a reasonable time.<sup>4</sup> Where the statute providing that the allowance by the proper officers of damages to be paid for land taken for a drainage ditch makes the amount payable out of the general fund of the county, there is a sufficient payment or deposit of the money to authorize the continuance of the proceedings under a constitutional provision making that a condition precedent to the taking, where there is nothing to show that the county is insolvent.<sup>5</sup> The compensation is sufficiently secured if the taxable property of the community is pledged to its payment.<sup>6</sup> The landowner may waive the right to have his dam-

<sup>1</sup>*Chelsea Dye House & Laundry Co. v. Com.* 164 Mass. 350, 41 N. E. 649.

<sup>2</sup>*Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489.

<sup>3</sup>*Smith v. McKee*, 3 Ohio Dec. Reprint, 578; *Beck v. Medina County*, 9 Ohio Dec. Reprint, 108.

<sup>4</sup>*Stonehouse v. Enniskillen*, 32 U. C. Q. B. 562.

<sup>5</sup>*Oliver v. Monona County*, 117 Iowa, 43. 90 N. W. 510.

<sup>6</sup>*Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781.

<sup>7</sup>*Zimmerman v. Canfield*, 42 Ohio St. 463.

But a statute authorizing the condemnation of lands for sewer purposes, which provides that commissioners to make the award shall issue improvement certificates in their own names payable any time they designate within two years pledging the credit of the cities containing the sewers, is unconstitutional, as failing to secure payment for the

private land taken at the time it is appropriated, and as not securing the payment in money. *State, Butler, Prosecutor, v. Ravine Road Sewer Comrs.* 39 N. J. L. 665.

<sup>8</sup>*Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403.

Provision for compensation for a right of way for a drainage ditch is sufficient under a constitutional provision that the property cannot be taken until compensation is made, where, in case no funds are on hand arising from the levy of the drainage tax, warrants may be issued by the court which may be negotiated and the proceeds used in paying for a right of way. *Redmond v. Chacey*, 7 N. D. 231, 73 N. W. 1081.

But a provision for payment of compensation for a right of way for a drainage ditch to be made in county warrants is not sufficient where there is a possibility that there may be no funds out of which to pay the warrants,

ages paid before work commences.<sup>7</sup> The fact that the compensation has not been actually paid the landowner will not prevent the levying of an assessment of benefits upon the taxpayer.<sup>8</sup>

**222a. Set-off of benefits.**— Where, under the Constitution, compensation for land actually taken for a drainage ditch must be made in money, benefits to lands not taken cannot be reckoned as any part of such compensation, though damages to lands not taken may be compensated for by benefits.<sup>1</sup> But where the Constitution merely requires that compensation shall be made, if the owner of land which is taken receives benefits which are peculiar to his land and not common to the community generally, they may be set off against the amount to which he is entitled for the land taken.<sup>2</sup> The ground of this distinction is stated in *French v. Lowell*<sup>3</sup> as being that the benefit for which a landowner is to be assessed for the construction of a sewer is that similar to those enjoyed by all those whose land will be drained by the sewer, and not that which is peculiar to him by reason of the relieving of his land of the necessity of maintaining an ancient sewer thereon, so that the latter benefit can be set off against his claim for damages for land taken for the construction of the sewer. In *Ross v. Davis*<sup>4</sup> it was held that it is within the constitutional power of the legislature to provide for the payment of the cost of the construction of drains, established under the law, and for the damages resulting, by means of the assessment of benefits accruing to the landowners affected; and compensation for property appropriated may be

under a Constitution providing that private property shall not be taken for public use without just compensation having been first made to, or paid into court for, the owner. *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392.

<sup>1</sup>*Olmsted v. Dennis*, 77 N. Y. 378.

A landowner who fails to avail himself of his statutory right to have his compensation for damages fixed, and makes no opposition to the completion of the canal, thereby forfeits his right to previous compensation, and is not entitled to restrain the use of the canal by an injunction. *Jefferson & L. P. R. Co. v. New Orleans*, 31 La. Ann. 478.

<sup>2</sup>*Re Swan*, 35 Hun, 625.

<sup>3</sup>*Ginn v. Moultrie, C. & D. Drainage Dist.* 188 Ill. 305, 58 N. E. 988; *Martin v. Fillmore County*, 44 Neb. 719, 62 N. W. 863; *Payson v. People*, 175 Ill. 267, 51 N. E. 588.

But if the owner of land in a drainage district consents that the amount

allowed him for land taken shall be applied to the reduction of his benefits assessed, and pays the excess of benefits over the amount allowed him for compensation, he cannot complain that he was not paid in whole for the land. *Elgin, J. & E. R. Co. v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102.

<sup>4</sup>*Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Clark v. Worcester*, 125 Mass. 226.

<sup>5</sup>117 Mass. 363.

The facility for drainage of a particular tract of land afforded by the construction of a sewer through it may be found to be of special and peculiar benefit, which may be set off against the damages to be allowed for taking the right of way. *Butchers' Slaughtering & Melting Assn. v. Com.* 169 Mass. 116, 47 N. E. 599.

<sup>6</sup>97 Ind. 79.

The same ruling is found in *Winkelman v. Drainage Dist.* 24 Ill. App. 242.

made in such benefits or out of money realized by assessments of benefits to other lands, in case the damages exceed the benefits. There seems to be no valid objection to such rule. If one whose land is to be taken for a right of way is also subject to assessments for benefits which will result from the building of the ditch, it does not discriminate against him or place him at any undue disadvantage by applying the amount which he would have to pay by the assessment upon his property upon the amount due him for the land, and paying him merely the balance. But the entire expense of the improvement cannot be placed upon him by assessing the amount upon his land according to the number of acres owned by him.<sup>5</sup> In case damages are recoverable for injuries to land not taken, special benefits not common to the other landowners may be set off against the damages to be allowed therefor.<sup>6</sup>

**223. Measure of damages.**—In determining the damages to be paid for the right of way for a drainage ditch they must be confined to the proceeding then before the court, and cannot include damages for injuries which may arise from other proceedings, as the construction of the ditch over another ditch the right to construct which is the subject of another proceeding.<sup>1</sup> As nearly as possible, the damages awarded should represent the difference in value of the property before and after the drain was constructed.<sup>2</sup> In ascertaining its value, the jury may consider, not only the value of the land actually taken,<sup>3</sup> but the injury which will necessarily result to the remaining land.<sup>4</sup>

<sup>1</sup>*Harticell v. Armstrong*, 19 Barb. 166. of the ditch. *Palmer v. Harris County* (Tex. Civ. App.) 69 S. W. 229.

<sup>2</sup>*Martin v. Fillmore County*, 44 Neb. 719, 62 N. W. 863.

<sup>3</sup>*Skagit County v. McLean*, 20 Wash. 102, 54 Pac. 781.

<sup>4</sup>In assessing the damages to be allotted a lot owner in a drainage district, no damages suffered or sustained in consequence of the original construction of a levee should be allotted, but the same must be confined to such damages as will result from the completion of the proposed work under the present assessment. *Lorell v. Sny Island Levee Drainage Dist.* 159 Ill. 188, 42 N. E. 600.

<sup>5</sup>*Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844; *Driscoll v. Taunton*, 160 Mass. 486, 36 N. E. 495.

<sup>6</sup>In a proceeding to condemn land for the construction of a ditch to drain a public road, the market value of the entire tract sought to be condemned must be considered in assessing the damages, although the entire tract so taken may not be necessary for the construction

of the ditch. *Palmer v. Harris County* (Tex. Civ. App.) 69 S. W. 229.

<sup>1</sup>*Taft v. Com.* 158 Mass. 526, 33 N. E. 1046; *Chaplin v. Highway Comrs.* 129 Ill. 651, 22 N. E. 484; *Thomas v. County Comrs.* 5 Ohio N. P. 449; *Essex v. Acton Local Board*, L. R. 14 App. Cas. 153, 58 L. J. Q. B. N. S. 594, 61 L. T. N. S. 1, 38 Week. Rep. 209, 53 J. P. 756; *Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844; *Miller v. Weber*, 1 Ohio C. C. 130; *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56.

The compensation for land taken for a sewer route should include the injury which will be done to the tract by the emptying of the sewer into a stream flowing across it, although the ordinance authorizing the sewer does not in terms undertake to acquire that right, and the petition describes only that portion of the owner's property over which the sewer will pass. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.



These will include the reasonable cost of any necessary adaptation of the remaining land to the new state of things produced by the sewer,<sup>5</sup> and the value of improvements interfered with,<sup>6</sup> and such temporary injuries as may be inflicted during the progress of the work.<sup>7</sup> The value of the land for any purpose for which it was adapted may be considered, but the consideration should not be confined to the business interests of the owner.<sup>8</sup> Whatever use the own-

A provision in a drainage law which authorizes the allowance to the owner of land of "such actual damages, only, as will be sustained" by the entry upon his land by another for the purpose of constructing a drain over the same, embraces all damages that will be sustained by, or in consequence of, the entry upon the land and the construction of the drain, the proper construction of the words "actual damages" being all damages, both direct and consequential, which necessarily result from such taking and appropriation, the measure of which will be the diminution in value of the land by reason thereof. *Chronic v. Pugh*, 136 Ill. 539, 27 N. E. 415.

The owner of land taken for a sewer farm is not only entitled to compensation for the land taken, but also for injuries to other land of his located close to, but not immediately contiguous to, the land taken, under a statute authorizing compensation, not only for the value of the land taken, but also for injuriously affecting other lands. *Queen v. Essex*, L. R. 14 Q. B. Div. 753, 33 Week. Rep. 214.

<sup>5</sup>*Butchers' Slaughtering & Melting Assn. v. Com.* 163 Mass. 386, 40 N. E. 176.

<sup>6</sup>The value of a stone wall by the running foot along the front of the property is a proper element to be considered in an assessment of damages for land taken by eminent domain for sewer purposes. *Stone v. Com.* 181 Mass. 438, 63 N. E. 1074.

<sup>7</sup>*Re Chatham Street*, 16 Pa. Super. Ct. 103.

Where a strip of land is taken for the construction of a sewer, its owner is entitled to compensation for the temporary destruction of a water supply on his remaining land during the process of construction, where the statute requires compensation to be made for all damages that shall be sustained by reason of the taking. *Pennney v. Com.* 173 Mass. 507, 73 Am. St. Rep. 312, 53 N. E. 865.

Damages to abutting property from the temporary escape of sewer gas dur-

ing the time reasonably necessary for making repairs to a sewer or removing obstructions should be considered in determining the compensation to be made in proceedings to condemn land for sewer purposes. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

When, in the construction of a public ditch across or upon the right of way of a railroad company, it will become necessary to make an excavation under the tracks of a railroad, and for the company to incur expense in supporting the tracks or otherwise while the ditch is being constructed so as not to interfere with the use of its road at that place, such expense shall be taken into account in assessing the damages of the company. *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009. Followed in *Northern Ohio R. Co. v. Hancock County*, 63 Ohio St. 32, 57 N. E. 1023.

<sup>8</sup>Damages for the taking of land by a city for the laying of a sewer are not to be awarded in reference to the peculiar situation or circumstances or plan of the owner, or to the business in which he happens to be engaged; but any possible use of the land may be considered by the jury. *Maynard v. Northampton*, 157 Mass. 218, 31 N. E. 1062.

In a condemnation proceeding to ascertain the just compensation to be paid for lands which are subject to overflow, it is not proper to take into consideration the value thereof as affected by their capability of improvement by the erection of dikes, where such dikes, if constructed, would have the effect of wrongfully overflowing the lands of adjoining riparian owners. *Burke v. Sanitary Dist.* 152 Ill. 125, 38 N. E. 670.

When a sewer outlet is located on an unoccupied wharf lot the damage will be the difference between its value before and after the taking, without regard to its possible uses. *Harris v. Philadelphia*, 2 Monaghan (Pa.) 391, 16 Atl. 740; *Harris v. Philadelphia*, 155 Pa. 76, 26 Atl. 874.

er of the land taken can make of it as matter of right should be considered in reduction of damages,<sup>9</sup> but not the fact that he has been given a license to place a building over the drain.<sup>10</sup> The fact that the drain may constitute a nuisance cannot be taken into consideration, because the public authorities will be in duty bound to abate any nuisance which may arise from their use of the premises.<sup>11</sup> The damages are to be measured by the right which the public has acquired, and not by the use it actually makes of the property.<sup>12</sup> The value of a private sewer appropriated by a municipal corporation, for which damages must be paid, is not necessarily fixed by the amount paid by the owner for its construction, but by the cost of an adequate sewer at the time of taking, not exceeding the cost of the sewer taken.<sup>13</sup> A landowner can recover only for the injuries which have been caused since he acquired title to the property.<sup>14</sup> Damages which are likely to result in the future are to be considered.<sup>15</sup> Benefits cannot be considered in reduction of the compensation to be allowed for the land taken.<sup>16</sup> A claim for damages for the overflow of an owner's land resulting from the construction of a dam, the erection of which clearly appeared necessary to a feasible and economical prosecution of the work of the drainage district, will be presumed to have been passed upon by the jury in the assessment of such owner's damages in the drainage proceedings, and, if not, the matter becomes *res judicata* because he might have had such damages determined at that time.<sup>17</sup>

<sup>9</sup>*Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. 130.

<sup>10</sup>*Roanoke City v. Berkowitz*, 80 Va. 616.

<sup>11</sup>*Clark v. Washington*, 1 Pa. Dist. R. 651, 11 Pa. Co. Ct. 433; *Stewart v. Rutland*, 58 Vt. 12, 4 Atl. 420.

<sup>12</sup>*Hays v. South Easton*, 10 Pa. Super. Ct. 390.

<sup>13</sup>*Hays v. South Easton*, 10 Pa. Super. Ct. 390, 44 W. N. C. 432.

<sup>14</sup>*Alexander v. District of Columbia*, 3 Mackey, 192.

Where it appears that a person objecting to the construction of a drain through his land obtained title thereto after proceedings for the construction of the drain had been instituted, and for the purpose of raising certain objections which the original owner had lost the right to make, the sale is not a bona fide one. *Hackett v. Brown*, 128 Mich. 141, 87 N. W. 102.

But a right to damages for land taken  
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for a drainage ditch under a contract permitting the occupation of it until the damages are ascertained and the taxes raised to pay therefor, during which time no assessments for benefits shall be collected from the landowner, will pass with a sale of the land. *Murray v. Jayne*, 8 Barb. 612.

<sup>15</sup>*Lincoln v. Com.* 164 Mass. 368, 41 N. E. 480.

<sup>16</sup>*Thomas v. County Comrs.* 5 Ohio N. P. 449.

Under the provisions of the farm drainage law of Illinois, the jury must, in assessing the damages to a landowner in a drainage district, find the value of the ground used for the ditch, also the damages, if any, to the remaining land not taken, and cannot set off the benefits thereto by the drainage, that being the duty of the commissioners. *Union Drainage Dist. v. Volke*, 163 Ill. 243, 45 N. E. 415, Affirming 59 Ill. App. 283.

<sup>17</sup>*McGillis v. Willis*, 39 Ill. App. 311.

## IX. ACQUISITION OF FUNDS.

**224. How far drainage may be made a public charge.**—The drainage of land for the purpose of promoting the public health or welfare is a public purpose for which the power of taxation may be exercised;<sup>1</sup> and, when the improvement affects such a large portion of the state as to make it of general importance, it may be paid for out of the funds arising from general taxation.<sup>2</sup> The legislature may authorize a municipal corporation to secure a fund by general taxation to construct and maintain sewers.<sup>3</sup> Drains are, however, internal improvements within a constitutional provision forbidding the state to engage in such improvements, and in states where such provisions exist they must be carried on, if at all, by the communities which will be specially benefited by them. Many of the grants of swamp land by the general government to the respective states contained a provision that the proceeds of sales should be used to drain and reclaim the lands. This provision, while in part for the benefit of the purchaser, cannot be enforced by him. The duty, being for the public good, must be enforced by the public authorities.<sup>4</sup> And the failure by the state to apply the purchase money to the reclamation of the lands does not entitle the purchaser to recover back the purchase

<sup>1</sup> § 170, *ante*.

<sup>2</sup> § 176, *ante*.

<sup>3</sup> When the legislative authority of a municipal corporation assumes control of the sewerage of the city, and creates a department of city government, charged with the location, extension, construction, and maintenance of sewers, and has accepted plans and estimates for the extension of the sewerage already under its control, it has established a system of sewerage within the meaning of the act of legislature authorizing cities having an established system of sewerage annually to levy and collect a tax to be known as "the sewerage-fund tax," and is authorized by that act, upon report of the city sewer department of the amount necessary for the purpose of constructing and maintaining the same, to levy and collect a sewerage-fund tax. *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468.

<sup>4</sup> *Baugh v. Lamb*, 40 Miss. 493; *Barrett v. Brooks*, 21 Iowa, 144; *Keltner v. Story County*, 28 Iowa, 35.

Such provision does not limit or qual-

ify the power of the state legislature over the lands and their proceeds to dispose of as they see fit, but is, at the utmost, but the expression of a wish or desire on the part of Congress that such proceeds should be so expended, but not making it a condition of the grant. *Whiteside County v. Burchell*, 31 Ill. 68.

A purchaser of swamp land who acquired his title thereto under the existing system of disposing of the swamp lands of the state, which provided that the proceeds from such sales should be applied in reclaiming such lands by the construction of drains, and that the same should be laid out in districts and the work let to the lowest bidder, and, if a purchaser thereof is the lowest bidder, that he be allowed to pay his purchase price in that way, but, if not the lowest bidder, that he should pay cash or execute his note and mortgage therefor,—cannot compel the county in which his lands are located to take its pay for notes given by him in labor in ditching the lands, where no contract exists between him and the county giving him

jury in the appellate court is sufficient.<sup>15</sup> Under the power of awarding damages for the location of a sewer outfall, a committee cannot determine whether a cesspool should or should not be constructed, and award annual damages to be paid in the future till such cesspool shall be built by the city.<sup>16</sup> If the municipal corporation has no power to institute the proceeding, it will be enjoined.<sup>17</sup> Where the location of a discharge for a city sewer is such as to constitute a nuisance to adjoining property, a recovery may be had for the entire damages in one action, if they are of a permanent character and go to the entire value of the estate affected; but, where the extent of the wrong may be apportioned from time to time, and does not go to the entire destruction of the estate or its beneficial use, separate actions must be brought for the damages.<sup>18</sup> A proceeding to condemn land for a drain, under a statute providing for the condemnation of land by a village for a drain, is not complete until such resolution or order is recorded, such recording being a condition precedent to the right to enter upon the land and construct the drain.<sup>19</sup> That the ditch was not legally laid out is not material where the landowner consented to the work done; nor is it important that the parties interested did not originally agree as to the exact line of the ditch, if they consented to what was done.<sup>20</sup> After the damages have been paid without the observance of the legal formalities no further damages can be recovered when the use of the sewer does not constitute a nuisance.<sup>21</sup> Refusal to allow damages exhausts the power of the municipal authorities, and they cannot subsequently entertain a new petition by the same landowner for the same laying out.<sup>22</sup>

**220b. Right remaining in landowner.**—The public right is limited by the public necessity, and no greater title passes than the needs of the public require, so that the residue remains in the former owner; and he may make such use of it as is not incompatible with the pub-

equal to the difference between the award and an assessment of the benefits levied against his land, deposited by the municipal corporation in court. *Pearce v. Chicago*, 176 Ill. 152. 52 N. E. 27.

<sup>16</sup>*Chesbrough v. Putnam & P. Counties*, 37 Ohio St. 508.

<sup>17</sup>*Jackson v. Portland*, 63 Me. 55.

<sup>18</sup>A proceeding in the nature of eminent domain brought in a state court by a village to obtain an easement over land for the flow of sewage after leaving its sewers will be enjoined, where the village has no power of eminent domain except as accessory to its power to make

public improvements, and it is not proposed to construct culverts, drains, sewers, or cesspools, but simply to throw the sewage upon complainant's land. *Colby v. La Grange*, 65 Fed. 554.

<sup>19</sup>*Scott v. Nevada City*, 56 Mo. App. 189.

<sup>20</sup>*Swennes v. West Salem*, 114 Wis. 650, 91 N. W. 121.

<sup>21</sup>*Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904.

<sup>22</sup>*District of Columbia v. Hutchinson*, 1 App. D. C. 403.

<sup>23</sup>*Cumbridge v. Middlesex*, 117 Mass.

79.

**225. Raising funds by local assessment.**—There is no doubt that drainage may be carried on at the expense of the local property which will be benefited by it.<sup>1</sup> The only question which can arise in any case is as to how far the right to impose the local assessment has been conferred upon the authority attempting to exercise it. To enable a municipal corporation to assess the expense of a sewer on abutting property the authority must be expressly conferred by the legislature;<sup>2</sup> but, if general power over improvements is conferred upon local authorities, it is within their discretion to determine whether particular improvements shall be paid for by local or general taxation.<sup>3</sup> Under the rule that the power to make the improvement may be delegated, not only to municipal corporations, but to districts and local officers, they may also be given the power to levy necessary assessments to meet the expense of the improvement.<sup>4</sup> An act of the legislature vesting the corporate authorities of cities and villages with power to construct and maintain drains, levees, dykes, and pumping works for drainage purposes by special assessment upon the property benefited thereby is not unconstitutional as exceeding the power granted by a clause in the Constitution authorizing cities, etc., to make local improvements by special assessment, but does not authorize such assessments to maintain the same, where the authority to pass such act is derived from an amendment to the Constitution authorizing the establishment of drainage districts, and vesting the corporate authorities thereof "with power to construct and maintain drains . . . by special assessments," which amendment controls as to assessments of this character regardless of the provisions of the original Constitu-

empowering the county to issue bonds in lieu of immediate taxation for the improvement, does not authorize the county to loan its credit to any company, association, or corporation in violation of the state Constitution. *Shelley v. St. Charles County*, 5 McCrary, 474, 17 Fed. 909.

<sup>1</sup> § 172, *ante*.

When sewers have been constructed according to a plan devised pursuant to a statute, and no fraud has occurred in any of the proceedings, nor any legal irregularity at all affecting the rights or interests of the owners, an assessment to defray the expense is valid. *Re New York Protestant Episcopal Public School*, 47 N. Y. 561.

<sup>2</sup> *Watertown v. Fairbanks*, 65 N. Y. 588.

<sup>3</sup> It is within the scope of the power of the board of trustees of a village to

determine whether the removal of an old culvert and construction of a new one should be regarded as a local improvement to be paid for by special assessments. *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

<sup>4</sup> *Reeves v. Wood County*, 8 Ohio St. 333.

Under a constitutional provision "that the general assembly may delegate the taxing power, with the necessary restriction, to the state's subordinate, political, and municipal corporations, to the extent of providing for their existence, maintenance, and well being," the legislature is not required to delegate the power to levy sewer taxes to city councils, but may delegate the power to a board of local improvement representing one of the improvement districts of a city; and an act is constitutional which provides that such board shall report to

tion.<sup>5</sup> The power to tax is not exhausted by one attempted exercise of it if the fund is not sufficient to pay for the improvement.<sup>6</sup> To render an individual liable to assessment, however, the object for which the assessment is levied must affect the public; and, therefore, a property owner cannot be charged with the cost of placing a sewer in his private alley against his protest.<sup>7</sup> Local assessments can only be made for local improvements, but the mere fact that the sewer is not for the exclusive benefit of those assessed does not give them a right to exemption from assessment.<sup>8</sup> To justify a local assessment

the city as to the cost of the improvement, and that the city council must levy a tax regarding such report, although the council has no discretion as to the levy of the tax, and, where it fails to make the levy, it may be compelled to do so by mandamus. *Little Rock v. Little Rock Bd. of Improvements*, 42 Ark. 153.

<sup>5</sup>*Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

<sup>6</sup>*State ex rel. Frazer v. Holt County Ct.* 135 Mo. 533, 37 S. W. 521; *State ex rel. Zook v. Holt County Ct.* 136 Mo. 474, 37 S. W. 1131; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813; *Rogers v. Voorhees*, 124 Ind. 469, 24 N. E. 374.

But a statute authorizing a reassessment for the expense of constructing a sewer in all cases where, by reason of a defect in the ordinance under which the improvement was made, the special tax bills issued therefor remain unpaid, violates the constitutional provision prohibiting retrospective legislation so far as it applies to assessments for improvements made prior to its adoption, and cannot be defended upon the ground that it constitutes an exercise of the power of the legislature to authorize the levying of taxes to pay pre-existing taxes, as such power is limited to general taxation, and does not include assessments for local purposes. *St. Louis v. Clemens*, 52 Mo. 133.

So, drainage commissioners have no power to incur any indebtedness against a drainage district organized under the drainage laws of Illinois in excess of the assessment levied, although such assessment was wholly inadequate to complete the work commenced, and the additional work was necessary to protect the lands of the district, and the commissioners advanced the money for the excess; and a special assessment levied to meet such indebtedness is void. *Ahrens v. Minnie Creek Drainage Dist.* 170 Ill. 262, 48 N.

E. 971; *Winkelmann v. Moredock & I. L. Drainage Dist.* 170 Ill. 37, 48 N. E. 715.

<sup>7</sup>*Harrisburg v. Brightbill*, 6 Pa. Dist. R. 438.

Purchasers of houses connected with a private drain in a private way may become liable for assessments for the cost of the sewer when the way is opened as a public one, and the municipality acquires title to the drain from its former owner and makes it part of its sewer system, unless they have obtained the right to maintain the drains free of expense from the owner of the private drain. *Slocum v. Brookline*, 163 Mass. 23, 39 N. E. 351.

Where a statute provides for assessments for sewers made in any "street," that term means public streets, either by lay-out or by dedication and acceptance. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

It is not necessary, in determining the public benefit of a proposed ditch, so as to justify the levying of special assessments for the cost thereof, to show the number of persons who, or that any particular person, will be benefited in health or comfort thereby; but, if it can be justly concluded, from the nature of the system of drainage adopted, that there will be a material element of public good in the result, then the purpose is a public one, and property may be assessed, even though the pond or marsh to be drained is wholly on the land of one citizen, which he is under no duty to drain at his own expense for the benefit of the community, although he may be compelled to pay the entire benefit which thereby accrues to his property. *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782.

<sup>8</sup>The fact that 25 acres of land not originally included within the lines of a sewer district have been drained into a sewer constructed as a district sewer

the improvement must be of the class for which the statute authorizes such assessment.<sup>9</sup>

**226. What property is subject to assessment.**— The basis upon which a particular locality or section of a state can be required to pay for the cost of drainage is that, because of the unwholesome condition of the land, the public has a right to require the owner to abate a nuisance upon it, or that, because of the location of the land, it alone will be benefited by the improvement. If the benefit will result equally to the entire state, and the condition of the land is not such as to constitute a menace to the public health, there is no principle upon which a particular section of country can be made to pay for the improvement. The entire state should, under such circumstances, contribute to the expense. If the benefit from the improvement will be enjoyed by the people living in the improved section alone, justice demands that they should pay for the improvement, and a particular parcel of land should be subjected to assessment only when it is so situated as to share in the benefit. The fact that the land was not included by the officers within the limits of that which would be benefited is *prima facie* evidence that it should not be assessed.<sup>1</sup>

The limits of a drainage district, empowered to levy a property

does not render it a public sewer so as to relieve owners of property within the district from liability on their special tax. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, Affirmed in 181 U. S. 402b, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

A sewer constructed exclusively for the drainage of abutting lots does not, because it drains the surface water from the streets, lose its character of a local sewer, within the Ohio statutes declaring a local sewer to be one intended for use exclusively for the drainage and accommodation of lots abutting thereon, as the city is not compelled to take care of surface water on the streets, but such water is a common enemy which abutting lot owners must themselves keep off, and the street is not a lot by itself distinct from the abutting lots, but belongs to the owners thereof subject to the public easement; and assessments for the construction of such a sewer are therefore void where assessed in proceedings by the board of public affairs without the action or concurrence of the council, under a statute dispensing with such action only in the case of trunk or main sewers. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

To enforce an assessment upon abutting property under a statute permitting the construction of trunk sewers under certain prescribed proceedings and the assessment of private property therefor, it must be shown that the sewer was in fact a trunk sewer. *Cincinnati use of Deters v. McDuffie*, 1 Ohio N. P. 53.

A sewer is within a law relative to assessing upon benefited property the expense of constructing a "new sewer," although there was an old sewer on the street, but on the other side, no part of it being used in the new construction, it being broken down and useless. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

*Chicago v. Adcock*, 168 Ill. 221, 48 N. E. 155; *Re Pequest River*, 39 N. J. L. 197, Affirmed in 40 N. J. L. 380; *Re Pequest River*, 42 N. J. L. 553.

While an assessment for the expense of the drainage of certain land may, by reason of inveterate usage, be based otherwise than on benefits received, nevertheless, owners of land outside the district drained may not be assessed without giving them any voice in the management of the work. *State, Benjamin, Prosecutor, v. Bog & Fly Meadow Co.* 68 N. J. L. 197, 52 Atl. 215.

tax which must be voted for, must be fixed with certainty and precision, a failure in this regard rendering the organization of such drainage district invalid, and any taxpayer residing within the district is a proper party to raise the question of its invalidity.<sup>2</sup> But any benefit which the land will receive from the improvement is sufficient to uphold an assessment.<sup>3</sup> As has already been seen,<sup>4</sup> general tax exemptions do not apply to special assessments for the construction of drains and sewers; and, therefore, all classes of property within the district may be assessed, unless it is expressly exempted from the payment of drainage assessments.<sup>5</sup> An assessment against lands of infants for the construction of a drain without the appointment of a guardian *ad litem* is not void so as to be subject to collateral attack.<sup>6</sup>

<sup>2</sup>*Richard v. Cypremort Drainage Dist.* 107 La. 657, 32 So. 27.

<sup>3</sup>Land used as a wharf is liable to assessments for the construction of a sewer, although unconnected with it, where such sewer drains higher land of water which might otherwise flow over the wharf land to the river. *Boeres v. Strader*, 13 Ohio Dec. Reprint, 414.

The fact that a toll bridge drains directly into a river does not exempt it from liability to assessment for the construction of a sewer on the ground that it derives no benefit from the sewer, as it derives the general benefit and advantage of being accessible, and all its approaches and neighboring public ways being properly drained and cleansed. *Hammersmith Bridge Co. v. Hammer-smith*, L. R. 6 Q. B. 230.

Property is benefited by the construction of a sewer so as to be subject to assessment for its construction, although not strictly connected with it, when without it the service is inadequate, causing, in times of freshets, the sewage to back up and overflow streets, sidewalks and cellars in the low lands, and even forcing gases and odors into houses situate on high lands as the premises in question are situate. *Prior v. Buehler & C. Constr. Co.* 170 Mo. 439, 71 S. W. 205.

Land within a drainage district not benefited by a system of ditches proposed to be provided therein because the level of the lands is such that the proposed ditches will not carry off the water therefrom are nevertheless subject to assessment for the improvement; the theory of the law being that the public health, convenience, and welfare are promoted by the improvement.—not simply that the lands of particular owners

are rendered more valuable. *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.

Other ordinances of a municipal corporation, providing for the construction of lateral branches to an outfall sewer, may be introduced at the confirmation of assessments for the construction of such outfall sewer under an ordinance providing for openings on both sides, for the purpose of showing good faith in the city in carrying out its provisions for lateral connections, so as to justify the assessment of property not abutting upon such lateral sewer. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

Property not abutting on the line of a main sewer may be assessed to the extent of its benefits if it is within the limits of a district having a right to drain into the sewer. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>4</sup>§ 172. *ante*.

<sup>5</sup>The California statute authorizing the assessment of reclaimed swamp land does not impair the obligation of any contract between the United States and California, or the United States and its patentees and grantees, or between such state and purchasers from it or grantees of the United States, or of any contract in the charter of the reclamation district. *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366.

Assessments for the cost of a sewer are to be levied on parcels of land belonging to a railroad company aside from that made use of in carrying on business peculiar to railroading, and enforced in the same way as provided for any other property. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

<sup>6</sup>*McBride v. State*, 130 Ind. 525, 30 N. E. 699.



Where a township is separated, part of it being incorporated into a village, the liability to assessment for government drainage, the assessment for which had not been completed, is not a matter to be arbitrated on as being a debt of the township to which the village ought to contribute, but each corporation is bound to raise the amount assessed in respect to the land locally situated within it.<sup>7</sup>

**227. Who may select land to be assessed.**—The persons who will be intrusted with the selection of the land to be assessed are determined by the method which is adopted for paying for the improvement. The legislature may itself provide that the assessment shall be made upon all property abutting on the improvement, in which case all that is necessary is to ascertain the facts which will render the property liable; or the cost may be imposed upon all property benefited, in which case the determination of what property is benefited must be made by the persons upon whom the duty is imposed by the legislature. The legislature may fix the bounds of the district which is to be charged with the cost of the improvement, or it may authorize the organization of a drainage district to have charge of it, the bounds of which may be fixed by the officers selected by the persons interested. The persons who shall designate the property to be assessed will in each case be those indicated by the legislature in its designation of the manner in which the improvement is to be carried out. The determination of the officers charged with the duty of determining what property shall be assessed is conclusive in the absence of fraud, or without showing that they proceeded on a wrong theory.<sup>1</sup> Acts of the proper officers cannot be interfered with on the ground that they have not included all property which should be included.<sup>2</sup> The officers may permit temporary use of the drains without requiring the one making such use of them to pay assessments for their construction.<sup>3</sup>

**227a. Boundaries of drainage districts.**—There can be little difference of opinion as to the necessity of sewers in a municipal corporation; but, when the attempt is made to secure the drainage of a tract of land devoted for the most part to farming purposes, there is a great

<sup>1</sup>*Point Edward v. Sarnia Twp.* 44 U. C. Q. B. 461.

<sup>2</sup>*Prior v. Buehler & C. Constr. Co.* 170 Mo. 439, 71 S. W. 205; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Toledo use of Macgahan, v. Ford*, 20 Ohio C. C. 290; *Ft. Wayne v. Cody*, 43 Ind. 197; *Re Tuthill*, 50 N. Y. Supp. 410.

<sup>3</sup>*Topeka v. Huntoon*. 46 Kan. 634, 26 Pac. 488; *Kelso v. Boston*, 120 Mass. 297.

<sup>4</sup>That a person has a revocable license to enter his private drain into a sewer does not render it necessary to assess him for the improvement if it is not contemplated that he shall permanently avail himself of the sewer, and other accommodations are contemplated for his property. *Fairbanks v. Fitchburg*, 132 Mass. 42.

temptation in some instances to organize a district and carry on improvements which may benefit a very small tract of land at the expense of land which is in no need of drainage. Therefore, the proceedings to organize such districts in which land is included against the objection of its owner should be scrutinized much more strictly than in case of city sewers. As said in *Cypress Pond Draining Co. v. Hooper*,<sup>1</sup> an act of legislature creating a drainage district within specified boundaries, and incorporating a company with power to levy taxes on all the lands within that district, equally, to defray the cost of such drainage, is within the constitutional prohibition against the taking of private property for public use without just compensation, and therefore void, where a large portion of the land in such district would be benefited very little, if at all, by such proposed drainage, and the objects and purposes of such act, passed without the knowledge and consent of such owners, and to the provisions of which they have never assented, do not even partake of a public nature, but are confined exclusively to the advantage of those owners whose lands would be greatly benefited thereby.

An order of court fixing the boundaries of a drainage district, including all the lands that will be benefited thereby, does not become a final adjudication upon that question as to lands not mentioned in that proceeding, the owners of which were not parties thereto.<sup>2</sup> If the statute prescribes steps to be taken to include land within a district, such steps must be followed, or the landowner may take proceedings to contest the validity of the inclusion.<sup>3</sup> The statutory authority of the township board upon the appeal of a landowner from an assessment for drain benefits as made by the drain commissioner to correct any "error or inequality in the assessment," does not entitle it to exclude lands from the assessment district which the commissioner had determined were benefited; nor has it the power to determine the validity of the proceedings, or to change the per cent assessed upon the township at large.<sup>4</sup> In the case of assessments for sewers the question whether or not property will be benefited is primarily committed to the officers in charge of the improvement, and their determi-

<sup>1</sup>2 Met. (Ky.) 350.

<sup>2</sup>*Streuter v. Willow Creek Drainage Dist.* 72 Ill. App. 561.

<sup>3</sup>The land of an owner cannot lawfully be included in a drainage district, unless included by the owner signing the petition for organization of the district, or by having his name included in the petition as a landowner by the petitioners, or by having his name appear in the

notice as required by the statute under which such district is organized; and such owner, or others whose lands are included, have the right to make an objection by a writ of certiorari. *Sanner v. Union Drainage Dist.* 175 Ill. 575, 51 N. E. 857, Reversing 64 Ill. App. 62.

<sup>4</sup>*Thomas v. Walker Turp. Board*, 116 Mich. 597, 74 N. W. 1048.

nation cannot be called in question in the absence of fraud.<sup>5</sup> Quo warranto is not the proper remedy to question the inclusion of land within a drainage district by order of court, unless it is alleged that the order was procured by fraud.<sup>6</sup>

**228. Enlargement of district.**—The original establishment of the bounds of a drainage district does not exhaust the authority of the officers; but, in case it subsequently appears that land which should have been included has been left out, it may be added to the district. The power of the legislature of a state to change and authorize the alteration of the boundaries of such quasi municipal corporations as drainage districts, and to extend the authority of the commissioners of the district so as to be coextensive with the district as changed, cannot be questioned under a constitutional provision authorizing the formation of drainage districts;<sup>1</sup> and it may be conferred upon the officers of the district.<sup>2</sup> One who was originally left outside of the district may be included in it by his own application; and he will be presumed to have applied for inclusion in case he makes use of the advantages offered by the system.<sup>3</sup> The land need not be directly

<sup>5</sup>*Moore v. People*, 106 Ill. 376.

The plan upon which drainage districts are organized, under the drainage laws of Illinois, is to have only such lands included within their boundaries as will in fact in some material degree be beneficially affected by the proposed drainage, so that the drainage commissioners, when they fix the boundaries to a drainage district, at the same time pass upon the question as to what lands will be benefited; and it is made their duty to exclude all lands in their judgment not benefited, and include all those benefited; and, when their report has been confirmed by the county court, due notice of the application for confirmation being given to all persons interested, who are at liberty to appear and contest the proposed boundaries fixed, such decision, so long as it stands in full force and unreversed, is conclusive; and a jury impaneled to assess damages and benefits for proposed work in a drainage district so organized have nothing to do with the question as to whether or not land included therein would in fact be benefited; but their duty is simply to apportion the entire benefits among the several tracts of land included in the district in the ratio in which benefits will result to the respective tracts from the improvement; and an attempt on their part to determine that only a por-

tion of a particular tract is in fact benefited is extrajudicial and nugatory, and the assessment will be taken as having been made on the entire tract. *Gauen v. Moredock & I. L. Drainage Dist. No. 1*, 131 Ill. 446, 23 N. E. 633.

It is said in *Buckley v. Lorain County*, 1 Ohio C. C. 251, that § 4491 of the Ohio Revised Statutes, providing that the court may correct any gross injustice in the apportionment made by commissioners for the construction of a ditch, was intended to meet and obviate the objection of the conclusiveness of the finding by the commissioners that the lands would be benefited.

<sup>6</sup>*People ex rel. Harrison v. Mineral Marsh Drainage Dist.* 193 Ill. 428, 62 N. E. 225.

<sup>1</sup>*People ex rel. Hardy v. Drainage Comrs.* 143 Ill. 417, 32 N. E. 688.

<sup>2</sup>*Doyle v. Baughman*, 24 Ill. App. 614; *Davenport v. Drainage Dist.* 25 Ill. App. 92.

The jurisdiction of drainage commissioners to enlarge a drainage district under a section of the drainage law authorizing them to make such enlargement cannot be questioned on the ground that they are an interested tribunal. *Scott v. People*, 120 Ill. 129, 11 N. E. 408.

<sup>3</sup>*Lake Fork Special Drainage Dist. v. People*, 138 Ill. 87, 27 N. E. 857; *Drain-*

connected with the ditches of the district to be liable to annexation. It is sufficient if it is connected with ditches which connect with the district.<sup>4</sup> A landowner cannot construct ditches for the purpose of conveying water from his property into the district drained without being liable to have his property connected with the drains.<sup>5</sup> The mere preservation of existing ditches, however, does not make the landowner liable to be included within the district if they do not connect with the district drains.<sup>6</sup> The drainage commissioners have no power to contract not to include land which makes use of the district

*age Dist. No. 3 v. People*, 147 Ill. 404, 35 N. E. 238.

An owner of land who widens and deepens a small ditch on his land which connects with the ditch of a drainage district so as to drain water from his land into the district ditch, which would not flow therein otherwise, will be deemed, under the drainage law of Illinois, to have voluntarily applied to be included within the district. *People ex rel. Baron v. Drainage Dist. No. 3*, 155 Ill. 45, 39 N. E. 613.

The drainage commissioners of a drainage district have the power, under the drainage laws of Illinois, to annex the lands of owners who have connected the drains on the same with those of the district, even though such lands may be in an adjoining township; and the facts that such commissioners are the highway commissioners of the township in which the district is situate, and that the owners of the annexed land in another township have no voice in their election, make no difference, since they, having voluntarily applied to be included in the district by availing themselves of its benefits, must bear their fair portion of the burden. *People ex rel. Hardy v. Drainage Comrs.* 143 Ill. 417, 32 N. E. 688.

The determination by the county court on the organization of a drainage district that certain lands should not be included in the district is not such *res judicata* as will prevent the commissioners afterward, when the owners of such lands have made constructive application for annexation by joining their lands by ditches to the ditches of the district, from making the statutory order of annexation of such lands. *People ex rel. Herman v. Bug River Special Drainage Dist.* 189 Ill. 55, 59 N. E. 605.

*Lake Fork Special Drainage Dist. v. People*, 138 Ill. 87, 27 N. E. 857; *People*

*ex rel. Baron v. Drainage Dist. No. 3*, 155 Ill. 45, 39 N. E. 613.

If the owner of land turns the water therefrom into an artificial channel connecting with a ditch of a drainage district he will be regarded as voluntarily applying to have his land connected with the district, and cannot question the authority or right of the drainage commissioners to thereupon annex his land to the district without notice and to proceed to classify and assess it as part thereof, where the drainage law under which such district is organized expressly gives them that right; although the lands of the district are servient to those of such owner, and are bound to receive the water flowing therefrom, and such owner has the right to collect the water upon his land in ditches and drains, and discharge the same, thus accumulated upon the land constituting the district. *People ex rel. Hardy v. Drainage Comrs.* 143 Ill. 417, 32 N. E. 688.

*Dayton v. Drainage Comrs.* 128 Ill. 271, 21 N. E. 198.

Owners of land have the right to have the water that accumulates thereon to flow in its natural direction, and no presumption can arise that they have applied to be included within a drainage district from the fact that such water naturally flows into the district ditch; and this is true although they increase the flow by ditches or drains upon their own land; but they cannot construct ditches from the district ditch over their own land so as to carry off water in that direction which would naturally go in another direction without becoming liable, under the statute, to be connected with the district, and thus contribute to the expense of the improvements. *People ex rel. Baron v. Drainage Dist. No. 3*, 155 Ill. 45, 39 N. E. 613.

drains.<sup>7</sup> A landowner who questions the right of drainage commissioners to annex his land to a drainage district because he has placed himself within the statutory provision authorizing such annexation whenever the owner of land connects a ditch or ditches on his own land with those of a drainage district must proceed by quo warranto, and cannot maintain a bill in equity to enjoin the commissioners from acting as such over his land.<sup>8</sup> Additional lands may be included by petition,<sup>9</sup> and no act on the part of the landowner is necessary;<sup>10</sup> but the same notice is required as is required in the original organization of the district.<sup>11</sup> The legality of acts done in enlarging the district cannot be questioned in a proceeding to collect the special assessment upon the added land.<sup>12</sup> The decision of commissioners that land shall be added to a drainage district is not, in the absence of fraud, a subject of inquiry in quo warranto proceedings;<sup>13</sup> but it may be reviewed by certiorari where no other means of review is provided by statute.<sup>14</sup> The authority of the commissioners does not extend to the reduction of the size of the district, unless it is conferred by statute.<sup>15</sup>

**229. Levying the assessment.**—To give the authorities jurisdiction to impose a tax to defray the expense of constructing a ditch, the statute describing the proceedings relative to the ditch must be complied

<sup>7</sup>*Lake Fork Special Drainage Dist. v. People*, 138 Ill. 87, 27 N. E. 857.

<sup>8</sup>*Bodman v. Lake Fork Special Drainage Dist.* 132 Ill. 439, 24 N. E. 630.

<sup>9</sup>The statute allowing a supplemental petition to be filed after the report of the drainage commissioners, asking that lands not mentioned in the report, but which are affected by the drainage, be referred to the commissioners for assessment, should be so construed as to allow such a petition in the case of lands stricken from the report because the owners did not have proper notice. *Osborn v. Musinkuckee Lake Ice Co.* 154 Ind. 101, 56 N. E. 33.

<sup>10</sup>*Streuter v. Willow Creek Drainage Dist.* 72 Ill. App. 561.

<sup>11</sup>The fact that a section of the drainage law, vesting the drainage commissioners with power to enlarge the boundaries of their district, fails to prescribe the mode of procedure or the notice to be given to the owners of land sought to be annexed, will not be construed as conferring upon such commissioners the power to annex such lands without giving the owners thereof the right to be heard upon the question whether a

proper petition has been presented, and whether their lands are involved in the same system of drainage, and require for outlets the drains of the district: but such statute will be construed as requiring the same procedure and notice as are required in the organization of the original drainage district. *Mason & T. Special Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995, Affirming 28 Ill. App. 561.

One who, having due notice of a hearing on a petition to annex his land to a drainage district, suffers default, cannot, on the hearing as to the amount of the assessment, insist that no assessments shall be made against him because his land is not benefited. *Trigger v. Drainage Dist. No. 1*, 193 Ill. 230, 61 N. E. 1114.

<sup>12</sup>*People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294.

<sup>13</sup>*People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

<sup>14</sup>*Mason & T. Special Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995.

<sup>15</sup>*People ex rel. Bollweg, v. Drainage Comrs.* 165 Ill. 156, 46 N. E. 261, Affirming 61 Ill. App. 416.

with.<sup>1</sup> The proceedings for the levying of the assessment must follow the mode pointed out by statute or the ordinance under which the improvement is made.<sup>2</sup> A provision of the drainage laws giving an appeal from the drainage commissioners' order confirming special assessments, to the county surveyor, treasurer, and sheriff, who are constituted an appeal board with power to inquire into and pass upon the amount of benefits which will accrue to such tract of land and whether the assessment made by the commissioners is correct, is not unconstitutional, as conferring judicial powers on a nonjudicial body, since such board does not exercise judicial powers within the meaning of the term as used in the clause in the Constitution prohibiting persons in one of the three departments of the state—legislative, executive, and judicial—from exercising any power belonging to the other departments.<sup>3</sup> The discretion of the commissioners must be legally exercised.<sup>4</sup> The assessment may be laid by the persons designated

<sup>1</sup>*Curran v. Sibley County*, 47 Minn. 313, 50 N. W. 237.

The statute to enable owners of marshes swept by the tides to improve them and assess the expense on the land, must be strictly followed, or the proceedings will be set aside, as, for instance, two thirds of the owners being required to concur previously, not only must an actual agreement have been made preliminary to action, but it must have been in such indisputable form, and there must be some legal evidence of its existence. *State, Ward, Prosecutor, v. Frank & G. Creek Co.* 14 N. J. L. 301.

<sup>2</sup>*Andrews v. People*, 173 Ill. 123, 50 N. E. 335.

A special assessment for the construction of the main artery of a sewer system of a particular district may not be levied and collected on the real estate of the district in advance of its completion, when the ordinance authorizing its construction, and providing for the assessment of the cost thereof, contemplated a completion before the levy was made. *Sanborn v. Mason City*, 114 Iowa, 189, 86 N. W. 286.

So, a municipal corporation authorized to construct sewers and assess the lots where "the work is to be done" cannot first construct the sewer and then collect the assessments. *Harper's Appeal*, 109 Pa. D. 1 Atl. 791.

A municipal corporation cannot di-

vide the levy of a special assessment for the construction of a sewer into instalments, where the statute under which it is constructed provides for the levy and collection of assessments to pay for such work according to the provisions of a general law, which general law did not, at the time such act was passed, provide for dividing special assessments into instalments, although since the passage of that act an amendment has been made to the general law authorizing it. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985.

In the absence of any statutory direction as to how a sewer assessment is to be made, a power to make it by ordinance would seem to be incident to a power to charge the cost of construction upon abutting property. *Erie v. Flint*, 8 Pa. Co. Ct. 482.

But dike and ditch taxes levied subsequent to the adoption of a state Constitution by districts organized prior thereto are illegal and void when the dike and ditch laws are in conflict with provisions of the Constitution, as the effect of the adoption of the Constitution is to abrogate and annul all territorial laws repugnant thereto. *Pickering v. Ball*, 19 Wash. 185, 52 Pac. 1022.

<sup>3</sup>*Owners of Lands v. People*, 113 Ill. 296.

<sup>4</sup>*Hetley v. Boyer*, Cro. Jac. 330.

by the statute;<sup>5</sup> but the apportionment must be made by the body designated by the statute, and the power cannot be redelegated by it.<sup>6</sup>

A special assessment on lands for the cost of draining a designated district in which such lands are situated is void, and cannot be enforced, where such assessment was made by a body corporate created by an act of legislature for the purpose of draining the district thereby created, with power to assess the cost thereof upon the lands benefited, three of its officers being appointed by it for that purpose, whose power to make the assessment is absolute, limited only by their discretion, and without giving the owners of land a hearing or an appeal therefrom; and such officers, not having been either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent, are not corporate authorities, who are the only officers to whom the legislature has the power, under the Constitution, to delegate the right of corporate or local taxation.<sup>7</sup> In *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.*<sup>8</sup> it is said that to be legal and effectual, an act authorizing the construction of a sewer should go beyond a mere direction to assess the cost, or a part of it, upon the lots drained, and establish some constitutional rule for apportioning the burden, designate the property out of which the tax is to be made, and fix some certain standard of assessment. The legislature cannot commit to the discretion of others the fixing of the method; and when, under a statute deficient in these respects, the sewer commissioners return an assessment as in their judgment just and equitable, without showing that it is confined to, or even imposed on, the property drained by the

<sup>5</sup> An act requiring the board of county commissioners to ascertain the aggregate cost of a drainage ditch and apportion the same to land according to benefit received is not invalid on the ground that it fails to provide for an impartial tribunal to determine the benefits and make the assessments. *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368.

<sup>6</sup> To sustain an assessment for sewer purposes where the assessors are required to be disinterested freeholders, and to levy the assessment on the owners benefited in proportion, as nearly as may be, to the advantage deemed to accrue to each, it is essential that the proceedings show upon their face that the assessors possessed the requisite qualifications, and that their report show not only that the assessment was made on the owners benefited, but in what pro-

portion. *State, Tims, Prosecutor, v. Newark*, 25 N. J. L. 399.

<sup>7</sup> One not a resident within the limits of any of the municipalities which embrace the area assessable for a sewer is not disqualified to act as assessor by reason of owning a mortgage on some of the land included in the sewer district. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

<sup>8</sup> A direction by the common council that a sewer assessment be levied upon land within a designated portion of the city is not addressed to the assessors individually, and may be carried out by their successors in office. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

<sup>9</sup> *Dollar Sav. Bank v. Ridge*, 62 Mo. App. 324.

<sup>10</sup> *Gage v. Graham*, 57 Ill. 144.

<sup>11</sup> 38 N. J. L. 190, 20 Am. Rep. 380.

sewer, or alluding even to the benefits conferred, without any intimation that the assessment has any reference to benefits; and the fact is that it was made according to surface area of the proximate lots,—the assessment is invalid.<sup>9</sup> Where authority is given to assess the cost upon any person or persons who are, in the opinion of the commissioners, benefited, the assessment is not invalid because made against one only of two joint owners of the property.<sup>10</sup> A whole lot may be assessed, although only a portion of it will be benefited.<sup>11</sup> In case a sewer constructed along several streets is a unity, the assessment may be for the whole work under one proceeding.<sup>12</sup>

*Method of assessment.*—No assessment can be laid upon the property unless it is for the purpose of abating a nuisance, in the absence of benefit to the property. But the actual apportionment of the tax among those who are liable for it may be made in several different methods. When it has once been determined that land will be sufficiently benefited to be liable to an assessment, the most equitable rule is to assess each tract for the exact amount of benefit which will result to it. In *Blue v. Wentz*<sup>13</sup> it is said that the correct rule to apply in the assessment of lands for artificial drainage is to assess such lands according to the amount of waterfall that needs artificial drainage so as to render it suitable for the purposes to which it may reasonably be put, and not by simply estimating the amount of its watershed. And a statute or constitution may provide that the assessment shall be according to benefit; and in such cases the benefit must be regarded in levying the assessment.<sup>14</sup> In such cases it is indispensable that every fact materially affecting the extent and character of the work, and a reasonable estimate of the cost, should be before the jury.<sup>15</sup> The entire assessment cannot exceed the benefits conferred

<sup>9</sup> In some states, however, the manner of making assessments on lands benefited is left to the discretion of corporate authorities of a municipality. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 791.

<sup>10</sup> *Cone v. Hartford*, 28 Conn. 363.

<sup>11</sup> *Re McLean*, 45 U. C. Q. B. 325.

<sup>12</sup> *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

<sup>13</sup> 54 Ohio St. 247, 43 N. E. 493.

<sup>14</sup> *Barana Turp. v. Kelsey*, 120 Ill. 482, 11 N. E. 256.

A law authorizing sewer commissioners to levy upon benefited estates a "proportional part of the cost thereof, not exceeding," etc., must be taken to mean

proportional to the special benefit received. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

<sup>15</sup> *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170.

A provision authorizing the assessing of railroad companies' rights of ways and tracks, and providing the method of classifying them in proportion to the benefits received by them, which is subject to review on appeal, and which provides that assessments based thereon, when levied, are likewise subject to appeal on the one question as to whether such tax exceeds the benefits, is not unconstitutional and void as violating the rule that special assessments shall not exceed the benefits, or that the whole costs of the improvement must not ex-



upon the whole tract assessed;<sup>16</sup> but the fact that the actual cost exceeds the amount estimated will not defeat the assessment if it is still within the benefit conferred.<sup>17</sup> In estimating the benefit everything may be taken into consideration which will show a betterment of the property.<sup>18</sup> The property must be considered in its true character, and not in that which is given it by the owner.<sup>19</sup> The discretion of the commissioners as to the assessment of corner lots will not be interfered with in the absence of anything to show that it was abused.<sup>20</sup> The assessment may be made upon the value of the land

ceed the benefits. *Illinois C. R. Co. v. East Lake Fork Special Drainage Dist.* 129 Ill. 417, 21 N. E. 925.

In laying assessments for the construction of drainage works the report of the engineer or surveyor must state with particularity, as nearly as may be in his opinion, the proportion of benefit to be derived from such drainage by every road and lot or portion of lot, not stating a lump sum for roads generally. *Essex County v. Rochester Twp.* 42 U. C. Q. B. 523.

<sup>16</sup> Under a constitution which requires that taxes shall be proportional and reasonable, an abutting owner cannot be subjected to his proper proportion of a general tax for a sewer improvement and also to a special assessment greater in amount than the benefit that he receives. *White v. Gove* (Mass.) 67 N. E. 359.

A charter provision that sewer taxes shall be assessed upon the property specially benefited in an amount equal to the contract price of construction is not inconsistent with a further provision that the premises specially benefited by the improvement shall be assessed according to the benefits, where it is shown that the contract price does not exceed the whole amount of benefits derived by the property assessed. *Adams v. Bay City*, 78 Mich. 211, 44 N. W. 138.

<sup>17</sup> When the cost of a sewer draining a district lying partly in three towns is apportioned among the three, and the amount apportioned to each is assessed upon lands within that town embraced in the drainage area, if the lots are not assessed more than the value of their actual benefits, and if also the assessment is not improperly distributed, the fact that the estimated cost according to the drainage area proves greatly disproportionate to the actual cost according to the benefits conferred, which is the method adopted and required by statute in assigning to each town the amount it is to pay, is a ground of com-

plaint, neither of the town itself in its corporate capacity, nor of the landowners assessed. *State, King, Prosecutor v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

<sup>18</sup> Upon the trial of an appeal by the owner of land from an assessment levied thereon by drainage commissioners for benefits thereto by a proposed drainage, the jury may take into consideration the benefit the owner may derive by the drainage of a slough which separates him from other land belonging to him, as enabling him to cross at any point, and obviating the necessity of building and maintaining a bridge over the slough. *Spear v. Drainage Comrs.* 113 Ill. 632.

In determining whether or not a railroad right of way is benefited by the drainage in a drainage district, the jury have a right to take into consideration the fact that such drainage has the effect to reduce the volume of water in a natural water course so as to permit the company to maintain a smaller bridge and opening on its right of way across the same. *Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073.

The future improvement of land laid out for lots, but which still remains farming land in appearance, may be considered in assessing the property for a trunk sewer by which it is benefited. *McKee Land & Improv. Co. v. Swickhard*, 23 Misc. 21, 51 N. Y. Supp. 399; *McKee Land & Improv. Co. v. Williams*, 63 App. Div. 553, 71 N. Y. Supp. 1141.

<sup>19</sup> Lots within the city limits, near the compact part of the city, with houses around them, though not in their immediate vicinity, must, for purposes of sewer assessment, be regarded as city lots, and not as agricultural lands. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>20</sup>*Cincinnati v. Weicell*, 9 Ohio Dec. Reprint. 677.

In assessing a corner lot which abuts

without improvements.<sup>21</sup> The report of the engineer, when adopted by the county board, should be accepted as prima facie evidence of benefits conferred;<sup>22</sup> but the opinion of witnesses may be taken as to the amount of benefit which will accrue.<sup>23</sup> The fact that, in making an assessment on a tract of land for the construction of a sewer, the commissioners designated it as the south 20 acres in the subdivision of a certain quarter section, does not imply that they made the assessment at a certain sum per acre without deducting the streets laid out therein; but, in the absence of anything to show the contrary, it will be presumed that the benefits to the land were estimated after taking such streets into consideration and without regard to the exact number of acres therein.<sup>24</sup> A statutory provision authorizing the apportionment of a drainage tax to be made upon the per cent of benefits to accrue, instead of in dollars and cents, is not unjust, where the drain is conducive and necessary to public health.<sup>25</sup>

*Area or frontage assessment.*—It is not possible in all cases to make the assessment exactly according to benefits, and, as has been seen, it is permissible, where all the land within the area which will be subject to the tax will be affected in substantially the same way, to levy the assessment according to area or frontage.<sup>26</sup> The question of the propriety of this method of levying the assessment arose in the early *Case of the Isle of Ely*,<sup>27</sup> where the commissioners of sewers attempted to cut a new channel for a river and assess the expense upon several towns by general tax, so much to each town generally, and it was resolved that none could be taxed towards the reparation of sewers, but those who had prejudice, damage, or disadvantage by the nuisance or default, and who might have benefit and profit by the reformation or removal of them, and that the assessment ought to have these qualities: (1) It ought to be according to the quantity of

lengthwise on a sewer improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the frontage it would have thereon in such case; and such rule is not affected by a statutory provision that the council may exempt from assessment such portion of the frontage of corner lots as to it may seem equitable. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32; *Blanchard v. Columbus*, 8 Ohio S. & C. P. Dec. 676. <sup>22</sup>*Boston v. Shaw*, 1 Met. 130; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 233.

The assessment of benefits for a sewer which is based on the value of the land

alone without buildings must be based on their value at the time of making the improvement; and an ordinance allowing the assessment of each lot at the time when a drain therefrom enters the sewer is void because unreasonable and unequal. *Boston v. Shaw*, 1 Met. 130.

<sup>23</sup>*Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

<sup>24</sup>*Spear v. Drainage Comrs.* 113 Ill. 632; *Yost v. Conroy*, 92 Ind. 464, 41 Am. Rep. 156.

<sup>25</sup>*De Koven v. Lake View*, 129 Ill. 399, 21 N. E. 813.

<sup>26</sup>*Brady v. Haycard*, 114 Mich. 326, 72 N. W. 233.

<sup>27</sup> § 175, ante.

<sup>28</sup> 10 Coke, 141.

the lands, tenements, and rents of the respective owners liable therefor, and by the number of acres and perches; (2) according to the rate of every person's portion, tenure, or profit, or the quantity of the common of pasture, of fishing, or other commodity; and, therefore, it was resolved that the tax generally of a several sum in gross upon the town was not warranted. But this method of taxation cannot be employed in such a manner as to require the determination of benefit to every acre assessed.<sup>28</sup> When sewer assessments are made according to the foot-front rule, abutting property cannot be assessed for a greater portion of the cost of the sewer than its frontage upon the improvement bears to the total frontage of the lots of private owners thereon.<sup>29</sup> The determination to assess according to the area or frontage method may result in such disproportion as to be void; but it is only when that method is likely to result in disproportionate or unreasonable taxation that the court will interfere.<sup>30</sup>

**230. Apportionment and equalization.**—As stated in the preceding section, the cost of the assessment should be apportioned among those liable to pay it as nearly as possible according to the benefit actually conferred. Every owner of land in a drainage district has an interest in the classification of such land, which interest is recognized by the drainage laws in giving such owners the right to notice of the time when and the place where the commissioners will meet to hear objections thereto, and in giving them the right to appeal from the decision of such commissioners; and, in making assessments, the commissioners must have regard to such classification, and have no power, on the ground that it will not be benefited thereby, to credit certain land with the full amount levied against it, thus in effect releasing it from any assessment; and a levy so made will render the whole assessment void.<sup>1</sup> Where a drainage work initiated in a higher municipality obtains an outlet in a lower municipality, the assessment for "outlet liability," provided for by statute, is lim-

<sup>28</sup>*Commissioners of Sewers v. Newburg*, 3 Keble, 827.

<sup>29</sup>*Scranton v. Beckett*, 17 Pa. Super. Ct. 296.

<sup>30</sup>In *White v. Gore* (Mass.) 67 N. E. 359, it is said the assessment in *Weed v. Boston* and *Deater v. Boston* was set aside on the ground that the method was not a proportional or reasonable way of determining benefits from the construction of a sewer to be built through streets or private lands in all parts of Boston.

An overestimate in the number of square feet in the estate of a person assessed for construction of a sewer does

not invalidate the assessment if the estate was assessed no more than its just proportion of the expenses. *Keith v. Boston*, 120 Mass. 108.

This assessment of lots for the cost of a sewer according to the number of square feet in each lot, under a statute providing for the payment of the cost of sewers according to a front-foot rule, is a harmless error when the lots are all the same length. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

<sup>1</sup>*People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6.

ited to the cost of the work at such outlet.<sup>2</sup> In determining the relative portions which several towns benefited by a drainage system should contribute, the value of all the property in them, personal as well as real, may be taken into consideration.<sup>3</sup> If apportionment is not made as required by statute, the assessment cannot be enforced.<sup>4</sup> After a sewer assessment apportioned equally between the city and the property benefited has been declared invalid, a second assessment, which imposes two thirds of the cost of improvement upon the property benefited, with a proviso that property owners who have paid the former assessment shall be exempt from further demand, constitutes an unlawful discrimination between the property of persons taxed, and cannot be sustained.<sup>5</sup> The duty of carrying out the apportionment may be delegated by local officers having charge of the improvement.<sup>6</sup> The mere fact that the assessors neglected to state that they made the assessment in proportion to benefits will not invalidate the proceeding if they in fact did so.<sup>7</sup> The apportionment cannot be attacked for apparent inequity in isolated cases.<sup>8</sup> A sewer-assessment list will be returned to the board of assessors for reapportionment when the statute requires it to be imposed in proportion to the advantage which each owner shall be deemed to acquire, where the peti-

<sup>2</sup>*Sutherland Innes Co. v. Romney Twp.* 30 Can. S. C. 495.

<sup>3</sup>*Re Kingman*, 170 Mass. 111, 48 N. E. 1075.

When part of an assessment for a sewer located in three towns has been properly apportioned to one of them, the fact that such portion has been improperly assessed and distributed among the individual landowners in such town does not affect the validity of the total assessment on the town, provided the town was benefited upon the entire tract within its limits. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

<sup>4</sup>*Bogart v. Castor*, 87 Ind. 244.

<sup>5</sup>*White v. Saginaw*, 67 Mich. 33, 34 N. W. 255.

<sup>6</sup>*Warren v. Grand Haven*, 30 Mich. 24.

A provision in a drainage law requiring the county court, after a drainage district has been formed and the commissioners have found the sum necessary to be raised by special assessment to perform the proposed drainage, to call a jury to apportion the tax according as the property may be severally benefited, does not make such law unconstitutional as violating a constitutional clause requiring the special assessments to be levied by the commissioners, or corpo-

rate authorities; since the jury have nothing to do with fixing the aggregate sum to be raised, and therefore cannot be said to levy the assessment. *Huston v. Clark*, 112 Ill. 345.

<sup>7</sup>*State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208.

The tax roll of a sewer assessment required by charter to be assessed according to the benefits derived from the improvement must show expressly that the assessment was made on that basis; and it should also appear that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work. *Adams v. Bay City*, 78 Mich. 211, 44 N. W. 138.

A sewer assessment required by charter to be levied upon property, the value of which is increased by the improvement, and which the resolution of the council directs to be assessed against the premises improved thereby, is void where the certificate attached to the assessment roll merely shows that the assessment was made pursuant to the resolution of the council, which may mean no more than in obedience to its command. *Warren v. Grand Haven*, 30 Mich. 24.

<sup>8</sup>*Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49.

tioner's assessment is nine times greater than that of adjoining property similarly situated and even more valuable.<sup>9</sup>

231. What may be included in assessment.— Nothing more than the actual cost of the improvement may be assessed upon benefited property;<sup>1</sup> but the cost of the improvement may include all that is necessary to render it available.<sup>2</sup> And the size of the improvement need not be limited to the actual present needs of the district.<sup>3</sup> The particular thing however, which is sought to be included in the assessment must have been a part of the improvement as authorized by the

<sup>9</sup>*Re Munn*, 49 App. Div. 232, 63 N. Y. Supp. 22.

<sup>1</sup>*Re Fifth Ave. Sewer*, 3 Pittsb. 278, 4 Brewst. (Pa.) 364; *Sutherland Innes Co. v. Romney Twp.* 30 Can. S. C. 495; *Winkelman v. Moredock & I. L. Drainage Dist.* 170 Ill. 37, 48 N. E. 715.

An act authorizing and directing the trustees of a designated reclamation district to make up a sworn statement in detail of the total cost and incidental expenses of the work of reclamation therein, "based upon the books and vouchers thereof," and to "report" the same to the board of supervisors; whereupon such board must appoint commissioners to value and assess on the lands of the district "the whole amount so reported" in proportion to benefits resulting or to result therefrom,—is unconstitutional as an attempt by the legislature to levy an assessment upon the lands of the district, the amount being the sum total shown by the books and vouchers, without reference to the nature or character of the charges in the books, calling for and admitting of no question as to the correctness of such books and vouchers or charges, and irrespective of any question as to whether the law authorizing and providing for the work has been complied with. *People v. Houston*, 54 Cal. 536.

Under a power "to assess the cost and expense of constructing a sewer upon benefited property," the expenses of making the assessment cannot be included in the assessment, as the language of the Constitution is too uncertain to warrant an additional burden on private property. *Harrisburg City v. Eby*, 16 Pa. Co. Ct. 124.

But in Michigan it was held that a sewer assessment is not invalid because the warrant attached to the tax roll permits the collector to add 2 per cent for his fees. *Warren v. Grand Haven*, 30 Mich. 24.

<sup>2</sup>The cost of an entire system of sewerage including an outlet constructed outside the limits of a town, also a sum of money paid for a right of flowage through another sewer outside the limits, may all be assessed upon land within the town according to benefits received. *Butler v. Montclair*, 67 N. J. L. 426, 51 Atl. 494.

An assessment on land in a reclamation district is not invalid because it includes a sum for the purpose of erecting a pump and maintaining it. *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

Where a street has been paved at the expense of the abutting owner, and the pavement is torn up for the construction of a sewer, it cannot be repaved at the expense of the abutting owner, but must be restored by the city, and the expense must be accounted as part of the work of constructing the sewer. *Burlington v. Palmer*, 67 Iowa, 681, 25 N. W. 877.

A municipality in grading a street may impose upon the adjoining land the cost of constructing temporary culverts for the purpose of protecting the work done from surface waters, under its charter providing for the grading of streets and assessing the cost on adjoining property, and, in a subsequent section, authorizing the city to construct such temporary culverts without providing for the manner of paying the cost. *Russell v. Adkins*, 24 Mo. App. 605.

<sup>3</sup>The mere fact that a charter provision authorizing the construction of a district sewer of dimensions larger than necessary for the drainage of the district so that other districts may drain into it, and compelling the district to pay the additional cost of such increased dimensions, is oppressive or unequal in its operation, does not render it void. *Kansas City use of Adkins v. Richards*, 34 Mo. App. 521.

statute or ordinance;<sup>4</sup> and no assessment can be made for expenses which the commissioners had no right to incur, or to repay borrowed money if they had no right to borrow it.<sup>5</sup>

**232. Rights of taxpayer.**— Most of the requirements of the statute with regard to notice of intended improvements and the filing of the plans and specifications, and providing for a hearing, are for the benefit of those who are to be assessed for the expense of the improvement. To make the assessment valid, these requirements must be complied with. But a property owner is not entitled to be given a hearing upon the question whether or not the improvement should be made. In many instances the public good requires it to be made, and the individual cannot be permitted to defeat the proceeding. Assessments for local purposes, such as a drainage system, charged upon the property benefited in proportion to the benefit received, are not taxes within a county government act providing that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors.<sup>1</sup> But upon the question whether or not particular property shall be subject to assessment its owner is entitled to a hearing. There certainly can be no power in the government to charge particular land with the expense of a drain which is entirely for the benefit of the public or of other private property. While the taxing power is not subject to many of the constitutional restrictions, yet it must be exercised along well-established lines. The taxpayer should be given an opportunity to show that the tax should not be placed upon his property, or that it is invalid, or that the amount is excessive.<sup>2</sup> The constitutional requirement of due process of law is satisfied if there is an opportunity for such hearing at any time before the tax is actually enforced.<sup>3</sup> The taxpayer is en-

<sup>4</sup> A municipal corporation has no right to charge the cost of constructing flush tanks at the dead ends of a sewer to the fund collected by special assessments for the construction of such sewer, under an ordinance which does not provide for the construction of such flush tanks, although the same are necessarily beneficial for the perfect working of the system. *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479.

But when drainage commissioners advance funds for an improvement, and thereby acquire a conscionable, if not legal, right to repayment, equity will recognize their right to be subrogated, and will enforce an assessment therefor on the benefited premises. *Allen v. Williams*, 33 N. J. Eq. 584.

<sup>5</sup> *Winkelman v. Moredock & I. L. Drainage Dist.* 170 Ill. 37, 48 N. E. 715.

<sup>1</sup> *Holley v. Orange County*, 106 Cal. 420, 39 Pac. 790.

<sup>2</sup> *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

But a property owner whose lands are not traversed by a proposed drain, but who is within the assessment district, is not entitled to be heard upon the question of the public necessity for the drain, where by statute the determination of the drain commissioner is conclusive except in condemnation proceedings. *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091.

See also the succeeding section.

<sup>3</sup> *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct.

titled to the benefit of any safeguards established by statute against extravagance or other waste of his money. And he is also entitled to the benefit of any statutory limitation of the amount of assessment.<sup>4</sup> He is not entitled to have the amount of his assessment fixed by a jury. The assessment is a species of taxation, and is not within the constitutional provisions guaranteeing a jury trial.<sup>5</sup> One not denied a jury, and whose personal property was not distrained, cannot question the constitutionality of a drainage act because it provides for issues of fact to be tried by the court without a jury, and authorizes the commissioners of drainage to sell personal property for the payment of any assessment of benefits for the construction of a ditch, the same as a county treasurer is empowered to do.<sup>6</sup>

**232a. Right to notice.**—In the absence of statutory requirements, a taxpayer is not entitled to notice of an intent to make the improvement, or of any of the preliminary proceedings for the laying out of the drain, the organization of the district, or the determination of the area which shall be subjected to taxation;<sup>7</sup> but, if the statute requires notice to be given of such preliminary mat-

Rep. 663; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Owners of Lands v. People*, 113 Ill. 296.

<sup>4</sup>*Conner v. Cincinnati*, 11 Ohio C. C. 336; *Toledo use of Gates v. Lake Shore & M. S. R. Co.* 4 Ohio C. C. 113.

Making a statutory provision limiting assessments for sewers to one fourth the value of the property assessed applicable only in cities of a certain class does not render the statute obnoxious to a constitutional provision requiring all laws of a general nature to have uniform operation throughout the state. *Cincinnati v. Connor*, 55 Ohio St. 92, 44 N. E. 582.

<sup>5</sup>*Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692, 16 R. I. 198, 14 Atl. 79; *Briggs v. Union Drainage Dist. No. 1*, 140 Ill. 53, 29 N. E. 721.

Even the issues formed in an action to enforce by foreclosure the lien of an assessment on lands for the construction of a ditch, being in the nature of an equitable suit, are triable by the court, and not by a jury. *Laverty v. State*, 109 Ind. 217, 9 N. E. 774.

But the owner of land, on appeal to the county court from an assessment by commissioners of a drainage district under a clause in the drainage act allowing such appeal upon the sole ground that such tax is a greater amount than the benefits to accrue to the land by the proposed drainage, is entitled to a jury

if he demands one, such act evidently embracing a jury trial; and the issue, being one of fact as to whether or not the land is benefited, and, if so, the amount, is one properly within the province of a jury. *Mascall v. Drainage Dist.* 122 Ill. 620, 14 N. E. 47.

<sup>6</sup>*Scott v. Brackett*, 89 Ind. 413.

<sup>7</sup>*Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Works v. Lockport*, 23 Hun, 9; *Woodhouse v. Burlington*, 47 Vt. 300.

Failure to provide a landowner whose property is not traversed by a drain, but lies within the assessment district, an opportunity to contest the public necessity for the drain, as to which question the determination of the drain commissioner is conclusive by statute, in the absence of condemnation proceedings, does not constitute a taking of his property without due process of law, where the statute provides for notice of the assessment, and gives him an opportunity to be heard thereon. *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091.

The advertisement of a plan of sewerage as required by the Ohio statutes is not a jurisdictional fact, and assessments on property on a street omitted from such advertisement are not invalidated thereby, where such street appeared in all subsequent resolutions, ordinances, and advertisements. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32.

ters, no valid proceedings can be had until the statute is complied with. The right to levy a tax depends upon the permission granted by the statute, and all conditions imposed by the statute must be met to permit the improvement to proceed.<sup>2</sup> If the assessment is to be made according to benefit, or there is no discretion as to the amounts which shall be levied on the property, the owner is entitled to notice of the time of making the apportionment, and to an opportunity to be present and be heard.<sup>3</sup> And, if the assessment is against the landowner personally, he is entitled to notice before he can be charged.<sup>4</sup> If, however, the assessment is to be made by a uniform rule, as by the area or the frontage, so that there is no discretion as to its amount, the rule requiring notice does not apply.<sup>5</sup> As said in *English v. Wilmington*,<sup>6</sup> since, the amount of the assessment being a mere mathematical calculation with no question of value or matter of judgment involved, an opportunity for a hearing would be useless and futile,—especially as such owners could at the proper time contest the constitutionality of the act, and institute proceedings for the correction of injustice, fraud, or error in making the required mathematical calculations. So, if the assessment is to be proportional throughout the

<sup>2</sup>*Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306.

A landowner may, in a proceeding for judgment against his land for a delinquent tax, contest the fact of the jurisdiction of the court in including his land within the district when originally organized, where that court had no jurisdiction of the person of such owner by reason of the failure to serve him with the statutory notice of the organization of the district. *Payson v. People*, 175 Ill. 267, 51 N. E. 588.

<sup>3</sup>*Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569; *Cook v. Covert*, 71 Mich. 249, 39 N. W. 47; *McKeesport v. Dunshee*, 29 Pittsb. L. J. N. S. 88.

An assessment on township highways for benefits conferred by the construction of a ditch cannot be enforced where neither the petition for, nor the notice of, the establishment of the ditch mentioned or contained the name of the township or its officers, and the only notice they had of the assessment was the recording in that county of a copy of the assessment, where the drainage law under which the ditch was established requires either the lands affected to be described in the petition, or the names of their owners to be given and a like description in the notice, and provides

that notice shall be given to such owners. *Young v. Wells*, 97 Ind. 410.

A tax deed issued on a sale for drain taxes will be set aside as a cloud on title, where it does not appear that any notice was given of the assessment, or any opportunity afforded to review the proceedings, or that the commissioner examined the lands or obtained a release of the right of way, or called a jury in the proceeding; and it does not appear that any apportionment of the costs and expenses was made. *Pieotter v. Whaley*, 80 Mich. 257, 45 N. W. 81.

<sup>4</sup>*Miller v. Graham*, 17 Ohio St. 1. Distinguished in *Baltimore & O. & C. R. Co. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91.

<sup>5</sup>*Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, Affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *Cleveland v. Tripp*, 13 R. I. 50.

The provision of the United States Constitution forbidding the taking of property without due process of law is not violated by reason of failure to notify a taxpayer of the apportionment of a sewerage tax assessed according to area, which would be a mere mathematical calculation, where notice is provided for as to the making and performance of the sewer contract. *Gillette v. Denner*, 21 Fed. 822.

<sup>6</sup>2 Marv. (Del.) 63, 37 Atl. 158.



district, the individual is not entitled to notice.<sup>7</sup> A statute which authorizes an assessment based on benefits, without any provision for notice to the taxpayer, is either unconstitutional,<sup>8</sup> or it will be held that notice must be given notwithstanding it is not provided for by any statute.<sup>9</sup> But failure of the statute to provide for notice does not affect the validity of the proceedings if the assessment cannot be enforced without resort to the courts, where the validity of the assessment may be contested.<sup>10</sup> If the taxpayer has one notice of the proceedings, that is sufficient, since he is bound to take notice of the subsequent steps.<sup>11</sup> A mere mistake in serving notice on the holder of the record title will not defeat the assessment against the true owner unless he was misled thereby.<sup>12</sup> And one taxpayer cannot take advantage of failure to serve notice on others.<sup>13</sup> If the statute prescribes the kind of notice to be given, the statutory requirements must be followed, and, in the absence of statutory requirements, any notice is sufficient which will advise the taxpayer that his property is likely to be subject to an assessment.<sup>14</sup> In the establishment of a drainage district, the matter as to which the property owner is entitled to notice is that his land is included within the body or district of land that is to be subject to general assessment for such improvement; and there-

<sup>7</sup>*Allen v. Charlestown*, 111 Mass. 123.

An assessment for the expense of constructing a sewer is not invalid because of omission to give to the owner of the lots assessed a personal notice that an assessment is to be imposed. *Re De Peyster*, 80 N. Y. 565.

<sup>8</sup>*Re Lent*, 47 App. Div. 349, 62 N. Y. Supp. 227; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299.

<sup>9</sup>*Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

<sup>10</sup>*Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676; *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945.

So a statute authorizing municipal corporations to levy assessments for the construction of sewers is not unconstitutional as failing to provide notice to landowners, and giving them no opportunity to test the validity of the proceedings, where it provides for notice to be given by the town treasurer that the benefits assessed are in his hands for collection and for the enforcement of the lien created by such assessment in a court of competent jurisdiction, although it limits the owners' defense to proof that the assessment has been paid, and that his lands are not benefited to

the amount assessed against them. *Kizer v. Winchester*, 141 Ind. 691, 40 N. E. 265.

<sup>11</sup>*People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872.

<sup>12</sup>*Carr v. State*, 103 Ind. 548, 3 N. E. 375.

<sup>13</sup>*Grimes v. Ooe*, 102 Ind. 406, 1 N. E. 735.

<sup>14</sup>*Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817.

Under a charter provision requiring the assessors to give notice of the filing of their report and to fix a grievance day, a notice that the assessors had assessed the expense of extending a sewer, had made a report in writing, and had deposited the same with the clerk, and which states the time and place where the parties can be heard, sufficiently complies with the charter. *Bell v. Yonkers*, 78 Hun, 196, 28 N. Y. Supp. 947.

An ordinance requiring notice of the intended construction of a sewer to be given to the owner of land assessed therefor by personal service, or by leaving the same at his place of residence, is not complied with by leaving the notice on the desk at his place of business during his absence. *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897.

fore, where parties had notice of the general boundaries of a drainage district to be created, such notice is sufficient.<sup>15</sup> The notice need not be personal, but may be made by publication.<sup>16</sup> A general notice by advertisement not giving the names of owners or describing the lands affected by the construction of a sewer, and before it can be known by them what property is benefited thereby, is a reasonable one within the legislative power, and an assessment based thereon is valid.<sup>17</sup>

**233. The assessment as a lien.**—Special legislative provisions are necessary to render an assessment for the cost of a drainage improvement a lien on the property.<sup>1</sup> But the assessment may be made a lien, and the fact that the landowner is given a right to pay the amount in instalments will not prevent the lien from continuing until the full amount is paid.<sup>2</sup> The lien attaches as soon as the benefits are assessed, and it is not affected by delay in extending the assessment on the tax roll.<sup>3</sup> The requirement that the assessment be made in the name of the owner of the land is directory merely, and the lien will not be lost by the fact that another name is inserted by mistake.<sup>4</sup> If the tax is not binding, so that the lien is invalid, it may be set aside as

<sup>15</sup>*Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.

<sup>16</sup>*Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Nocais v. Fulmer*, 135 Ind. 8, 34 N. E. 639.

Notice by publication to the nonresident owners of lands adjacent to a proposed ditch is sufficient, although not addressed to them by their individual names, but only "to the nonresident owners of" certain described lands. *Miller v. Graham*, 17 Ohio St. 1; *Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317.

Sufficient constructive notice to property owners of proceedings to construct a sewer, the cost of which is to be assessed against their property, and sufficient opportunity to be heard to constitute due process of law, are provided under a charter requiring the publication in the official paper of the city of the fact that a plan for the sewer to be constructed within designated boundaries has been completed and is open for inspection, and offering an opportunity to be heard, also requiring the publication of the action ordering the construction of the sewer, and of the advertisements for bids for doing the work, and giving the council the option to publish notice of the letting of the contract, and that a statement showing the amount of special assessments chargeable to lots

benefited is on file with the city clerk, and requiring publication of the resolution for issuing bonds to pay for the work in case the assessments are not paid. *Hennessey v. Douglas County*, 99 Wis. 129, 74 N. W. 983.

<sup>17</sup>*Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144.

<sup>1</sup>*Meadville v. Dickson*, 129 Pa. 1, 18 Atl. 513; *Mauch Chunk v. Shortz*, 61 Pa. 309; *Philadelphia v. Tryon*, 35 Pa. 401; *Dowdne v. New York*, 54 N. Y. 180.

<sup>2</sup>*Clapp v. Minnesota Grass Twine Co.* 81 Minn. 511, 84 N. W. 344.

<sup>3</sup>*Lindsay v. Eastwood*, 72 Mich. 336, 40 N. W. 455.

By virtue of the act of February 19, 1895, § 2, when the benefit to property accruing from the construction of a trunk sewer is prospective only, depending upon the construction and connection of another sewer, not yet built, the assessment is to be made at the time of the construction of the trunk sewer; but the lien of such assessment does not come into existence until the connecting sewer is built, and interest thereon does not begin to run until the confirmation of the assessment for the connecting sewer. *Scaman v. Camden*, 66 N. J. L. 516, 49 Atl. 977.

<sup>4</sup>*St. Louis use of Rotchford v. De Nove*, 44 Mo. 136.

a cloud on title.<sup>5</sup> To make the lien binding on a mortgagee, he must be given his day in court.<sup>6</sup> The lien may be valid as against sales for the enforcement of subsequent state taxes where no effort was made to cut off the lien of the assessment.<sup>7</sup> After rights have become vested in the lien, the legislature cannot release it so as to affect such rights.<sup>8</sup>

**234. Enforcement of payment.**—The time and manner in which payment of the assessment shall be enforced are completely under the control of the legislature, so that it may require payment of the assessment before the drain is completed.<sup>1</sup> In the absence of anything in the statute forbidding it, the municipality may contract as to the time when payment shall be made;<sup>2</sup> but the enforcement must be in strict conformity with the requirements of the statute in force at the time the assessment is made.<sup>3</sup> Where the assessment is against the land,

<sup>5</sup>*Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705.

<sup>6</sup>*Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E. 48.

The lien of a drainage assessment levied for the construction of a public ditch is junior to the lien of a pre-existing mortgage, where the drainage law simply provides that the assessment shall "be a lien from the date of filing the report of the commissioners," without other provision indicating an intention to make such lien paramount to prior encumbrances. *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144.

The lien of an assessment on land for the construction of a ditch is lost, and may be set aside as a cloud on the title, by a sale of the land under foreclosure of a mortgage existing prior to the institution of the drainage proceedings, although a deed was not acquired thereunder until after the drainage lien attached, as the latter is subordinate to the lien of the mortgage, and the mortgagee is not estopped to assert his priority by silently standing by and permitting the drain to be constructed, such conduct being entirely consistent with a reliance upon such priority. *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

A mortgagee of land is not estopped by a judgment against the mortgagor in an action to which he was not a party, establishing a ditch assessment to be a lien upon the land, from questioning the validity of the ditching proceedings and the judgment, where his mortgage was duly recorded prior to the commencement of any of such proceedings, and the judgment creditor is seeking to enforce his lien as superior and prior to

that of the mortgage. *Deisner v. Simpson*, 72 Ind. 435.

<sup>7</sup>*McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

<sup>8</sup>*New Orleans Canal & Bkg. Co. v. New Orleans*, 30 La. Ann. 1371.

<sup>1</sup>*Re First Drainage Dist.* 27 La. Ann. 20.

In an action by a draining association to recover an assessment for benefits to land by drainage, it is not necessary that the completion of the drain should be averred, where such completion is not a condition precedent to the right to collect assessments. *Eel River Draining Asso. v. Topp*, 16 Ind. 242.

<sup>2</sup>Where the route of a sewer as established by ordinance runs through private property which has not been condemned, a contract entered into between the owner and the city officers in charge of the work, by which, in consideration of the grant of the right of way, the owner's time in which to pay his assessment is extended three years, is valid; and the city, having availed itself of the benefit of the contract, will be presumed to have ratified it. *St. Louis use of Lancaster v. Armstrong*, 56 Mo. 298.

And such contract is binding on the contractor, so as to prevent his instituting an action on the tax bill before the expiration of the time agreed upon, as, without such agreement, the construction of the sewer would have been illegal. *Ibid.*

<sup>3</sup>An assessment on lands for benefits conferred by the construction of a drain in pursuance of a statute is not a contract in which the one constructing the drain has a vested right. *Bate v. Sheets*, 64 Ind. 209.

the proceedings to enforce payment must be in a proceeding *in rem*, and not by action in assumpsit.<sup>4</sup> The lien may be enforced in equity;<sup>5</sup> and even property already devoted to public use may be sold to satisfy it if there is no other method of collecting the assessment.<sup>6</sup> Special proceedings may be provided for the enforcement of the lien.<sup>7</sup> Where the assessments are to be collected the same as taxation generally, the land may be bid off in the name of the state.<sup>8</sup> To prevent an

<sup>4</sup>*Philadelphia v. Bradfield*, 159 Pa. 517, 28 Atl. 360; *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799; *Rowbury v. Nickerson*, 114 Mass. 544.

An averment in a complaint to enforce a ditch assessment upon lands, that the owner did not appeal from the assessment; that he stood by and saw the work done without objection; that the course of the ditch through his premises was changed at his instance; that a certain amount was expended for his benefit in constructing the ditch through his land; and that he did not question the legality of the assessment until after the work was completed, without alleging that he either requested the work to be done or promised to pay for it,—will not render him liable in assumpsit for the value of the labor done in constructing the ditch through his premises if the assessment lien to enforce which the action is brought, fails because of defective description of the property. *Boatman v. Macy*, 82 Ind. 490.

But a landowner is liable in assumpsit for the value of work and labor performed in constructing a ditch over his land, irrespective of whether the proceedings instituted to establish the same, in pursuance of a statute, by which he was assessed for the benefits conferred upon his land, were or were not valid, where he had, with others, signed a written waiver of all error, informality, or omission in the proceedings, and had stood by from day to day and seen the work being done, encouraged its completion, and promised to pay what the work would be worth. *Flora v. Oline*, 89 Ind. 208.

And when a statute authorizing a sewer improvement provides the municipal corporation with a lien on the benefited property, and does not clearly prohibit a common-law action *in personam*, the debt is not discharged by the expiration of time within which the lien could have been filed, and may be recovered in assumpsit. *Scranton v. Smith*, 6 Lack. Legal News, 185.

A ditching association may recover a personal judgment against a landowner for the amount of a lien which it had against his lands for the assessment of benefits conferred by the construction of a drain, but which it did not enforce, but waived the right thereof upon the faith of his promise to pay the same upon demand if suit to enforce the lien was not brought. *Hull v. Brearley Run Draining Asso.* 58 Ind. 520.

<sup>5</sup>*Williams v. Allen*, 32 N. J. Eq. 485.

<sup>6</sup>*Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781; *Indianapolis & C. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316.

But this cannot be done in the absence of express statutory authority so to do. *Louisville, N. A. & C. R. Co. v. State*, 122 Ind. 443, 24 N. E. 350.

A personal judgment may be recovered against a railroad company to enforce the collection of a sewer assessment under a statute making such assessment a lien and authorizing its foreclosure, the right of way and franchises of which are not subject to sale upon execution and decree for the enforcement of such lien. *Lake Erie & W. R. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864.

This is under the power of the courts to provide a remedy for an existing right, since the ordinary method of collecting by sale of the property benefited is prohibited by considerations of public policy. *Louisville, N. A. & C. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916.

<sup>7</sup>*Samuels v. Drainage Comrs.* 125 Ill. 536, 17 N. E. 829.

<sup>8</sup>Under the provision of the Michigan drain law of 1885, that drain taxes shall be collected in the same manner as state and other general taxes, land returned delinquent for the drain taxes may be bid off in the name of the state, for the use of the state, county, and town in proportion to the tax due each as specified in the general tax law, although, because drain taxes are neighborhood affairs, neither the state, county, nor

action for an assessment, a tender must cover all that is due, including the penalty if one has been incurred.<sup>9</sup> A purchaser at a sale to collect a drainage assessment, of land which is erroneously described, is subrogated to the rights of the one who did the work, so that the assessment may be enforced against the land benefited in the hands of the original owner, but not in the hands of his assignee without notice.<sup>10</sup> An action to collect a drainage assessment levied under a drainage law which provides that the action may be brought in any court of competent jurisdiction must be commenced in the courts of the county in which the real estate assessed is situated, although the owner may reside in another county in which the drainage proceedings were instituted, under the general law requiring actions for the recovery of real estate, or of an estate or interest therein, or to determine such right or interest and for injuries to real property, to be brought in the county where the land is located.<sup>11</sup> After the warrant has been placed in the hands of the proper officer for collection, the municipal authorities cannot rescind the entire order laying the assessment.<sup>12</sup> Payment of an assessment afterwards set aside, but not refunded, may be applied on a new assessment.<sup>13</sup> A statutory requirement that assessments imposed upon reclaimed swamp land be collected in gold coin does not impair the obligation of any contract.<sup>14</sup> If an assessment is set aside as illegal, the city cannot recover in assumpsit from a property owner such amount as the court may determine that he ought to pay, since his share of the public burden must be determined by a tax proceeding.<sup>15</sup> The legislature may limit the time within which the assessment may be enforced.<sup>16</sup> The tax to pay the cost of the improvement and a claim for damages for injuries inflicted by it are of an entirely different nature, and cannot be said to arise out of the same transaction within the meaning of the law governing set-off and counterclaim; and, therefore, the taxpayer cannot set off against his liability upon the assessment any claim for damages which he may receive, either

town has any interest in the moneys arising from such sales. *Hilton v. Dumphrey*, 113 Mich. 241, 71 N. W. 527.

<sup>9</sup>*Toledo use of Gates v. Platt*, 2 Ohio N. P. 304.

<sup>10</sup>*Klinger v. Lemler*, 135 Ind. 77, 34 N. E. 698.

<sup>11</sup>*Dowden v. State*, 106 Ind. 157, 6 N. E. 136.

<sup>12</sup>*Woodbridge v. Cambridge*, 114 Mass. 486.

<sup>13</sup>*Bayonne v. Morris*, 61 N. J. L. 127, 38 Atl. 819.

<sup>14</sup>*Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 306.

<sup>15</sup>*Manisice v. Harley*, 79 Mich. 238, 44 N. E. 603.

<sup>16</sup>A law making benefited property liable for sewer assessments if made within two years from its completion is no more unreasonable or contrary to any principle of constitutional right than is a statute of limitations. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E.

from the plan of the improvement,<sup>17</sup> or from negligence in the performance of the work.<sup>18</sup>

**235. The handling of funds.**—An owner whose property has been assessed for the construction of a sewer has a right to have the city keep an account showing what moneys have been expended by it for the improvement within the power conferred upon it by law for making the same.<sup>1</sup> The proceeds of the assessment must all be expended on the improvement or refunded; they cannot be diverted to other purposes.<sup>2</sup> In case the assessment is excessive, the court may refuse to enforce payment of more than is necessary.<sup>3</sup> But it has been held that, when the assessment is in compliance with law, the taxpayer cannot refuse to pay on the ground that the cost of the improvement was less than the assessment.<sup>4</sup> In a proceeding by a municipal corporation to reimburse itself for the amount of bonds which it has issued for the construction of a sewer improvement partly through its territory under direction of sewer commissioners, damages due a taxpayer for land taken for the improvement cannot be set off, where the only thing that the municipal corporation is permitted by the statute to pay over to the commissioners in liquidation of the assessment against it, which is represented by the bond, is money and improvement certificates issued for construction of the work.<sup>5</sup> The money belongs to the officials having charge of the improvement, and they will be responsible for caring for it.<sup>6</sup> Drainage commissioners are

<sup>1</sup>*Lanerty v. State*, 100 Ind. 218, 9 N. E. 774.

<sup>2</sup>*Philadelphia use of Jones v. O'Connor*, 9 Pa. Dist. R. 230, 23 Pa. Co. Ct. 653.

<sup>3</sup>*People ex rel. McCornack v. Mo-Wethy*, 177 Ill. 334, 52 N. E. 479.

<sup>4</sup>*Cleveland v. Tripp*, 13 R. I. 50.

A statute authorizing the expenditure of drainage funds collected on assessments in excess of what was necessary to complete the ditch, for new work on the ditch, does not authorize the collection of that portion of the assessment not needed and never called for to complete the original construction. *Reamer v. Hogg*, 142 Ind. 138, 41 N. E. 353.

Where, by statute, in case a greater amount is assessed for a sewer than is required for the work, it is to be apportioned and paid to the owners of the property assessed, a property owner must look to the municipal corporation, and cannot bring an action against the sewer commissioners to restrain the payment of the moneys collected. *Lutes v. Briggs*, 64 N. Y. 404.

<sup>5</sup>*People ex rel. McCornack v. Mo-Wethy*, 177 Ill. 334, 52 N. E. 479.

<sup>6</sup>*Philadelphia v. Coates*, 18 Pa. Super. Ct. 418.

<sup>7</sup>*State ex rel. Hoboken Land & Improv. Co. v. Marvin*, 51 N. J. L. 296, 17 Atl. 158.

<sup>8</sup>Under the New York act of 1867, money paid to a county treasurer under a drainage assessment belongs to the drainage commissioners, and not to the county; so that, in case the assessment is set aside, the county will not be liable to refund the money. *Dewey v. Niagara County*, 62 N. Y. 294, Reversing 2 Hun, 392.

A township is not liable for drain taxes illegally imposed and paid to its treasurer under protest, where, by statute, they do not form part of the township moneys, but remain a separate fund for the payment of orders specifically drawn upon it. *Dawson v. Aurelius Twp.* 49 Mich. 479, 13 N. W. 824; *Camp v. Alginsee Twp.* 50 Mich. 4, 14 N. W. 672.

authorized, under the Illinois drainage laws, to raise money by special assessments on the lands in their district, to be expended, under the direction and approval of the county court, outside the district, where such expenditure is necessary for the protection or the complete drainage of the lands within the district; and a petition to the court for leave to raise the money need not state where the same is to be expended.<sup>7</sup>

The statute of limitations will not run against the liability of a city under its agreement, upon voluntarily purchasing with drainage warrants a plant for purifying its drainage system, to facilitate the collection of assessments, and not to divert such collections from payment of the warrants, until it repudiates the trust, although judgments are substituted for the warrants against its own property.<sup>8</sup>

**236. Curing errors and irregularities.**—The principle upon which drainage assessments are sustained is that a particular parcel of land has been so far benefited by a public improvement that it should be charged with the cost of it. Therefore, if in fact the improvement has been made and the benefit conferred, the taxpayer should not be permitted to escape payment merely because of irregularities in the proceedings; and the legislature has power to cure defects of that kind and still hold the taxpayer liable; and what it has power to do itself, it may delegate to the officials who have had charge of the work.<sup>1</sup> Irregularities in an assessment are cured by setting it wholly aside, and making a reassessment in accordance with the provisions of the statute.<sup>2</sup> Under this power the legislature may cure defects, such as, that the ordinance was not introduced as required by the municipal charter, that the records of the proceedings were imperfect, that the map and assessments did not remain on file the required time, and that proper notice of the proceedings was not given.<sup>3</sup> So, a mistake in the

<sup>7</sup>*Hosmer v. Hunt Drainage Dist.* 134 Ill. 360, 26 N. E. 584.

<sup>8</sup>*New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

<sup>1</sup>*Curran v. Shelby County*, 56 Minn. 432, 57 N. W. 1070.

The legislature may provide for the completion of a partly finished drain, and point out a way for the correction of errors so as to make it possible to complete it, although the expense is increased thereby. This increased expense, although due to the mistakes of the commissioner, must be paid by those benefited by the drain as a part of its cost. *Anketell v. Haywood*, 119 Mich. 525, 78 N. W. 557.

A statute authorizing the levy of

sewer assessments for a work already constructed, but not paid for because of previous authority therefor was declared void, is not an attempt to exercise judicial functions. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

The legislature has the power to authorize the payment of expenses incurred in the construction of a drainage ditch, under an act which was declared unconstitutional after such expenditures were made. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

<sup>2</sup>*Townsend v. Manistee*, 88 Mich. 406. 50 N. W. 321.

<sup>3</sup>*State ex rel. Walter v. Union*, 33 N. J. L. 350.

description of the land may be cured.<sup>4</sup> And the fact that the statute under which the improvement was made was unconstitutional because special, will not prevent the levying of an assessment to pay for the improvement.<sup>5</sup> So, where the details of the work were improperly delegated to the officers in charge, the defect may be cured;<sup>6</sup> and where the cost was not properly apportioned.<sup>7</sup> And the tax may be provided for after the completion of the improvement.<sup>8</sup> The lands may be reclassified if necessary.<sup>9</sup> Where a statute authorizes the construction of sewers only in public streets, an assessment made for a sewer constructed in a private way cannot be validated by the subsequent lay-out of the street as a public street, although the assessment was made after such lay-out.<sup>10</sup> An injunction restraining the collection of a tax for a drainage ditch because the commissioners had not obtained title to the easement will not prevent new proceedings to condemn such easement under curative acts of the legislature.<sup>11</sup>

**237. Who may contest assessment.**— Anyone upon the title of whose property an illegal tax lien will constitute a cloud may contest the assessment and maintain a bill to set aside the lien.<sup>1</sup> Such person need not have the record title. It is sufficient if he is in fact the owner.<sup>2</sup> But a taxpayer of a municipal corporation who will not be affected by the proceedings, or taxed for the improvement, has no right to be heard as to the validity of the acts of the officials.<sup>3</sup> Landowners whose ob-

<sup>1</sup>*Mazadder v. State*, 131 Ind. 598, 31 N. E. 453.

In a proceeding by a drainage commissioner in a court of general jurisdiction to enforce a drainage assessment of which the property owner is entitled to notice and an opportunity to litigate all proper questions, the court may reform a description of the property assessed so as to make the lien effectual, since the property actually benefited should bear its proportion of the expense of constructing a drain, and the court should reform mistakes so that the assessment can be enforced. *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. 331.

<sup>2</sup>*Brown v. Union*, 65 N. J. L. 601, 48 Atl. 562.

<sup>3</sup>*St. Louis use of Fox v. Schoenemann*, 52 Mo. 348.

<sup>4</sup>*Dollar Sav. Bank v. Ridge*, 79 Mo. App. 26.

<sup>5</sup>*Cleveland v. Tripp*, 13 R. I. 50.

Under statutory provisions empowering a city to cause estimates of the expense of constructing sewers to be made, and to levy assessments therefor upon the property benefited, and, in case the

cost of the proposed work exceeds the assessment, authorizing a further levy, the sewer assessment is valid although made for the first time after the building of the work, where the subsequent section provides that, if the city deems it necessary for the more speedy execution of its ordinances, it may cause necessary works to be executed at its own expense on account of the person assessable therefor. *Wetmore v. Campbell*, 2 Sandf. 341; *Laimbeer v. New York*, 4 Sandf. 109.

<sup>6</sup>*Boul v. People*, 127 Ill. 240, 20 N. E. 1.

<sup>7</sup>*Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>8</sup>*Curran v. Sibley County*, 56 Minn. 432, 57 N. W. 1070.

<sup>9</sup>*Alger v. Slaughter*, 64 Mich. 589, 31 N. W. 531; *Woodruff v. Fisher*, 17 Barb. 224.

<sup>10</sup>*Bell v. Cox*, 122 Ind. 153, 23 N. E. 705.

<sup>11</sup>*Re Olyphant Borough Sewer*, 198 Pa. 534, 48 Atl. 487; *Williamson v. New York*, 3 Hun, 65.

The husband of the owner of land in



jections to the tax are the same may join in a proceeding to contest it.<sup>4</sup> A contestant of a sewer assessment who fails to obtain a reduction thereof in an action brought to enforce the same must pay the penalty prescribed by a statute providing that, if special assessments payable by the owner of the property assessed, personally, by the time stipulated in the ordinance, are not paid by the time so stipulated, the amount assessed with interest and the prescribed penalty may be recovered by suit, as such penalty becomes due on failure to pay at the stipulated time the amount rightfully owing; but, against a contestant securing a reduction because the assessment was more than that allowed by law, no such penalty can be recovered, as at no time was the amount claimed from him owing.<sup>5</sup>

**238. Method of contesting assessment.**—Resort to an independent action to set aside a drainage award is not proper where the statute provides for appeal to a statutory administrative board of the state, which has full authority in the matter so long as such appeal has not been taken.<sup>1</sup> In case the proceeding is sought to be attacked collaterally a landowner who has neither paid his tax nor sought to avoid it by timely application must make a very strong case in order to ob-

a drainage district is not made a party to the record of the proceeding of drainage commissioners of such district, or shown to be the owner of or interested in such land, so as to entitle him to maintain a writ of certiorari against such commissioners, from the mere fact that at one time the commissioners attempted to settle with him the damages to such land by the location of a district ditch thereon. *Scheiwe v. Holz*, 168 Ill. 432, 48 N. E. 65.

*People ex rel. Funk v. Keener*, 194 Ill. 16, 61 N. E. 1069.

Owners of property may join in a suit to enjoin the collection of an assessment for the construction of a sewer on the ground of an arbitrary levy thereof and failure of the charter to provide for notice, although their interests are distinct and affected to a different extent, as the cause of injury is common to all, and gives them sufficient community of interest for that purpose; but owners claiming that no benefits result to their lands from the improvement cannot join, as in such case the assessment and attempted enforcement are several in their nature as respects each owner. *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450.

But in *Jones v. Cardicell*, 98 Ind. 331, it was held that a joint action cannot

be maintained by separate property owners to enjoin the collection of a drainage assessment against their property, since the rights respect separate and definite parcels of land, and the causes of action are, therefore, separate and distinct and held in separate rights.

*Cincinnati use of Wilson v. Fugman*, 5 Ohio N. P. 14; *Cincinnati v. Jung*, 7 Ohio N. P. 665.

*People v. Wasson*, 64 N. Y. 167; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781; *Auditor General v. Melze*, 124 Mich. 285, 82 N. W. 886.

The rule that persons affected by a drainage assessment must seek relief therefrom by some direct proceeding, or by an appeal, and cannot attack the same collaterally applies to infants. *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

Landowners cannot enjoin the proceedings for the construction of a drain on the ground that the proposed new ditch will so increase the flow of water in an old ditch as to exceed its capacity and overflow such owner's land, where the proceedings are in pursuance of a statute providing ample legal remedy by an appeal from the assessment of benefits and damages, and by a suit for

tain the favor of the court.<sup>2</sup> An adjudication by the proper tribunal that the proceedings conform to the statute cannot be inquired into in a collateral proceeding;<sup>3</sup> nor can the various steps which are taken in proceedings after jurisdiction has been acquired be questioned.<sup>4</sup> That the lands in a reclamation district were swamp and overflowed, and that lands assessed for reclamation purposes would be benefited thereby, being jurisdictional facts, which the board of supervisors necessarily determine in approving the petition for the formation of the district, its judgment on those questions where all the parties were brought before it by proper notice is conclusive, and cannot be collaterally attacked.<sup>5</sup> If, however, there has been an invalid sale of the property, the landowner may maintain an action to quiet the title.<sup>6</sup> A proceeding, under a statute, to establish a ditch and assess the cost thereof on the lands specially benefited is not a civil action so as to fall within a provision of the Code concerning civil cases, authorizing the court, in its discretion, to relieve the party from its judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect on complaint or motion filed within two years, so as to relieve a landowner from a judgment assessing his lands, to which he was prevented from filing remonstrances by sickness.<sup>7</sup>

*Injunction.*—If the proceedings are void, the taxpayer may resort to equity for relief;<sup>8</sup> but such resort cannot be had until the proceed-

damages for the overflow of all lands subject to assessment. *Plouffe v. Boyer*, 58 Ind. 113.

<sup>2</sup>*Barker v. Vernon Twp.* 63 Mich. 516, 30 N. W. 175.

<sup>3</sup>*Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.

<sup>4</sup>*Ythaca v. Babcock*, 36 Misc. 49, 72 N. Y. Supp. 519; *Jebb v. Sexton*, 84 Ill. App. 45; *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038.

But in England an assessment by a commissioner of sewers is not conclusive, but the person assessed may, in an action brought against a person for taking his goods to satisfy the assessment, prove that he acquired no benefit from the sewer. *Stafford v. Hamston*, 2 Brod. & B. 691, 5 J. B. Moore, 608.

<sup>5</sup>*People v. Hagar*, 52 Cal. 171.

<sup>6</sup>*Chaffee v. Detroit*, 53 Mich. 573, 19 N. W. 191.

<sup>7</sup>*Hays v. Tippy*, 91 Ind. 102.

<sup>8</sup>*Runier v. Miller*, 105 Ind. 393, 4 N. E. 867; *Bayha v. Taylor*, 38 Mo. App. 427.

An injunction will lie to restrain the collection of an assessment on lands for the construction of a public ditch on the

ground that the court had no jurisdiction as to the owner because the notice required by the statute to contain the names of all the owners of land affected described his land as being owned by another person, and his name did not appear in the notice or subsequent proceedings, and he had no notice thereof in time to resist the assessment of benefits to his land on the ground that no benefits accrued. *Vizzard v. Taylor*, 97 Ind. 90.

An injunction will lie to restrain an illegal attempt to collect an assessment on lands for the construction of ditches to drain swamp and low lands which is void because the commissioners failed to go upon and examine all the taxable lands before making the levy, as required by the statute authorizing such drainage. *Curry v. Jones*, 4 Del. Ch. 559.

While an action for an injunction against the collection of an assessment for the construction and repair of a ditch cannot be maintained as a general rule, it may be where the proceedings establishing the ditch in question had been nullified, and such nullification

ings have been carried far enough to affect the rights of the taxpayer.<sup>8</sup> Equity will not afford relief if there is an adequate remedy at law.<sup>10</sup> An action in equity to restrain the sale of land for an unpaid sewer assessment will not lie when the assessment on the face of the proceedings to impose it is a valid lien upon the land, and extrinsic evidence is required to show its invalidity.<sup>11</sup> Injunction cannot be resorted to merely to control the proceedings before the officers having charge of them.<sup>12</sup>

was not known by the interested party until it was too late for him to appeal under the statute providing for an appeal from an assessment. *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828.

<sup>8</sup>*Kansas City v. Smiley*, 62 Kan. 718, 64 Pac. 613; *Andrews v. Love*, 50 Kan. 701, 31 Pac. 1094.

<sup>10</sup>*Haff v. Fuller*, 45 Ohio St. 495, 15 N. E. 479; *Schuls v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963; *Rickcoods v. Hammond*, 67 Fed. 380.

The remedy for a sewer assessment objected to on the ground of no benefit received is not by injunction to restrain its collection, but by appeal to the district court. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

An action is not maintainable in equity to enjoin the collection of a special assessment for the construction of a sewer or the transmission to the county auditor of a statement of the amount claimed to be due for such sewer assessments for the purpose of collection, as there is an ample remedy at law under the statute for illegal assessments. *Fajder v. Aitkin*, 87 Minn. 445, 92 N. W. 332, 934.

Where an assessment, in proceedings to open a drain from a highway, of private property, has been made by appraisers as provided by statute, and objections have been filed by the landowner in the county court as authorized by the statute, which gives such court power to hear the case with the aid of a jury, the landowner cannot abandon the proceedings and enjoin the construction of the ditch on the ground that no court has declared that the land should be taken, and that the same has never been condemned, nor compensation paid, as required by statute. *Shoppert v. Martin*, 137 Mo. 455, 38 S. W. 967.

The construction of a sewer will not be enjoined by a suit of property owners in front of whose premises the sewer is being built, on the ground that the

proceedings authorizing it are illegal and void, where the real estate of such owners is not invaded, and they are not injured by the work complained of, but simply seek to avoid an illegal assessment, since ample remedies at law exist therefor. *Schuls v. Albany*, 42 App. Div. 437, 59 N. Y. Supp. 235.

A court of equity will not enjoin the collection of an assessment on lands for the construction of a sewer and the diversion of a natural water course therein, in a joint action by several landowners, on the ground that the assessment is void because the statute conferring upon the city the power to regulate or change within its limits the course of natural streams, to construct sewers, and assess the cost upon the parties specially benefited, is unconstitutional in so far as it undertakes to give the power of taking private property without providing any mode of ascertaining the amount of compensation to be paid the owners; also because certain conditions precedent, prescribed by city ordinances, which must be observed to make the assessment legal, were not complied with, since such an assessment is void by reason of its inherent defects, and creates no lawful lien, and casts no cloud upon titles, so that an adequate remedy is afforded at law,—nor will equity interpose merely to afford a consolidation of actions, or to save the expense of separate actions, as a multiplicity does not mean a multitude of suits. *Murphy v. Wilmington*, 6 Houst. (Del.) 108.

<sup>11</sup>*Longley v. Hudson*, 4 Thomp. & C. 353.

<sup>12</sup>A suit to enjoin the collection of a portion of an additional ditch assessment which has been adjudged void is a collateral attack, and cannot be sustained on the ground that the original assessment should have been deducted therefrom. *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12.

A landowner cannot enjoin the collection of an assessment for the construc-

**Quo warranto.**—Quo warranto will not lie to test the validity of an attempt to levy an assessment in excess of benefits if there is ample remedy by common-law action, whereby relief may be obtained.<sup>13</sup> But a writ of quo warranto may issue to test the validity of an attempted enlargement of a district, so as to include and make valid an assessment against complainant's property.<sup>14</sup>

**239. Grounds for contesting assessment.**—To render an assessment valid the constitutional and statutory requirements must be substantially complied with;<sup>1</sup> and, if the proceedings were entirely unauthorized, no assessment can be made.<sup>2</sup> Objections to the various steps leading to the completion of the improvement must be interposed at the proper time; and many objections which would be available to change the form in which the proceedings were going forward if interposed at the proper time will come too late if not raised until the attempt is made to enforce the assessment. The legislature may provide that no assessment shall be set aside for mere irregularities, unless fraud is shown;<sup>3</sup> and, even in the absence of such provision, mere irregularities are not available on collateral attack, which is the form of attack which is usually made in a proceeding to defeat the collection of an assessment.<sup>4</sup> To be available, irregularities must be such

tion of a public ditch on the ground that the ditch was not constructed according to the plans and specifications, thereby resulting in no benefit to his land, where the proceedings establishing the ditch and levying the assessment were in conformity with the law, and that law makes it the duty of the officers having the work in charge to have the same done according to the plans and specifications, and affords landowners an opportunity to be heard in respect to the final completion of the ditch. *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933.

<sup>13</sup>*People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

Where the various steps for the organization of a drainage district are taken in conformity with the statute, the finding of the court in favor of the petitioners and organizing the district binds all who might have objected thereto, and quo warranto will not lie to test its validity,—especially where the interests involved are mainly of a private character. *People v. Wild Cat Special Drainage Dist.* 31 Ill. App. 219.

<sup>14</sup>*Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246.

<sup>1</sup>*Hankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Combs v. Etter*, 49 Ind. 535.

In order to sustain special assessments for benefits from a public ditch, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power, and the enabling statute will be strictly construed. *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851.

<sup>2</sup>A sewer constructed by a city is unauthorized, and an assessment levied for the cost thereof is void, where the action of the city was based upon neither a petition of a majority of the property holders, nor a recommendation of the board of health, which are the only conditions under which the city is granted the power to construct such sewers. *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

Under statutory authority to open, enlarge, and straighten a drain, commissioners have no power to construct, in addition thereto, a lateral ditch; and the assessment levied by the commissioners is absolutely void where it included the cost of such ditch. *Mitchell v. Lane*, 62 Hun. 253, 16 N. Y. Supp. 707.

<sup>3</sup>*Re Mayer*, 50 N. Y. 504; *Re Ellsworth*, 53 N. Y. 647.

<sup>4</sup>*Cauldwell v. Curry*, 93 Ind. 363; *Smith v. Clifford*, 99 Ind. 113; *Poillon v. Brunner*, 66 N. J. L. 116, 48 Atl. 541;

as to destroy the jurisdiction of the officials.<sup>5</sup> In order to uphold the assessment it is not necessary that the laying out of the drain should be conducted with the technical formalities attached to the laying out of highways.<sup>6</sup> If the officials have acquired jurisdiction of the proceedings, their acts will be presumed valid in a proceeding to attack the assessment, unless facts are clearly shown which make the assessment void.<sup>7</sup> If the statute under which the proceedings are taken is unconstitutional and void, the taxpayer may raise that objection in defense of an objection to enforce the assessment;<sup>8</sup> but he cannot raise the objection that the statute is invalid for lack of details.<sup>9</sup> The court will not inquire into the motives which induced the municipi-

*Dorst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Keigwin v. Drainage Comrs.* 115 Ill. 347, 5 N. E. 575; *Foster v. Paxton*, 90 Ind. 122.

It is no defense to an action to enforce an assessment for the construction of a sewer that the contractor failed to file a bond as provided in his contract with the city, which the latter had waived, and had accepted the work as having been performed in accordance with the contract. *Larned v. Maloney*, 19 Ind. App. 199, 49 N. E. 278.

A statutory provision that, after the adoption of a plan for a sewer system, the council may direct the engineer to make an estimate of the cost, is not violated so as to make the assessment for the construction of the system void, by the fact that the estimate of the engineer as to cost accompanies his plans, and is not called for separately, if the council is thereby put in possession of the necessary information. *Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

A court of equity has no power to set aside a sale of an owner's property for delinquent drainage assessments upon the ground that the statutory notices required to be given landowners, antedating the order of the county court confirming the report of commissioners, and finding that a drainage district is duly established, were irregular or insufficient. *Calkins v. Spraker*, 26 Ill. App. 159.

\*Under the provisions of the charter of the city of Duluth, the failure of the board of public works to establish a street grade or a sewer system before constructing a sewer, or to give the required notices of the meeting to make an assessment to defray the expenses of its construction and of application for its confirmation by the district court, does not affect the jurisdiction of the

district court to render final judgment against the property for the amount of the assessment. *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117.

That the report of viewers of a ditch, proposed to be established under the ditching law, does not locate any flood gates, water ways, bridges, or farm crossings, and does not determine whether such gates, etc., are necessary, and that no outlet had been provided for the ditch, whereby adjacent lands would be overflowed and the drain be of no benefit, are defects in the proceedings which do not affect the jurisdiction of the commissioners; and their decision establishing the ditch cannot be collaterally attacked in an action to enjoin the collection of an assessment thereunder. *Argo v. Barthand*, 80 Ind. 63.

Such defects might have been ground for appeal, but not for injunction.

\**Cone v. Hartford*, 28 Conn. 363.

\**Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

\**Diets v. Neenah*, 91 Wis. 422, 64 N. W. 299.

The owner of land across which a ditch is constructed under an unconstitutional statute is, subsequent to the completion of the work, entitled to an injunction restraining the collection of an assessment therefor, when he had no actual notice that the improvement was being made, had not stood by and permitted the work to be done for his benefit, and he was not guilty of any want of diligence in failing to assert his right before the work was completed. *Tecumseh v. Davis*, 36 Ohio St. 601.

\**Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635.

pality to make the improvement.<sup>10</sup> The assessment is not invalid because a taxing or assessment district was not established, when such districts are not required by statute.<sup>11</sup> And the fact that the improvement extends into two districts will not defeat it.<sup>12</sup> It cannot be defeated because water mains have not been extended into the street, where, notwithstanding this, the sewer is of benefit to the property assessed.<sup>13</sup> The question whether or not the lot is benefited cannot be raised as an objection to paying the assessment;<sup>14</sup> nor can objection be made that it is too high.<sup>15</sup> Such objections should be made at the proper time during the course of the proceedings, unless the statute gives a right to raise them upon the attempt to enforce the assess-

<sup>10</sup>*Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89.

But the fact that a contractor building a sewer employs members of the common council at high wages as superintendents of the work for the purpose of influencing the council to accept the work though not properly done, and does so influence them, amounts to fraud, and is a defense to an action for collection of assessments. *Green v. Shanklin*, 24 Ind. App. 608, 57 N. E. 269.

<sup>11</sup>*Wilson v. Cincinnati*, 5 Ohio N. P. 68.

<sup>12</sup>An assessment for a sewer constructed in parts of two districts is not invalid under the Ohio statutes, providing for the division of municipal corporations into sewer districts, and that where a corporation is so divided, the assessment provided for by statute shall be by districts; as such provisions are not jurisdictional in character. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32.

A tax bill whereby the cost of constructing a district sewer is assessed against the property in the district is not rendered invalid by reason of the fact that the sewer was constructed in the center of a street forming the dividing line between that and another district, thereby placing one half of the width of the pipe in the other district, coupled with the further fact that the surface water of the side of the street located outside of the district was drained into it through inlets constructed for that purpose. *St. Joseph ex rel. Danaker v. Dillon*, 61 Mo. App. 317.

<sup>13</sup>*Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

<sup>14</sup>*Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004; *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa, 377, 82 N. W. 787;

*Vandersyde v. People*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 808; *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

That the owner of land included within the area benefited by the construction of a sewer has no present right, under any existing statute, to construct connecting laterals from such land to the sewer, or to procure the construction of the same, does not invalidate the assessment against him, since it is unlikely that the needful legislation would be withheld. *McKee Land & Improv. Co. v. Swikehard*, 23 Misc. 21, 51 N. Y. Supp. 399.

An owner of property abutting on an alley cannot collaterally attack the validity of an assessment thereon for the construction of a small collateral drain therein in connection with a local sewer in a parallel street, on the ground that his property was already provided with adequate drainage by a sewer in the street upon which his property fronts, where the right to make the assessment was within the letter of the statute under which the sewer was constructed and the assessment levied, and he had failed to avail himself of his right to remonstrate against the assessment at the proper time. *Bryan v. Foley*, 17 Ind. App. 629, 47 N. E. 351.

But in one case it was held that, in a proceeding for judgment against the right of way of a railroad company within a drainage district for an assessment by the drainage commissioners, it is for the jury to say whether the right of way was benefited by the carrying off of water that at times stood thereon in ponds and holes. *Drainage Comrs. v. Illinois O. R. Co.* 158 Ill. 353, 41 N. E. 1073.

<sup>15</sup>*New Eel River Draining Assn. v. Durbin*, 30 Ind. 173.

ment.<sup>16</sup> The fact of want of benefit is not even ground for reducing the assessment;<sup>17</sup> nor is the fact that, since the improvement, a portion of the land against which it has been laid has been dedicated to the public for street purposes.<sup>18</sup> Even if the claim is made that the improvement is an injury to the land rather than a benefit, the claim must be proved;<sup>19</sup> and such defense is not open if it should have been raised earlier in the proceeding.<sup>20</sup> The assessment cannot be defeated by the fact that the cost of the improvement was too great.<sup>21</sup> The judgment of a state court, rendered on the appeal of a railroad company from the action of drainage commissioners, is conclusive upon the question of benefits and damages accruing to the railroad from the improvement of a navigable stream passing under the track; and, although the judgment assesses benefits but no damages, the improvement will not be enjoined by a Federal court on the ground that the railroad company will be put to great expense in rebuilding its

<sup>16</sup>The report of appraisers as to lands benefited by drainage by a draining association and assessing the same is only prima facie evidence, in a suit to enforce the lien of such assessment, where the statute authorizing assessments for such purposes by such associations permits landowners to deny that the work is of public utility, that their lands are benefited thereby to the amount of the assessment, or that for any other reason they should be compelled to pay the assessment or any part of it. *Nel River Draining Asso. v. Topp*, 16 Ind. 242.

The defense that land was not benefited, and that it was arbitrarily and excessively assessed without regard to proportionate benefits, may be raised in an action to enforce an assessment for reclamation-district purposes, where no hearing on the question of benefits is provided except by way of defense to suits for the collection of assessments, so that the charge on the land does not become final until the determination of such a suit. *Lower Kings River Reclamation District No. 551 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; *Reclamation Dist. No. 551 v. Runyon*, 117 Cal. 164, 49 Pac. 131.

<sup>17</sup>*Conner v. Cincinnati*, 11 Ohio C. C. 336.

<sup>18</sup>*Wilson v. Cincinnati*, 5 Ohio N. P. 68.

<sup>19</sup>The fact that the proposed drain will be an open ditch from 10 to 15 feet wide does not necessarily imply that such drain will be an injury to the land, which will warrant the court in setting aside an assessment on it for benefits

resulting thereto, levied by the commissioners of the drainage district without awarding damages for injuries, but who reported that no lands would be injured by the drainage or the construction thereof,—especially as the county court confirmed their report, and it does not appear that anyone claimed any damages for the construction of such drains over his land. *Huston v. Clark*, 112 Ill. 344.

<sup>20</sup>*Moffit v. Medsker Draining Asso.* 48 Ind. 107.

<sup>21</sup>An assessment for a completed work in draining lands will not be set aside as excessive upon objections supported only by general opinions, previous lower estimates, a proved offer to do at a lower price a certain item of work which cost more, nor by testimony that the lands assessed are, in the opinion of witnesses, not worth as much as the improvement cost, in the absence of particulars of a proper expenditure by exact measurements and accurate calculations by competent engineers and of explicit denials of services charged for and disbursements made. *Re Pequest River*, 42 N. J. L. 553.

Whether the project for the establishment of a ditch was more comprehensive, or embraced and affected more lands, than was necessary in order to accomplish the drainage of the petitioner's land in the cheapest and best manner is a subject for the exclusive judgment of the commissioners of drainage, and their determination of that question is not reviewable by the court.

bridge, and its interstate commerce and mail service will be interrupted.<sup>22</sup>

*Noncompletion of improvement.*—An assessment will not be enforced if the consideration for it has entirely failed because the work was abandoned, or was not completed, so that no benefit resulted to the property; as where an attempted drainage improvement was abandoned so as to leave the land under water,—a place of resort for water fowl, hunting, and fishing.<sup>23</sup> But the fact that the drain was not completed is not ground for injunction against the collection of the tax where a legal remedy exists for any damages caused thereby.<sup>24</sup>

*No right of way.*—The fact that a right of way over private property where the drain was constructed has not been obtained is no defense as against the assessment, if the authorities have a right to procure the right of way at any time. That question arises between the public authorities and the landowner, and the taxpayer has no right to raise it.<sup>25</sup> The statute may, however, make the acquirement of a

*Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

<sup>22</sup>*Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885.

<sup>23</sup>*Davidson v. New Orleans*, 34 La. Ann. 170; *Toledo use of Wernert v. Grasser*, 5 Ohio S. & C. P. Dec. 178.

<sup>24</sup>*Serber v. Rankin*, 154 Ind. 236, 56 N. E. 225.

And the collection of a special assessment for the construction of a connecting system of sewers cannot be enjoined upon the ground that a part of the work had not been done, as in such case the writ of mandamus may be invoked to compel the city to complete the improvement in accordance with the ordinance. *Laurence v. People*, 188 Ill. 467, 58 N. E. 991.

The collection of an assessment for a county ditch, the contractors for which had been paid, will not be enjoined on the ground that, owing to the negligence of the engineer having charge thereof and fault of the contractors therefor, the ditch was defectively constructed and inadequate to drain plaintiffs' lands, if plaintiffs had a remedy on the bonds of the engineers and contractors, and knowingly allowed such ditch to be so constructed without complaining thereof. *Putnam County v. Krauss*, 53 Ohio St. 628, 42 N. E. 831.

<sup>25</sup>*Miller v. Anheuser*, 2 Mo. App. 168; *Hyde Park v. Borden*, 94 Ill. 26; *Re Swan*, 33 Hun, 200; *Large v. Keen's Creek Draining Co.* 30 Ind. 263, 95 Am. Dec. 686; *Moore v. Albany*, 98 N. Y.

396; *Brady v. Haycard*, 114 Mich. 326, 72 N. W. 233.

The right of a municipal corporation to levy a special assessment for the construction of a sewer cannot be questioned on the ground that the ordinance providing for its construction was passed before the necessary steps had been taken to acquire the right of way therefor over private property beyond the corporate limits. The necessary steps to condemn or otherwise acquire such right of way may be taken after the assessment of benefits has been made and confirmed. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

A court of equity will not enjoin the payment of tax bills issued to the contractor, until a proper proportion of such bills are paid or tendered, where such contractor at great expense has constructed a sewer in full compliance with plans, specifications, and plats furnished, and under immediate direction and supervision of the authorized engineer, and the work has been accepted by the city, but which sewer, by mistake of the city authorities, wrongfully crosses private property, although the sewer may be useless until it is lawfully connected with a proper outlet, which can be done at an inconsiderable expense. The proper proportion of such tax would be the contract price for all the work less the cost of that part extending through the private property. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.



right of way a condition precedent to the legality of the proceeding; and, in such case, no valid assessment can be made unless the right of way has been obtained.<sup>26</sup>

*Other objections.*—The statute may make substantial error a ground for vacating an assessment.<sup>27</sup> Mere inequalities will not defeat the assessment if there is no direct discrimination in favor of some persons to the prejudice of others;<sup>28</sup> nor will slight departures from the plan of the improvement.<sup>29</sup> That assessments for other improvements have been erroneously inserted in the assessment roll will not defeat the assessment.<sup>30</sup> The authority of the officers having control of the work cannot be attacked for the first time on a motion for new trial of an action for the establishment of an assessment.<sup>31</sup> That ques-

A special tax bill for the construction of a sewer is not invalidated by reason of the fact that it was built on private property, where it was so constructed with the consent of the owner of the property, as he would be estopped from afterwards disturbing it. *St. Joseph use of Saxton Nat. Bank v. Landis*, 54 Mo. App. 315.

A sale of land for taxes for the construction of walls along the banks of a water course flowing through a city and used as a part of its drainage system will not be set aside, and the lien of the assessment discharged, upon a collateral attack in an action to quiet title, on the ground that the assessment was void for want of jurisdiction over the subject-matter because the municipality had not, by purchase or condemnation, acquired the right to construct the walls upon private property, in the absence of conclusive proof that the municipality had not acquired such right by dedication, prescription, or otherwise,—especially where the owner stood by and allowed the work to be completed without objecting, and has not paid or tendered the equitable amount of benefits resulting to his land by the improvement. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431.

<sup>26</sup>*Re Choesbrough*, 78 N. Y. 232, Affirming 17 Hun, 561; *Re Rhinclander*, 68 N. Y. 105; *People ex rel. Williams v. Haines*, 49 N. Y. 587; *Olmsted v. Dennis*, 77 N. Y. 378.

But the owner of land upon one side of a street, having the fee to the center, cannot defeat an assessment for a sewer placed in the street on the ground that the municipal corporation did not obtain title to the street, where he does not show that the sewer was not located on

the portion of the street to which he did not have title, by authority of its owners. *Re Ingraham*, 64 N. Y. 311, Affirming 4 Hun, 495.

<sup>27</sup>*Re Van Buren*, 17 Hun, 527.

<sup>28</sup>*Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

It is no defense to an action to enforce the payment of an assessment on lands for the construction of a drain that more land of another person is assessed than is mentioned in the petition for the application of appraisers as being affected by the drain. *Bate v. Sheets*, 50 Ind. 320.

The invalidity of a provision of a city ordinance exempting persons paying a specified sum into the treasury from future assessments for the expense of constructing a sewer does not render void the assessments made against other property owners, where the amount of such assessments was not increased by such exemptions. *Page v. St. Louis*, 26 Mo. 136.

The owners of property which can be drained by a sewer will not be relieved from a local assessment for its construction because there is property in the district which, because of the topography of the ground, cannot be drained. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>29</sup>A variation of two inches in the diameter of the size of a sewer as constructed and that referred to in the plan adopted for the improvement is not sufficient to defeat the assessment. *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690.

<sup>30</sup>*Hooker v. Rochester*, 30 N. Y. Supp. 297.

<sup>31</sup>*Goodwine v. Leak*, 127 Ind. 509, 27 N. E. 161.

tion should be raised at the proper time in the course of the proceedings.<sup>32</sup> Mere misdescription of the property is not sufficient to render the assessment void;<sup>33</sup> but, if the description is so insufficient that the land intended to be assessed cannot be determined, it will be void.<sup>34</sup> The question whether or not an erroneous statement of the name of the owner will defeat the assessment depends upon the provisions of the statute.<sup>35</sup> The fact that sufficient funds are already raised is no defense against the payment of the assessment, since, if it is too large, all landowners have a right to share in the rebate.<sup>36</sup> The taxpayer is not allowed to set off claims which have accrued to him during the construction of the ditch. Such claims, if the subject of set-off at all, should be adjusted at the time the assessment is levied, and cannot be brought forward upon an attempt to enforce it.<sup>37</sup>

**239a. Omission of benefited lands.**— The whole theory upon which a local assessment for the construction of a drain can be made is that the property assessed is merely paying its proportion of a sum which ought to be met by land which is particularly interested in and benefited by the improvement, and that, therefore, its owner must bear

<sup>32</sup>*Foster's Branch Ditching Co. v. Makepeace*, 45 Ind. 226.

Persons upon whom is imposed a drainage assessment cannot question the existence of the corporation and the authority of the officers imposing the assessment, since such matters can only be questioned by proceeding by quo warranto, where there was a *de facto* corporation assuming to exercise powers with reference to the drainage. *Blake v. People*, 109 Ill. 504.

<sup>33</sup>*Baker v. Clem*, 102 Ind. 109, 26 N. E. 215.

An erroneous description of lands upon which a sewer assessment is levied does not invalidate it where, by the city charter, the common council is authorized to correct errors in the description of lands on which an assessment is imposed. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

<sup>34</sup>*Atwell v. Zeluff*, 26 Mich. 118.

<sup>35</sup>A drainage assessment is a valid lien on land as against a collateral attack by the owner thereof, although such lands were described in the drainage proceedings as being owned by another party in whose name the land appeared on the tax duplicate, under a statute making it sufficient notice if lands affected are described as belonging to the person who appears to be the owner according to the last tax dupli-

cate or record of transfers. *Reed v. Kalsbreck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466.

A landowner may have an assessment on his land for the construction of a ditch set aside where the petition for its establishment and the notice properly described the land, but erroneously gave the name of the owner as the grantor of the present owner, contrary to an express provision of the statute requiring that the petition "give the names of owners thereof if known, and, when unknown, shall so state." *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728.

<sup>36</sup>*Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

That the construction of a drainage ditch was paid for out of general funds of the county contrary to law will not relieve the owners of property benefited from liability to pay their assessments, since the money received by the assessment may be substituted for that paid out. *Patterson v. Baumer*, 43 Iowa, 477.

<sup>37</sup>*People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507.

Proceedings upon a municipal claim for the construction of a sewer being exclusively *in rem*, there can be no certificate for a balance claimed by way of set-off. *Philadelphia use of Jones v. O'Conner*, 9 Pa. Dist. R. 230.

his portion of the burden under his duty to the government. This principle is at once violated, and the foundation for the assessment removed, if any of the property which is benefited, and which should contribute to the cost of the improvement, is omitted from the assessment roll.<sup>1</sup> This rule does not deprive the commissioners of the discretion as to what property is benefited so as to bring it within the assessment district, or give an individual taxpayer a right to control their discretion;<sup>2</sup> nor does it impair the right of the legislature to grant exemptions for valid reasons which give a right to grant such exemptions generally.<sup>3</sup> An assessment is not void, although it omits property which is within the terms of the statute authorizing the assessment, if it is not in fact benefited thereby;<sup>4</sup> and one whose assessment is not increased by an omission of other property cannot complain of it.<sup>5</sup> A sewer assessment is not invalid because it is laid on only a small portion of a tract of land belonging to the same person, that being the only portion of the tract that is benefited.<sup>6</sup>

<sup>1</sup>*Masters v. Portland*, 24 Or. 161, 33 Pac. 540.

Although commissioners of sewers are authorized to do according to their discretion, such discretion ought to be limited by the rule of reason and law; and they cannot assess the entire expense of repairing the bank of a river on the adjoining owner, but must assess it on all whose lands are in danger from failure to repair. *Rooke's Case*, 5 Coke, 99b.

The trustees of a village will be enjoined from enforcing the lien of a sewer assessment on the ground that it will cast a cloud upon the plaintiff's title, where the commissioners appointed to assess benefits intentionally omitted from the assessment, which did not on its face disclose the omission, a portion of the property included in the improvement district designated by statute. *J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 139, 44 N. Y. Supp. 317.

<sup>2</sup>A landowner within a drainage district cannot, by writ of certiorari, have the proceedings for the organization of a drainage district quashed upon the ground that certain land therein was not classified, where it appears that, if such land had been classified, it would have been at zero, and no tax could have been assessed against it. *Chapman v. Drainage Comrs.* 28 Ill. App. 17.

<sup>3</sup>*Toledo v. Potter*, 19 Ohio C. C. 661; *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

<sup>4</sup>An assessment for the construction of a sewer is not invalid because assessed only against the property on the side of the street on which such sewer is located, under an ordinance requiring the assessment to be made on the property benefited "bounding and abutting upon the improvement," where it does not appear but that the property not assessed is already supplied with local drainage, and therefore exempt from further assessment, or that it could be benefited thereby, except that at one point surface drainage on the owner's property may run into the sewer, as that is only an incidental benefit, if any. *Toledo v. Beaumont*, 3 Ohio N. P. 287.

A railroad right of way is not, in any proper sense, contiguous to a sewer passing through it under the ground, so as to render an ordinance invalid because it does not provide for the levying of a special tax thereon. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

<sup>5</sup>*Wilson v. Cincinnati*, 5 Ohio N. P. 68.

Where two sewers are constructed at the same cost per foot and as part of the same improvement, owners of lots assessed for one cannot defeat the assessment because the owners of the lots benefited by the other have not been assessed. *Fairbanks v. Fitchburg*, 132 Mass. 42.

<sup>6</sup>*Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

**240. Valid portion of assessment must be paid.**— To entitle one who has a good ground for contesting a drainage assessment to a hearing he must pay whatever portion of the assessment is valid.<sup>1</sup>

**241. Laches; waiver.**— As we have seen in considering the grounds for contesting an assessment, objections must be made in due time, and the right to make them may be lost by laches. The assessment and collection of a drain tax will not be enjoined on the ground that the complainant will not derive any benefit, where he had knowledge of the improvement, and did not commence his suit until the expense of constructing the drain had been incurred and orders had been issued for the work.<sup>1</sup> Closely connected with the loss of the right to contest an assessment by laches is the right of waiver. All objections which are not raised when they should be will be regarded as waived. Whatever irregularities might have been corrected had the objection been made at the proper time should be regarded as waived by failure to make them then.<sup>2</sup> But failure to object will not waive objections

<sup>1</sup>*Dorst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Gillette v. Denver*, 21 Fed. 822; *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

A landowner is estopped from attacking the validity of a ditch proceeding by a suit to quiet title after sale of his land for an assessment, unless he first pay or tender the benefits resulting to his land thereby. represented by the assessment levied thereon. where he stands by without objecting until after the ditch beneficial to his land has been constructed in good faith under color of statutory proceeding, and the rights of others have intervened. *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Prezinger v. Fording*, 114 Ind. 599, 16 N. E. 499.

<sup>2</sup>*Walker Twp. v. Thomas*, 123 Mich. 290, 82 N. W. 48; *Dorst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

A party who objects to the construction of a ditch upon the ground of want of jurisdiction of the board of commissioners to order it should proceed with reasonable promptness in asserting his objections, and not wait until the ditch is completed, and thus be enabled to receive all the benefits to be derived from it before asserting the want of authority. *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211.

One seeking a review by certiorari of the proceedings to assess lands for the cost of draining under a drainage act must move promptly. Delay until a large portion of the assessment has been collected and applied will constrain the

court to refuse relief. *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208; *Haines v. Campion*, 18 N. J. L. 49.

A delay of ten months by inhabitants and taxpayers of a town before bringing their bill to restrain payment of money for expense already incurred in draining a pond under authority of the town is such laches as will preclude a right to equitable relief. *Fuller v. McIrose*, 1 Allen, 166.

But in one case it was held that the right of a citizen, as against the municipal corporation, to have a lien for an unlawful sewer assessment stricken off cannot be lost by laches. "Assessments of this nature are a species of taxation, and, in laying and collecting them, the city exercises the delegated power of the state. It is manifestly unjust for the state to take advantage of the oversight or omission of a citizen, and to exact from him a tax that cannot constitutionally be imposed." *Harrisburg v. Hoak*, 9 Pa. Dist. R. 51.

<sup>1</sup>*Blake v. People*, 109 Ill. 504; *Hall v. Slaybaugh*, 69 Mich. 484, 37 N. W. 545; *Hackett v. Brown*, 128 Mich. 141, 87 N. W. 102; *Morrell v. Union Drainage Dist No. 1*, 118 Ill. 139, 8 N. E. 675; *Patterson v. Baumer*, 43 Iowa, 477.

A petitioner for a drain, who released the right of way and consented to all the proceedings, but objected to those taken for the purpose of raising the tax to pay for its construction, cannot be heard to complain of irregularities in the proceedings for the purpose of evading pay-

which go to the validity of the proceeding, and are more than mere irregularities.<sup>3</sup> Express assent, however, to the proceedings may amount to a waiver of even constitutional objections.<sup>4</sup> A resident of a municipal corporation will not be permitted to set aside proceedings for the construction of a sewer which has resulted in an assessment against his property because of defects in the proceedings, where, with knowledge of the facts, he permitted the sewer, which would be a great benefit to his property, to be completed without any objection from him.<sup>5</sup>

**242. Estoppel.**— Where the taxpayer has not only failed to urge his objections at the proper time, but has permitted the work to go forward and money to be expended on the faith of his conduct, the principle of estoppel will prevent him from denying liability for the assessment;<sup>1</sup> and this is especially true in case of persons who in-

ment of the tax assessed upon his lands. *Oook v. Covert*, 71 Mich. 249, 39 N. W. 47.

A landowner, duly notified of the proceedings at the time of the establishment of a ditch, cannot, after the final judgment of the court establishing it and confirming the assessment of benefits and damages, to which he filed no remonstrance, and after the construction of the ditch, file an intervening petition asking for an allowance of damages to his land on the ground that at the time of its establishment he was unable to discover that the proposed drain would not benefit his land, but would be an injury thereto. *Hoeffgen v. Harness*, 148 Ind. 224, 47 N. E. 470.

An injunction will not be granted at the suit of a property owner to restrain the collection of an assessment for the construction of a sewer on the ground of fraud by the placing therein, by the contractor, of rings instead of other connection, where no serious damage has been done thereby, and such owner stood by and permitted the work to be completed instead of enjoining its completion. *Blanchard v. Columbus*, 8 Ohio S. & C. P. Dec. 676.

<sup>1</sup>*Walters v. Chamberlin*, 65 Mich. 333, 32 N. W. 440.

<sup>3</sup>*Houston v. Wheeler*, 52 N. Y. 641.

<sup>4</sup>*State ex rel. Schintgen v. La Crosse*, 101 Wis. 208, 77 N. W. 167.

<sup>5</sup>*New Albany Gaslight & Coke Co. v. Crumbo*, 10 Ind. App. 360, 37 N. E. 1062; *Kellogg v. Ely*, 15 Ohio St. 66; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130.

One who consents to the construction

of a ditch, and promises to construct the part apportioned to him, and attempts to let out the job for the work, cannot, after the ditch has been constructed in part and his lands benefited thereby, complain of an assessment therefor. *Mabee v. Miner*, 45 Mich. 568, 8 N. W. 578.

One who stands by and permits the deepening, widening, and extending of a drain with knowledge that he is to be assessed therefor, and that those doing the work can be compensated in no other way, and who actually receives a benefit from the work, is not entitled to an injunction restraining the collection of the taxes assessed. *Atwell v. Barnes*, 109 Mich. 10, 66 N. W. 583.

A landowner who stands by and sees the construction of a ditch without objecting until after its completion is estopped from afterwards suing out an injunction on the ground that the statutory requirement as to the giving of notice of the letting of the contract was not complied with, and the contract was let at a higher price than it should have been. *Muncey v. Joest*, 74 Ind. 409.

A bill to set aside proceedings to establish a drain and to enjoin collection of the tax will be dismissed where the complainant joined with others in releasing the right of way, bid off the work for two sections, and deferred filing the bill until the tax, with a single other exception, had been paid. *Harwood v. Huntoon*, 61 Mich. 639, 17 N. W. 216.

An owner of abutting property who, by reason of living in the vicinity of a sewer improvement, knew, or should have known, that the same was being

stigate the proceedings.<sup>2</sup> But the mere signing of the petition will not estop the petitioner from objecting to illegal proceedings.<sup>3</sup> A landowner is estopped from denying the validity of an assessment levied against his land for the construction of a drain on the ground that a previous assessment had been made but was set aside, where the first assessment was invalid, and was set aside, and a new one was made at the request and with the consent of such owner, and he expressed himself satisfied therewith, and stood by and allowed the ditching company to expend money on the faith of it.<sup>4</sup> If the action of the taxpayer causes a change of position on the part of another interested person, the taxpayer is estopped from setting up the invalidity of the assessment.<sup>5</sup> Not every failure on the part of the taxpayer to object to the proceedings will estop him from contesting the validity of the assessment. In order to have that effect he must have known of the invalidity of the proceedings, or have had such notice as would put him on inquiry;<sup>6</sup> and he will not be estopped if he had no notice that one was to be made.<sup>7</sup> A member of the common council which authorized a sewer improvement and directed the levying of an assessment therefor is not estopped from taking exception to the assessment made against him, where he has not in any manner recognized the roll as valid, or taken action upon it.<sup>8</sup> To effect an estoppel the silence must be with respect to something to which the taxpayer

constructed partly on her property, and stood by and said nothing, is estopped from resisting the validity of an assessment for such work, in an action brought to restrain the enforcement thereof, as her remedy is by an action against the municipality for the appropriation to its use of such property, or the imposition of an additional servitude thereon. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

*Turnquist v. Cass County Drain Comrs.* (N. D.) 92 N. W. 852; *Erickson v. Cass County* (N. D.) 92 N. W. 841; *Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. Supp. 774.

*Taylor v. Burnap*, 39 Mich. 739.

*Nevis & O. C. Twp. Draining Co. v. Alkire*, 36 Ind. 189.

*People v. Weber*, 164 Ill. 412, 45 N. E. 723.

<sup>8</sup>*Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317; *Keane v. Klausman*, 21 Mo. App. 485.

<sup>9</sup>A landowner who appears before the jury in a drain proceeding, accepts the award made him, and enters into a contract to construct a portion of the drain,

is not thereby estopped from contesting, on the ground of irregularity, an assessment for the drain imposed upon land owned by him, where he had no notice of the assessment until the roll was completed and it was too late for him to appeal from the action of the drain commissioner. *Tinsman v. Monroe County*, 90 Mich. 382, 51 N. W. 460.

A landowner is not estopped from denying the validity of an assessment on his land for the construction of a ditch on the ground that he had no notice, by silently standing by without objecting and allowing the work to be done on the ditch and money expended in its construction knowing that the same was being done on the faith of the validity of the proceedings, in the absence of proof as to the value of the work done and the amount of money expended, as estoppels cannot be created by bare intendments so as to cut one off from availing himself of the right to notice secured to him by the organic law. *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221.

<sup>10</sup>*Warren v. Grand Haven*, 30 Mich. 24.

was bound to object. Silence with respect to proceedings as to the progress of the work will not raise an estoppel to object to the amount of the assessment which exceeds the statutory limit;<sup>9</sup> nor that it was not levied as required by statute.<sup>10</sup> Nor is the taxpayer estopped to set up the fact that there was no jurisdiction to make the improvement, since that is a matter of which all interested persons are bound to take notice.<sup>11</sup> Nor will mere silence estop one from taking advantage of an insufficient description of the land.<sup>12</sup> Merely making use of an illegal drain will not estop the taxpayer from contesting the validity of the assessment;<sup>13</sup> but such use will waive mere irregularities in the proceedings.<sup>14</sup>

**243. Recovering payments made.**— The rules governing the right to recover payments made under protest are similar to those which govern the right to contest the enforcement of the assessment. The taxpayer cannot recover a payment made under protest on the ground of

<sup>9</sup>*Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169.

<sup>10</sup> A landowner is not estopped from attacking, by direct proceedings, the validity of a sewer assessment which is void because not levied according to benefits but solely according to location, contrary to statute, by silently standing by and allowing the improvement to proceed and accepting the benefits thereof after knowledge of the manner in which it was to be made, as he had a right to assume that the assessment would be levied at least under color of statute. *Crawfordsville Musio Hall Assn. v. Clements*, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752.

<sup>11</sup>*Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566.

<sup>12</sup>*Hunt v. State*, 26 Ind. App. 518, 58 N. E. 557.

The facts that an owner did not appeal from an assessment upon his lands for the construction of a ditch, but stood by and saw the work done without objecting; that the course of the ditch through his premises was changed at his instance; that \$100 was expended for his benefit in constructing the ditch through his land; and that he did not question the legality of the assessment until after the work was completed,— do not estop him, in an action to enforce the assessment, from insisting upon its illegality because of defective description of the land. *Boatman v. Macy*, 82 Ind. 490.

<sup>13</sup>*State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street &*

*Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Watertown v. Fairbanks*, 65 N. Y. 588; *Neill v. Trans-Atlantic Mortg. Trust Co.* 89 Mo. App. 644. The court in that case said: Defendant had no lot or part in employing the contractor to build the sewer. The street is his property subject to the easement of the public. He, therefore, finds on his property an underground drain called a sewer. Why may he not use it without paying for it when it has been put there without his request, and, it may be against his consent? We have the highest authority for saying that when one finds a structure upon his property which has been placed there without his request, or direction, or consent, he cannot be made liable for its cost by using it.

An abutter on a street in a town through which a sewer is constructed, who enters the sewer with his private drain by license from the municipal authorities by which he agrees to make no claim for damages on account of the work, is not estopped to contest the validity of the order laying out the sewer under which an assessment is levied on him. *Sheehan v. Fitchburg*, 131 Mass. 523.

<sup>14</sup>*Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961; *Fitzgerald v. Philadelphia*, 3 Walk. (Pa.) 17.

A landowner cannot object to the validity of the laying out of a sewer for want of previous notice to him after he has entered his private drain into it. *Butler v. Worcester*, 112 Mass. 541.

want of benefit.<sup>1</sup> A statute governing the recovery of taxes generally does not apply to special assessments.<sup>2</sup> The payment cannot be recovered because part of the statute is unconstitutional if sufficient is constitutional to uphold the assessment.<sup>3</sup> If the taxpayer has waived irregularities, or estopped himself from setting them up, he cannot recover his payment because of them.<sup>4</sup> And if the payment is voluntarily made it cannot be recovered.<sup>5</sup> But a special protest is not necessary if the payment is made to avoid a liability upon the property of the taxpayer.<sup>6</sup>

## X. COMPLETION OF THE IMPROVEMENT.

**244. Validity of proceedings.**— To render valid the proceedings of the local authorities in the construction of a drainage improvement, they must follow the statutory and constitutional requirements so far as they exist. Proceedings may be quashed where jurors fail to take the oath to determine the necessity for using particular property and the just compensation to be made for it, as required by the Constitution.<sup>1</sup> And the statutes governing the kind of improvement that is being made must be followed. Therefore, if different proceedings are prescribed for local and trunk sewers, a local sewer cannot be built under the provisions relating to trunk sewers.<sup>2</sup> Discretion committed to the local authorities must be exercised according to law and justice.<sup>3</sup> The steps necessary to confer jurisdiction must be taken;<sup>4</sup>

<sup>1</sup>*Smith v. Carlou*, 114 Mich. 67, 72 N. W. 22.

<sup>2</sup>*Taylor v. Avon Twp.* 73 Mich. 604, 41 N. W. 703.

<sup>3</sup>*Mathias v. Cramer*, 73 Mich. 5, 40 N. W. 926.

<sup>4</sup>*Smith v. Carlou*, 114 Mich. 67, 72 N. W. 22.

<sup>5</sup>*New Orleans Canal & Bkg. Co. v. New Orleans*, 30 La. Ann. 1371.

A drainage tax paid by a landowner will not be refunded, although by statute his property is subsequently excluded from the drainage district, where it appears that, when the canals in process of construction are completed, his land will be drained. *New Orleans Canal & Bkg. Co. v. New Orleans*, 27 La. Ann. 505.

<sup>6</sup>*Cox v. Welcher*, 68 Mich. 263, 13 Am. St. Rep. 339, 36 N. W. 69.

<sup>7</sup>*Bowler v. Perrin*, 47 Mich. 154, 10 N. W. 180.

<sup>8</sup>Under statutes providing different proceedings for the construction of trunk and local sewers, which provide

that local sewers are such as are intended for use exclusively for the drainage and accommodation of lots abutting thereon, the mere fact that a sewer carries off surface drainage from the streets does not prevent its being local. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

<sup>9</sup>Under the statute authorizing sewer commissioners to make and ordain statutes and ordinances after the laws and customs of Romney-Marsh in the county of Kent or otherwise, after their own wisdom and discretion, the commissioners are not bound to follow such laws and customs. *Keighley's Case*, 10 Coke, 139.

<sup>10</sup>*Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

The *ex parte* appointment of a special drain commissioner on the same day that the application for his appointment was filed, and without notice to anyone, is invalid. *Corey v. Jackson County Probate Judge*, 50 Mich. 524, 23 N. W. 205.



but jurisdiction, once acquired, will, unless expressly taken away by the legislature, continue until the improvement is completed.<sup>5</sup> Where a municipal charter, after declaring that district sewers shall be established within the limits of the districts to be prescribed by ordinance, expressly confers on the city council power to cause sewers to be constructed in any district whenever it may deem it necessary for sanitary purposes, the character, dimensions, and materials to be prescribed by ordinance or contract, it is not necessary after a sewer district has been established to pass a special ordinance to authorize the construction of each lateral sewer; and an ordinance defining the limits of the sewer district, and authorizing the city engineer to construct such sewers therein as may be necessary, is sufficient, as the contracts made by the city engineer will have to be approved by the council.<sup>6</sup> Proceedings will not be invalid for failure to notify land-owners if they waived the defect.<sup>7</sup> Mere informalities will not render the proceedings invalid as against collateral attack.<sup>8</sup> A ditch located and constructed under color of the statute, the expense of which has been paid for without objection by the parties assessed, and which has been in use for fifteen years or more, must be regarded and recognized by the township drain commissioner as a public drain duly and legally established.<sup>9</sup> Whether or not the power of the commissioners will be exhausted by one attempt at its exercise will be governed by the provisions of the statute; so that, if the statute fails to give authority to perfect a drain, the commissioners may lose their authority when one has been constructed, although it is so defective as to be unserviceable.<sup>10</sup>

<sup>5</sup> An act of the legislature creating a sanitary district, embracing within its territory a municipal corporation, for the purpose of constructing a main channel so as ultimately to change the direction of the flow of sewage of such municipality and other territory within the district so that the same will flow away from, instead of into, a lake, with power to construct adjuncts or additions so as to carry such sewage and drainage into such main channel, does not operate as a repeal of the statute authorizing such municipal corporation to construct drains, ditches, etc., or require the corporate authorities thereof to surrender control of its sewer system to the drainage trustees,—especially until such main channel is constructed, and the adjuncts are so extended as to drain all parts of the territory of the district. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

<sup>6</sup>*State ex rel. Cavender v. St. Louis*, 56 Mo. 277.

<sup>7</sup> It is not a valid objection to the validity of drain proceedings that the names of two owners of land traversed by the drain were omitted from the application to the probate court, where such owners did not complain, and an adjoining owner has given a release of a sufficient quantity of land to accommodate the entire ditch and the deposits of earth therefrom. *Hauser v. Burbank*, 117 Mich. 642, 76 N. W. 111.

<sup>8</sup>*Donalson v. Lawson*, 126 Ind. 169, 25 N. E. 903.

<sup>9</sup>*Zabel v. Harshman*, 68 Mich. 273, 42 N. W. 44.

<sup>10</sup> Under the New York act for draining lands in Orange county, which authorized the commissioners to construct a ditch of such "depth and size as might be found necessary and useful" for leading off the waters, the commissioners

**245. Notice; hearing.**— Whether or not notice must be given to persons interested in the construction of a sewer, and a hearing accorded them, depends on the character of the improvement, the statutory provisions on the subject, the light in which the court views the exercise of power by which the improvement is made, and the manner in which the person claiming notice will be affected by the improvement. If the statute makes notice a prerequisite to jurisdiction over the proceeding, it must be given. If the improvement is to be in a public street, where there is a right to place it, and the power to make it resides absolutely in a governmental body, while the cost is to be met by an exercise of the taxing power operating uniformly upon all property affected, there is no reason why any notice should be given except that the assessment roll is in the assessor's hands. If a right of way is to be acquired by right of eminent domain, the property owner must be given notice and an opportunity to be heard. If the assessment is to be according to benefits, or a different rate is to obtain in different parts of the district, the taxpayer is entitled to a hearing.<sup>1</sup> If the theory which is gradually extending among the courts is correct, that the making of necessary improvements is a governmental function to be exercised when the public good requires it, and that the individual, by becoming a member of the state, agrees to bear his share of the expenses, and cannot defeat projects which are for the public good, no preliminary notice need be given to the residents and taxpayers of the district of the intention to make the improvement, and the proceedings cannot be defeated for lack of notice to them.<sup>2</sup> But persons given no notice of the proceedings at any stage are not bound by them; and, in case it is to their interest to do so,

are not limited to their first determination, but, in case that proves insufficient, they are empowered to continue widening and deepening until the object is secured. *Houston v. Wheeler*, 52 N. Y. 641.

Under a statute providing for drainage commissioners, and that the work shall be completed according to their directions, and that, after completion of the business, they shall make return to the court of their doings under the commission, they have no authority to repeat the action if, by the forces of nature, the channels provided by them for the drainage of a pond are filled up so that the pond is again raised to its former level. *Smith v. Smith*, 148 Mass. 1, 18 N. E. 595.

<sup>1</sup> § 172, *ante*.

<sup>2</sup> *Re Zborowski*, 68 N. Y. 88; *Scott v.*

*Brckett*, 89 Ind. 413; *Erickson v. Cass County* (N. D.) 92 N. W. 841.

The court, in *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450, while intimating its opinion to be that failure of a charter to provide for notice to landowners of the proposed construction of sewers comes within the prohibition against taking property without due process of law, nevertheless refuses to declare it void under the rule of *stare decisis*. But in his concurring opinion Strahan, J., on rehearing, says that the charter expressly provides for notice in cases of street improvements, and that by a section thereof such provisions are made applicable in cases of sewers where the expense is ordered by the council to be made a charge on the property directly benefited; and further, that by ordinance a hearing was provid-

they may attack them collaterally.<sup>3</sup> Any notice which may be given will prevent the annulment of the proceedings for lack of notice.<sup>4</sup> A drainage act is not unconstitutional which furnishes ample facilities for the landowner to present his claim for damages, to contest every question pertaining to his rights, and gives ample opportunities for appeals and questioning the regularity and legality of all proceedings in the establishment of the ditch or drain.<sup>5</sup> If the legislature requires notice to be given, that requirement must be complied with, and failure to do so will render the subsequent proceedings void,<sup>6</sup> and they may be quashed.<sup>7</sup> The court cannot proceed to appoint the commissioners, or take other steps in the proceedings, unless the no-

ed for, which he deems could be reasonably construed to imply that notice should be given. The court relies upon the case of *Stroobridge v. Portland*, 8 Or. 67, as deciding the question of the necessity of notice, but in that case notice of the proposed sewer improvement is alleged to have been published declaring the expenses assessed upon the property benefited and describing the property benefited, and the question upon which the contention of the case turned seems to have been more particularly with reference to whether the council should have first declared by ordinance that a sewer was necessary as preliminary to their proceeding to construct the sewer.

<sup>3</sup>*McCullum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

<sup>4</sup>*Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795; *Johnson v. State*, 116 Ind. 374, 19 N. E. 298; *Otis v. DeBoer*, 116 Ind. 531, 19 N. E. 317; *Pickering v. State*, 106 Ind. 228, 6 N. E. 611; *Deegan v. State*, 108 Ind. 155, 9 N. E. 148; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *McMullen v. State*, 105 Ind. 334, 4 N. E. 903.

<sup>5</sup>*Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677.

<sup>6</sup>*Wright v. Rowley*, 44 Mich. 557, 7 N. W. 235; *Jackson v. State*, 103 Ind. 250, 2 N. E. 742; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Purdy v. Martin*, 31 Mich. 455; *Daniels v. Smith*, 38 Mich. 660; *Lane v. Burnap*, 39 Mich. 736; *Whiteford Twp. v. Phinney*, 53 Mich. 130, 18 N. W. 593.

The commissioners of a drainage district have no power to incur the expense of additional work provided for by a special contract with the commissioners of another district, without first fulfilling the requirements of the statute as

to giving notice to the owners of land in their district, and affording them an opportunity to be heard and to contest the propriety of the work and the expense contemplated. *Lima Lake Drainage Dist. v. Hunt Drainage Dist.* 101 Ill. App. 72.

A drainage by-law published without a notice of the holding of a court of revision for the purpose of hearing complaints against the assessment at some day, "not earlier than twenty, nor later than thirty, days from the day on which the by-law was first published," as required by statute, is bad, and must be quashed. *Re Ferguson*, 44 U. C. Q. B. 41.

Under an act requiring that notice to sewer a street be addressed to the owners of the premises abutting thereon, such notice must be given to all such property owners, and the failure so to do renders the subsequent proceedings by the local authorities to construct the sewer void, and none of the frontagers are liable for the expenses incurred. *Handscroth v. Derrington*, 66 L. J. Ch. N. S. 691, [1897] 2 Ch. 438, 77 L. T. N. S. 73, 61 J. P. 518.

<sup>7</sup>*Dickinson v. Van Wormer*, 39 Mich. 141; *Lampson v. Drain Commissioner*, 45 Mich. 150, 7 N. W. 772; *Reinig v. Munson*, 46 Mich. 138, 8 N. W. 723.

The appearance and remonstrance of certain persons whose lands will be affected by a drainage ditch will not affect the right of the court to dismiss the petition in favor of one who, after the proceedings have progressed for some time, enters a special appearance, and moves to dismiss for want of notice, so as to prevent the further progress of the case as against those to whom no notice was given. *Nites v. Miller*, 120 Ind. 19, 22 N. E. 82.

tices are shown to have been served.<sup>8</sup> It is no defense to a proceeding to set aside the location, establishment, and apportionment of a ditch by one to whom no sufficient and proper notice was given, as required by law, that he had personal knowledge of the pendency of the petition to establish, that he stood by while the work was being done, and that he was benefited thereby, where it does not appear that any work was done on his own land.<sup>9</sup> A motion to set aside judgments in drainage proceedings on the ground of want of notice, and therefore lack of jurisdiction, is a collateral attack, and must show what the record discloses as to notice, appearance, or acquisition of jurisdiction.<sup>10</sup> Joining in a remonstrance against drainage proceedings will constitute a waiver of notice of such proceedings.<sup>11</sup> The fact that one or more landowners are not notified of proceedings to establish a ditch does not vitiate the proceedings as to those having notice.<sup>12</sup>

**245a. To whom must notice be given.**—The question as to how far the taxpayer is entitled to notice to charge him with liability for the assessment has already been considered.<sup>1</sup> If a right of way is needed over private property notice must be given to its owner as a foundation for the proceedings to acquire the right of way. The notice in such case is intended for the protection of the landowner, and must be given in the manner prescribed.<sup>2</sup> But he is not entitled to notice of the institution of the drainage proceedings; it is sufficient if he has notice of the proceedings to acquire his land.<sup>3</sup> In case of a contemplated improvement of a natural water course for drainage purposes notice must be given to riparian owners below the improvement, where the flow of the water may possibly be varied to their injury.<sup>4</sup> The notice referred to in the Illinois drainage act, "to all persons interested" to appear and present their claims for damages for the construction of drainage ditches, does not require notice to others whose lands are outside the district being organized, but affects those owners only whose lands are within the district.<sup>5</sup> The notice must be given to the one who has title to the property, or to his representative,<sup>6</sup> but the actual, though not record, owner of land cannot enjoin

<sup>8</sup>*Bennett v. Olney*, 56 Mich. 634, 23 N. W. 440; *Bettis v. Geddes*, 54 Mich. 608, 20 N. W. 608.

<sup>9</sup>*Rioc v. Wellman*, 5 Ohio C. C. 334.

<sup>10</sup>*Long v. Ruch*, 148 Ind. 74, 47 N. E. 156.

<sup>11</sup>*Sanier v. Miller*, 105 Ind. 393, 4 N. E. 867.

<sup>12</sup>*Carr v. Boone*, 108 Ind. 241, 9 N. E. 110; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191.

<sup>1</sup>§ 232a, *ante*.

<sup>2</sup>*Crihbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

<sup>3</sup>*Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

<sup>4</sup>*Neff v. Sullivan*, 9 Ohio Dec. Reprint, 765.

<sup>5</sup>*Santa Fé Drainage Dist. v. Waeltz*, 41 Ill. App. 575.

<sup>6</sup>In proceedings under the drainage statute, notice to a mortgagee who has taken title, but not possession, under a foreclosure sale of the lands of a mar-

the construction of a public ditch through his land on the ground that the proceedings were void because he had no notice thereof, under a statute requiring notice to state the names of owners so far as they can be ascertained from reasonable inquiry and search of the records, —especially where large sums of money have been expended in the construction of a large portion of the ditch, which promises great public and private benefit.<sup>7</sup>

**245b. Form of notice.**—Notice of proceedings for the establishment of a drain need not be personal, but may be given by publication;<sup>1</sup> but notice as published must contain the matters of which the statute requires notice to be given.<sup>2</sup> As has been seen, defective notice is not alone sufficient to defeat the proceedings;<sup>3</sup> and, therefore, if the notice is sufficient to give jurisdiction over the parties, they cannot defeat the proceeding because of its insufficiency.<sup>4</sup> And actual notice

ried woman, and to her husband, who occupies them with his wife, is sufficient; and, inasmuch as such married woman has been divested of legal title, she cannot maintain certiorari to review. *State, Berryman, Prosecutor, v. Little*, 49 N. J. L. 182, 6 Atl. 519.

Under the Michigan drain law of 1885, requiring notice of the hearing for the appointment of special commissioners to be served upon every person whose lands are traversed by such drain, or who will be liable to assessment therefor, neither mortgagees nor the possessor of a leasehold interest of five years' duration are entitled to notice. *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. 345.

A proceeding to lay out a township drain is void as to a nonresident landowner affected thereby, who was not named in the proceeding or notified of it, but whose husband was assumed to be the owner of the property. *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 581.

<sup>1</sup>*Kepler v. Wright*, 136 Ind. 77, 35 N. E. 1017.

<sup>2</sup>*Smith v. Carlou*, 114 Mich. 67, 72 N. W. 22; *Carr v. State*, 103 Ind. 548, 3 N. E. 375.

Personal notice to the owner of land sought to be taken for the construction of a ditch is not indispensable in order to its condemnation and appropriation, but notice, by publication, provided for by a statute regulating such taking, is sufficient, and not a violation of any constitutional rights of the owner: nor is a provision for waiver of the right to compensation in case of failure to make application therefor within a time limited by such act, based upon construct-

ive notice, unconstitutional. *Cupp v. Seneca County*, 19 Ohio St. 173.

<sup>3</sup>It is a prerequisite to the validity of an ordinance for building a sewer in Perth Amboy, New Jersey, that the advertised notice to interested parties to appear and be heard should name a time and place for the hearing; and an objection grounded upon failure to give such notice is not waived by appearing at a meeting to hear objections to the assessment and protesting that the sewer is uncalled for, that all the proceedings are unjust and unfair, and that property owners were not consulted. *State, Brinley, Prosecutor, v. Perth Amboy*, 29 N. J. L. 259.

<sup>4</sup>§ 245, ante.

<sup>5</sup>Persons who by regular notice and appearance are in court in a drainage proceeding, and upon whose remonstrance the first report of viewers had been dismissed, cannot rely on want of notice of a second report to excuse refiling the remonstrance. *West Creek Twp. v. Miller*, 142 Ind. 210, 41 N. E. 452.

A notice served on a property owner, stating that a commissioner appointed to locate a ditch had reported in favor of the location, and that all objections thereto must be filed before a certain date, or that action would be taken and the ditch located without reference to any objections, while not in the exact language used by the statute, is not so defective as to constitute no notice, so that the action of the board of supervisors holding it to be sufficient can be collaterally assailed. *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.

of the proceedings may be sufficient to prevent one who has stood by and permitted them to progress from moving to quash them.<sup>5</sup>

**245c. Hearing.**— The right to notice implies the right to be heard; so that, in general, all who are entitled to notice are entitled to a hearing. One whose land is to be taken for a right of way is entitled to be heard upon the question of necessity and of the compensation to be made.<sup>1</sup> The provision of a statute for an action by reclamation districts to determine the validity of an assessment, whereby the determination of such question is merely permitted to be made in advance of the action upon the assessment wherein the owner previously made his showing, and is made conclusive as to the parties, and in which the owner is given the hearing to which he is entitled,—is not unconstitutional.<sup>2</sup>

**246. Letting contract.**— A municipal corporation may construct public drains or ditches by its officers or servants, and is not bound to let such work out to independent contractors, where the work is not to be done at the expense of adjacent property owners.<sup>1</sup> But in case the work is required to be done by contract, all the requirements of the statute which are applicable to such proceedings must be observed. If public notice of the letting is prescribed, it must be given.<sup>2</sup> The advertisement for the letting cannot be made before the ordinance authorizing the improvement goes into effect;<sup>3</sup> and all the items speci-

<sup>1</sup>*Peters v. Griffec*, 108 Ind. 121, 8 N. E. 727.

<sup>2</sup>A statute providing for the construction of drains along a roadbed by railroad companies is invalid when it makes no provision for a hearing as to the railroad company at any stage of the proceeding. *Chicago & E. R. Co. v. Keith*, 67 Ohio St. 279, 60 L. R. A. 525, 65 N. E. 1020.

The statute providing for the assessment of damages for the taking of land for a drainage district by a jury, but without an opportunity to the owner to be present at the impaneling of the jury and object to jurors, or to cross-examine witnesses and offer testimony at the original assessment of damages, is unconstitutional, even though it gives him the privilege of objecting to such assessment after it is made. *Wabash R. Co. v. Coon Run Drainage & Levee Dist.* 194 Ill. 310, 62 N. E. 679.

<sup>3</sup>*Kings River Reclamation Dist. No. 531 v. McOullah*, 124 Cal. 175, 56 Pac. 887.

<sup>1</sup>*Platter v. Seymour*, 86 Ind. 323.

<sup>2</sup>*Burnett v. Scully*, 56 Mich. 374, 23 N. W. 50.

Provisions of a statute requiring proposals for sewer construction to be invited by advertisement, and compelling contractors to furnish bond or other security, are to secure proper expenditure of public money, and to protect taxpayers from fraud and imposition in the making of contracts, and are not directory, but in the nature of conditions precedent to the building of the sewer, and consequently to the validity of assessments for its cost. *Bowditch v. Superintendent of Streets*, 168 Mass. 239, 46 N. E. 1026.

<sup>3</sup>The fact that the construction of a sewer is a sanitary measure requiring prompt attention does not render a contract for its construction and the tax bill issued thereon valid, where the advertising for its letting was done before the ordinance authorizing it went into effect. *Keane v. Klausman*, 21 Mo. App. 485.

fied by statute must be submitted to competition.<sup>4</sup> A statutory requirement that contracts for sewers or sewer construction shall be let to the lowest bidder applies only to the contract for an original construction, and not to a reletting of the contract in case the original contractor fails to perform his contract.<sup>5</sup> Where the work is let in one, instead of several, contracts, as required by statute, a taxpayer cannot, after permitting the work to proceed at large cost to the contractor, refuse to pay his assessment on that ground, unless he first tenders the amount equitably due for benefits conferred by the work done.<sup>6</sup> Where, by reason of its grades, the drainage of a particular street must be done in sections with different outlets, the fact that one section of the work was begun at the time of the adoption of a city charter will not bring the entire work within the exception of a clause requiring all work to be let by contract excepting work already in progress.<sup>7</sup> If the contract is to be let to the lowest bidder, the price of none of the work can be fixed in the advertisement;<sup>8</sup> but the right to make alterations in the work as it progresses may be reserved.<sup>9</sup> Collusion between the city officers and the bidders will render the

<sup>4</sup>*Mutual L. Ins. Co. v. New York*, 144 N. Y. 494, 30 N. E. 386, Affirming 79 Hun, 482, 29 N. Y. Supp. 980.

But a clause in an ordinance of a municipal corporation for the construction of a sewer, in conflict with a statutory provision requiring all contracts exceeding \$500 for the making of public improvements to be let to the lowest responsible bidder, does not vitiate the balance of the ordinance, but may be rejected as nugatory, leaving the balance of the ordinance in force. *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

<sup>5</sup>*Re Leeds*, 53 N. Y. 400; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

When an ordinance is passed for the deepening and enlarging of a sewer by enlarging a portion, constructing a portion under a race, and deepening another portion, and, after advertisement, the contract is awarded for the work, a portion to be under the race and a portion to be open cut, the municipality may change the contract with the same contractor so as to require the whole work to be tunneled without readvertising. *Lutes v. Briggs*, 64 N. Y. 404.

<sup>6</sup>*Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795.

<sup>7</sup>*Re Blodgett*, 91 N. Y. 117.

<sup>8</sup>The requirement of a statute that work upon sewers shall be let by contract, after advertisement, to the lowest

bidder is not complied with by fixing the price for rock excavation in the proposal, and thereby withdrawing it from competition. *Re Manhattan Sav. Inst.* 82 N. Y. 142.

But the mere fact that the advertisements for proposals for sewer work do not involve the cost of rock excavation, but that the price for this item is fixed, does not avoid the whole assessment, but merely presents a case for the deduction of the objectionable item under the New York act of 1870. *Re Merriam*, 84 N. Y. 596.

<sup>9</sup>*Re Merriam*, 84 N. Y. 596; *Re Metropolitan Gaslight Co.* 85 N. Y. 526, Reversing 23 Hun, 327.

Where drainage commissioners, after complying with all antecedent requirements with reference to computing costs of improvement, levy or tax, advertising for bids, etc., enter into a written contract for the construction of a ditch, requiring the contractor to enlarge, if ordered by the commissioners so to do, on the basis of payment for the extra work in the same proportion as for the original work, they are not required to advertise again, even though the enlargement involves an expenditure of more than \$500, provided they have money on hand or provided for by levy to meet the additional expense. *Drainage Comrs. v. Lewis*, 101 Ill. App. 150.

proceedings void, and relieve taxpayers from liability for work done under the contract.<sup>19</sup>

**247. Remonstrance.**—If the power to make the improvement resides in the municipality the improvement cannot be defeated by a remonstrance on the part of all property owners along its route;<sup>1</sup> but, when the acquiescence of a majority of the owners of the property who will be affected by the proceeding is required to make it valid, a remonstrance of a majority of them will prevent any steps being taken toward its accomplishment.<sup>2</sup> Under a statute merely permitting several landowners affected by a drainage improvement to file a remonstrance, the withdrawal of some who have joined in the remonstrance will not defeat it, or impair or affect in any manner the right of others to proceed the same as if such withdrawal had not occurred.<sup>3</sup> The manner in which objections shall be heard is a matter largely within the discretion of the officials having charge of the improvement.<sup>4</sup> A provision in a drainage law allowing the owners of land affected by a ditch only three days to file remonstrances against the assessors' report is not repugnant to any provision of the state or Federal Constitutions, although the time limit seems unreasonable and oppressive.<sup>5</sup> Appearing and filing remonstrance against a drain will waive all questions pertaining to jurisdiction of the court over the remonstrant.<sup>6</sup> A property owner whose land will be injured by the construction of a ditch has the right to appear in the proceedings to establish it and file a remonstrance, although his land is not described in the petition, and no damages are assessed in his favor, and no benefits are assessed against his land, where the statute provides that "any

<sup>19</sup>*Cincinnati use of Steele v. Kemper*, 9 Ohio Dec. Reprint, 742.

<sup>1</sup>*Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89.

<sup>2</sup>This is true although they subsequently withdraw their opposition and erase their names from the protest. *State, Jersey City Brewery Co., Prosecutor, v. Jersey City*, 42 N. J. L. 575; *State, Green, Prosecutor, v. Jersey City*, 42 N. J. L. 565.

<sup>3</sup>*Munson v. Blake*, 101 Ind. 82.

Landowners cannot, after the time for filing remonstrance has elapsed, withdraw their names from a remonstrance against the establishment of a public ditch so as to defeat the statutory right to a dismissal of the petition for its establishment, where two thirds of those affected had remonstrated against such establishment. *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 337.

<sup>4</sup>When the public authorities are required by law to give a hearing to objections of interested parties to a proposed sewer, and they give due notice thereof, the fact that, in addition, they require objections to be submitted in writing, does not invalidate the proceedings. *State, Piard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

<sup>5</sup>*Hayes v. Tippy*, 91 Ind. 102.

<sup>6</sup>*Ford v. Ford*, 110 Ind. 89, 10 N. E. 648.

Recognizing drainage proceedings by filing a remonstrance against them on the merits will be a waiver of a defect caused by failure of the commissioners to file their report within the requisite time. *Blake v. Quivey*, 113 Ind. 124, 14 N. E. 916.



owner of lands affected by the work proposed" may remonstrate, although, in enumerating the causes for a remonstrance, the question of benefits and damages appears to be restricted to persons actually assessed.<sup>7</sup>

**248. Interpretation of statutes.**—The proceedings for the construction of a drain are dependent upon the provisions of the statute, and these provisions must be followed; but, if there is doubt as to the meaning of the statute, it will be construed so as to uphold the public improvement if possible. It is sufficient if the proceedings are authorized at the time the construction is begun, although they were not, at the time the improvement was ordered.<sup>1</sup> A general drainage act will supersede earlier provisions of a municipal charter relating to the same subject.<sup>2</sup> The later act will be the one which governs.<sup>3</sup> And if two statutes exist, one of which sanctions the proceeding taken, it will be sufficient, although the proceeding might not have been possible under the other one.<sup>4</sup> If both acts can stand, the earlier will not

<sup>1</sup>*Reasoner v. Creek*, 101 Ind. 482.

<sup>2</sup>*Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>3</sup>*State, Vreeland, Prosecutor, v. Jersey City*, 54 N. J. L. 49, 22 Atl. 1052.

<sup>4</sup>When the legislature adopts two drainage acts, the later enactment will, if inconsistent with the earlier one, operate as a repealer by implication; and action taken pursuant to the earlier statute will not be affected by the repeal thereof, when such action is within a saving clause in the repealer. *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208.

A provision in a drainage law authorizing township trustees to establish public drains for the benefit of highways is so far modified by a subsequent act taking the control of highways entirely out of his charge and giving another official exclusive control thereof as no longer to be enforceable by the township trustee. *Jones v. Dunn*, 90 Ind. 78.

<sup>5</sup>*Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

The provision of § 2384, Ohio Rev. Stat., under the subdivision, *Sewers*, that in no case shall the assessment of sewers exceed \$2 per front foot on the property assessed, does not take the levying of assessments for the construction of sewers outside of the general limitation contained in § 2271, providing that in certain municipal corporations no lot or land shall be assessed for any improvement in excess of 25 per cent of the value of such lot or land

after the improvement is made, but taken together, and giving effect to both, they constitute a declaration that such assessments shall in no case exceed 25 per cent of the value of the property, nor amount to more than \$2 per front foot on the property abutting on such sewer. *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582.

The right to construct a single main sewer under general statutory authority to cities and villages to construct drains and sewers is not dependent upon, or affected by, the condition precedent that abutting lots should need local drainage, attached by other separate statutory provisions to the right to construct a general system of sewerage, which do not expressly or by implication take away any of the former powers, but are merely cumulative and intended to give additional powers. *Hartwell v. Hamilton County House Bldg. Assn.* 7 Ohio Dec. Reprint, 397.

An amendment of the Municipal Code by giving city or village councils the power to determine when it becomes necessary to provide a system of drainage or sewerage for the municipality, and giving authority to proceed in a certain way after such determination to construct such improvements, will restrict power given by existing provisions to "open, construct, keep in repair, and order sewers, drains, and ditches," generally, only in cases where a system of sewerage has been determined to be necessary, and will not prevent the munic-

be held to have been repealed by implication.<sup>5</sup> All matters connected with drainage may be provided for in one statute, even to the improvement of water courses for that purpose.<sup>6</sup>

**249. Details of work.**— In carrying out the details of the work the ditch must be constructed in such a way that it will do no injury to adjoining property, and so as to prevent its overflow in times of ordinary floods.<sup>1</sup> The local authorities may decide on the style of work to be done.<sup>2</sup> In case the work is to be done by the owner of the land through which the ditch will pass, if he refuses to do it the court will not enjoin the selling of the allotment unless the proceedings for the establishment of the ditch are void on their face.<sup>3</sup> A drainage commissioner appointed under a drainage law to construct a ditch has no

ipality from placing a sewer in a particular street under the old law without providing a system of sewerage and proceeding under the new law. *Hartwell v. Cincinnati, H. & D. R. Co.* 40 Ohio St. 155.

\*An act of the legislature empowering county courts to authorize the drainage of land when the same shall be conducive to the public health of its inhabitants, the cost thereof to be paid by local assessments on the lands of those benefited, is not repealed by a subsequent act authorizing the several counties to remove ponds, pools, swamps, marshes, or reclaim swamp land that may cause sickness, to be paid for out of the county levy or by taxation of the taxable property of the county. The second act is intended to apply to cases where the provisions of the first cannot apply, or, at least, not so appropriately. *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824.

A statute providing for a special drainage system for a certain county, which is covered by a general law providing for a general drainage system to be carried out and executed by town and county officers, is not a violation of the Wisconsin Constitution, providing that the legislature shall establish but one system of town and county government, which shall be uniform and practicable, as the drainage of swamps and marshes is not one of the ordinary functions of town and county officers within the meaning of the Constitution, but is a special authority given for a particular purpose, which may be conferred upon any persons or body upon which the legislature may see fit to confer it. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

\**People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

\**Bungenstock v. Nishnabotna Drainage Dist.* 163 Mo. 198, 64 S. W. 149.

\*Under authority to improve streams flowing through a town for the purpose of surface drainage, and to divert the water, alter the course, or deepen the channel, a straight channel may be constructed, walled and covered by brick, as in the case of a common sewer. *Beals v. Jones*, 173 Mass. 591, 54 N. E. 245.

The power of trustees to grant permission to box or tile a ditch being limited by statute to those who apply in writing at the time of the hearing of the petition, a contract by them with an objecting owner on whose land a ditch is to terminate, permitting the tiling of the ditch by him, and agreeing that he shall not be required to receive more water than can be conveniently carried through a 5-inch tile, is not valid where made, not upon his application, but on a proposal by the trustees to avoid litigation; and does not prevent their successors in office from ordering him to take up the tiling and clean out the ditch to its original capacity as established under the petition; and injunction will not issue, restraining them from interfering with that portion of the ditch. *Doney v. Truro Twp.* 1 Ohio C. C. 566.

\**Young v. Sellers*, 106 Ind. 101, 5 N. E. 686.

\**Rigney v. Fischer*, 113 Ind. 313, 15 N. E. 594.

The legislature may authorize a drainage district to remove a county bridge across a stream which it is necessary to widen for drainage purposes, and require the county to replace it at

power, nor is it his duty, to build a bridge over the ditch at a highway crossing, and pay for it out of the ditch funds, where neither the act under which the ditch is established, nor any other act, makes it his duty to build such bridges, and no provision is made for the collection of money for that purpose, notwithstanding the township in which the bridge lies is assessed for the construction of the ditch.<sup>4</sup> The question of the right to make provision for the connection of private property with the drain will be considered in a subsequent section.<sup>5</sup>

**249a. Extension of drain.**— A municipal corporation or drainage district cannot extend its drain into the territory of another district without the latter's consent, or without taking the statutory steps, even though it has obtained title to a right of way there;<sup>1</sup> and the provisions of the statute authorizing such extension must be strictly complied with.<sup>2</sup> But general authority to construct a drain includes the right to make it efficacious; and, if necessary to do so, it may be extended as far as necessary beyond the limits of the district to which the authority is granted, even though the extension is into another district or into another county.<sup>3</sup> The extension of a drain for private accommodation is an administrative act with which a court of equity will not interfere, even though the city has contracted to improve the extension.<sup>4</sup> The extension of the drains to find a necessary outlet is

its own expense. *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201.

But when a farm drainage district acquires by condemnation an outlet for the water collected in its drains outside of the district by enlarging and deepening a natural channel across the lands of another, rendering the same impassable which before was passable, such outlet becomes, by operation of law, one of the ditches of the district for all the purposes for which it was acquired, and its duty to bridge the same attaches the same as if it were within the district, and, being its duty, the cost of a bridge was not an element of damage awarded the owner of such land in the condemnation proceeding; and hence, such district can be required to build and maintain a bridge or proper passageway over the same. *Union Drainage Dist. v. O'Reilly*, 132 Ill. 631, 24 N. E. 426.

<sup>1</sup> See §§ 275 *et seq.*, *post*.

<sup>2</sup> *Hamilton v. Barton Twp.* 20 Can. S. C. 173, affirming 17 Ont. App. Rep. 346, and 18 Ont. Rep. 199.

<sup>3</sup> Authority to a village to extend its sewer into and across the territory of

an adjoining township will not include the right to carry it across land lying in a township that does not touch the boundaries of the village. *South Orange v. Whittingham*, 58 N. J. L. 655, 35 Atl. 407.

<sup>4</sup> *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886.

As to extension of layout, see § 207. *ante*.

<sup>5</sup> *Gove v. Biddeford*, 85 Me. 393, 27 Atl. 264.

A return to an alternative mandamus requiring a municipality to extend a sewer which has been stopped by filling in work so that the sewage flows back causing sickness and unwholesome and offensive smells in the relators' homes, which answers that the filling in was by statutory authority; the extension of the sewer across the new land is impracticable and expensive; that the city has no funds for the purpose and no authority to raise them; that there is another sewer in course of construction, nearly complete, available to remedy the ills complained of,—is sufficient on motion

so far a part of the drainage improvement that they may be included in the statute providing for the improvement, and will be covered by a title describing an act for sewer construction without the necessity of special mention.<sup>3</sup>

**250. Procedure.**—An individual has no right to compel the public authorities to proceed with the construction of the improvement.<sup>1</sup> The judgment of the original petitioner is not conclusive as to who are necessary parties to the proceeding.<sup>2</sup> A township made liable under the drainage law for the assessment of benefits to highways by the construction of a ditch is a necessary party to the ditch proceedings, and, for the purpose thereof, must be regarded as a property owner with all the rights given by law to such owners.<sup>3</sup> An application to establish a ditch is in the nature of a proceeding *in rem*, and, in order to authorize the court to make an order therein, the persons upon whose lands the ditch is to be constructed must be before the court, either by notice or appearance; and this applies as well to orders concerning others who are before the court, for the reason that a ditch is an entire thing, and, in order to establish it, all the necessary parties must be before the court,—especially where the statute authorizing such ditches provides for an allotment, to those affected, of the construction of portions thereof.<sup>4</sup> The burden of proof of the matter set forth in the petition, if controverted, is upon the petitioner.<sup>5</sup>

**251. Sufficiency of completed structure.**—As we have seen<sup>1</sup> there is no duty on the part of the public to provide drainage. As a corollary,

to quash it. *State ex rel. Gallagher v. Board of Public Works*, 45 N. J. L. 465.

Under authority to extend and enlarge sewers and apportion the expense upon lands benefited, municipal authorities may extend the sewer already completed at the expense of abutting owners, and assess the cost upon the property benefited, including that assessed for the original improvement. *Cleveland v. Yonkers*, 115 N. Y. 193, 21 N. E. 1058.

The provision of an act of the legislature, creating a sanitary district, which confers upon the district the power, and imposes upon it the duty, to remove certain locks and dams in waterways, and to deepen and otherwise improve the same beyond the terminus of its own channel, is a necessary part of the general system of drainage for sanitary purposes embraced within the subject expressed in the title, where the result of constructing the proposed system of

drainage will necessarily increase the volume of water flowing through such waterways, and, unless the channels of the same are altered so as to accommodate the increased flow, the waterways, as well as the rights of riparian owners along the same, will be prejudiced thereby, and the whole scheme of drainage will fail. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

<sup>1</sup>*Van Horn v. State ex rel. Allen*, 51 Neb. 232, 70 N. W. 941; *Congregation of St. Vincent de Paul v. Bordentown Street & Sewer Committee*, 56 N. J. L. 48, 27 Atl. 799.

<sup>2</sup>*Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

<sup>3</sup>*Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

<sup>4</sup>*Wright v. Wilson*, 95 Ind. 408.

<sup>5</sup>*Trittipio v. Beaver*, 155 Ind. 652, 58 N. E. 1034.

<sup>1</sup>See *ante*, §§ 170, 171.

an individual has no right of action if no drainage is provided for his property, although his neighbor's property is drained. This nonliability is usually placed upon the ground that the determination as to drainage and the preparation of plans are legislative or judicial questions, for an exercise of which the local subdivision having charge of the work cannot be made to account. The adoption of this ground, however, is unwise, because it leads to consequences which are not supportable. If the municipality is not liable for errors in the plans, then there is no liability in case the plans are such that they will gather the water from a large territory, and then, because the drain is insufficient to carry it, or because the outlet is defective, cast it upon private property to its injury. Nonliability in such cases cannot be admitted; and yet some cases, by the application of the "adoption of plans" doctrine, have reached such result. The city is not an absolute insurer that its plans shall be adequate to prevent direct injury to neighboring property; but, to escape liability in such cases, it must act with ordinary business sense, and have the plans prepared by competent engineers, and not attempt to settle them through its own officials, who may be utterly ignorant in regard to such matters.

The true distinction is well stated in *Tate v. St. Paul*,<sup>2</sup> as follows: To determine when, and upon what plan, a public improvement shall be made is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is in its nature legislative; and, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground for the action. But, for the direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise it would be taking private property for public use without compensation. From this it appears that the true ground for nonliability on the part of the local district for failure to provide adequate drainage is that it is under no obligation to drain in the first instance, and the landowner is in no worse position after the attempted drainage than he was before, and cannot complain of the manner in which the public authorities exercised their discretionary or legislative functions. But a liability for insufficiency of the drains provided may exist under the terms of the statute. In *McCarthy v. Syracuse*<sup>3</sup> the charter provided that it should be the duty of the

<sup>2</sup> 56 Minn. 527, 45 Am. St. Rep. 501,   <sup>3</sup> 46 N. Y. 196.  
58 N. W. 153.

mayor and common council to make, open, regulate, repair, and improve sewers. The liability of a city acting under such a charter must, of necessity, be greater than that of a city whose charter imposes upon it no duty in that regard. So, if the sewer is made at the expense of abutting property, or a fee is exacted for its use, the municipality may be regarded as under an implied contract obligation that the sewer shall be at least reasonably adequate for the purpose intended. In the absence of any special circumstances, however, a local district which undertakes to provide drainage is not liable in case, because of a defect in plan, the water for the disposal of which the drain was provided is not all carried away. As said in *Little Rock v. Willis*.<sup>4</sup> For the construction of a sewer which has not the capacity to carry off the ordinary or extraordinary rain falls, the city cannot be made responsible; and the reason for this is that a city cannot be held to answer for an error of judgment, committed by a body created by law, and clothed with discretion to determine the width and depth of drains and sewers. To hold a city responsible, under such circumstances, would be to vest the power of judging of the proper grade of street and the width and depth of sewers in the judiciary, instead of the city council, where the legislature placed it. Where a city prescribes the grade of a street, or the capacity of a drain, and it is not constructed as directed, or is constructed in such an unskilful manner as to damage the property of persons adjacent thereto, in that event the city is liable. The law is that, for the exercise of a lawful power, which by law is vested in the judgment and discretion of a public body for the good of the whole, no injury, for which an action will lie, can be committed,—*salus populi est suprema lex*,—but that for an imperfect, negligent, unskilful execution of the thing ordained to be done, an action will lie in the absence of an express statute.<sup>5</sup> The liability of the municipality is not increased by

<sup>4</sup> 27 Ark. 572.

<sup>5</sup> *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *Thompson v. Polk County*, 38 Minn. 130, 36 N. W. 267; *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; *Paine v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405; *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070; *Mills v. Brooklyn*, 32 N. Y. 489; *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455; *Fairlawn Coal Co. v. Barton*, 148 Pa. 231, 23 Atl. 1069; *Beav. v. Allentown*, 148 Pa. 80, 23 Atl. 1062.

A municipality in opening and grad-

ing a street is not liable for injuries to adjoining property resulting from its failure, in adopting a plan for the construction of the road, to provide a method for carrying off surface water, as it is liable only for negligence in the execution of the plan adopted, and not for defects in the plan itself. *Foster v. St. Louis*, 71 Mo. 157.

A municipal corporation constructing a system of sewerage in accordance with the plans of skilled engineers is not liable for its failure to drain all the water from underground cellars, in the absence of negligence on its part in constructing or maintaining the sewers according to the plan adopted. *A. M. C.*

reason of the fact that it has notice that the drain is not performing the service which it was intended to perform.<sup>6</sup> If the sewer is constructed at the expense of the property for the benefit of which it was intended, then the municipal authorities must use due care to make it adequate, because, unless it will perform the service demanded of it, there is no consideration which will uphold the assessment upon the abutting property. In such cases negligence will be presumed in case the drain proves to be of insufficient capacity.<sup>7</sup> And if negligence is shown there is still greater reason for holding the municipal corporation liable.<sup>8</sup> The construction by a city of a public sewer from which it may derive revenue is not the exercise of a governmental function, but is a private municipal enterprise, for the negligent conduct of which the city is liable.<sup>9</sup> The question of liability for direct trespass upon abutting property because of insufficient capacity of the sewer will be noticed in a subsequent section.<sup>10</sup>

## XI. SUPERVISION BY COURT.

**252. Direct supervision.**—The proceedings for the laying out and construction of drains and the assessment and cost therefor on the property benefited so vitally affect the constitutional rights of the persons over whose property the drain will pass and the persons who will be assessed for the cost that it is necessary for the protection of such rights that the courts have some supervision of the proceedings. They cannot be charged with the ministerial duties connected with the making of the improvement, but the persons who will be affected by the proceeding must be given a right to apply to them for the protection of their rights. In case provision is made by the statute for a hearing

*Medicine Co. v. Montreal*, Rap. Jud. Quebec, 15 C. S. 594.

So, where a plan for draining a municipal corporation by constructing works along the bed of the outlet of a lake is submitted to the trustees of the municipality, and the plan adopted by them includes the construction of gates to regulate the flow of water from the lake, the manner of using the gates is a matter for their judgment: and the municipal corporation cannot be held liable if they are not operated so as to drain property of a private owner in the best manner. *Garratt v. Canandaigua*, 135 N. Y. 436, 32 N. E. 142. Affirming 40 N. Y. S. R. 944, 16 N. Y. Supp. 717.

\**Knoelman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887; *Bealafeld v. Verona*, 188 Pa. 627, 41 Atl.

651; *Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

*Litchfield v. Southworth*, 67 Ill. App. 398.

\**Rowe v. Portsmouth*, 56 N. H. 291. 22 Am. Rep. 464.

\**Ostrander v. Lansing*, 111 Mich. 693, 70 N. W. 332. Overruling *Dermont v. Detroit*, 4 Mich. 435, where it was held that a sum paid annually by a private citizen for the privilege of draining into the public sewer is for the license or permission so to do, and does not impose any obligation on the city to furnish ample drainage for his premises, or render it liable in case water is set back from the sewer through such citizen's drain to his damage.

<sup>10</sup> See post, § 254.

before the court of the matters which affect the rights of persons affected by the drain, the provisions of the statute must be followed. And only such matters may be taken up as the statute allows, unless some of the constitutional rights of the persons will be cut off by the statutory proceedings.<sup>1</sup> Everyone whose rights will be affected by the proceeding, whether he is named in the petition or not, is entitled to apply to the court.<sup>2</sup> In case no provision is expressly made by statute for an appeal to the court, it may be taken under the general procedure acts, because the rights of the citizen cannot be cut off without a hearing.<sup>3</sup> The court may examine the question *de novo* and is not bound by the finding of the commissioners; and it need not, therefore, consider their report.<sup>4</sup> The court may allow amendments which will uphold the validity of the proceeding, as well as correct errors which work injustice to the complaining landowner.<sup>5</sup> The appeal

<sup>1</sup> A provision in a statute authorizing municipal corporations to construct sewers by special assessments, which provides that upon appeals from precepts issued for their collection no question of fact shall be tried which may arise prior to the making of the contract for the improvement, renders it incompetent for the appellate court to inquire into the regularity of the proceedings had before the contract was let, and such provision is constitutional and valid, since such questions can be settled before the contract is let. *Allen County v. Silvers*, 22 Ind. 491.

An appeal does not lie from the determination of the board of supervisors that land was in the vicinity of a ditch constructed under authority of a statute to change the direction of a water course, and therefore liable to a tax of the cost of the ditch, where the statute allows an appeal in favor of certain persons, affected by the proceeding, but none in favor of the taxpayers. *Lambert v. Mills County*, 58 Iowa, 666, 12 N. W. 715.

<sup>2</sup> The right of appeal in a landowner whose land has been assessed for the construction of a drain, and who is named in the assessment, from the decision of the commissioners that the drain will be of public utility and ordering the same to be established, cannot be cut off on the ground that his name is not on the petition for its establishment, and therefore he is not a party to the proceedings, since the act of assessing his land and including his name upon the assessment roll brings him into the proceedings, and makes him a party

thereto. *Houk v. Barthold*, 73 Ind. 21.

<sup>3</sup> *Bryan v. Moore*, 81 Ind. 9; *Meekhan v. Wiles*, 93 Ind. 52.

An act providing for the construction of drainage ditches does not seek to deprive the owners of property of the same without due process of law in violation of the 14th Amendment of the Constitution of the United States because it makes no provisions for confirming and contesting the charge imposed, in the courts, when a remedy is given such owners by writ of certiorari. *State v. Henry*, 28 Wash. 38, 68 Pac. 368.

<sup>4</sup> *McKinsey v. Bowman*, 58 Ind. 88; *Beck v. Pavey*, 69 Ind. 304.

Under statutes which contemplate an appeal to the courts in drainage proceedings from decisions of the board of commissioners, the court and jury succeed to all the substantial duties which devolved upon the viewers before the commissioners, so that matters stand for trial *de novo* and a finding or direction in detail upon all matters in issue between the parties is contemplated. *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232.

<sup>5</sup> A petition for the establishment of a ditch over the lands of others, which fails to allege that the same will be of public benefit or utility, goes to the jurisdiction of the county commissioners; but, as they had jurisdiction of the subject-matter, it is competent for the circuit court, upon appeal from their decision, to allow the petition to be amended so as to supply the omission. *Coolman v. Fleming*, 82 Ind. 117.



to the court must be made within the time named by the statute.<sup>6</sup> In England, where there are no constitutional rights, the matters affecting the drainage may be left finally to the commissioners without allowing an appeal to the courts.<sup>7</sup>

**253. Collateral attack.**—As has been seen from the decisions cited upon the subject of laying out the work and the collection of the assessment, to be successful an attack upon the proceedings of the local authorities must be direct in the manner pointed out by statute.<sup>1</sup> And unless the defects in their proceedings are such as to render them void they cannot be attacked collaterally.<sup>2</sup> Nor will the court attempt to substitute its judgment for that of the authorities to whom the matter is committed so as to make the proceeding one of the court rather than one of the local authorities.<sup>3</sup> A landowner cannot maintain a suit to set aside a sale of his land for delinquent taxes levied for the construction of a ditch, on the ground that the contractor did not properly perform the work, or that the drain was not of public benefit or utility or conducive to the public health and was never found to be such, without showing that he ever paid or offered anything for the work done on his land, or that the same was sold without legal authority. The proceedings establishing the ditch, and the de-

<sup>6</sup> Where an appeal from a sewer assessment is required to be made within three months, upon one month's notice to the municipal corporation in writing, it is not sufficient to merely serve the notice within the three months. *Custy v. Lowell*, 117 Mass. 78.

<sup>7</sup> *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

<sup>1</sup> Where the statute permits an appeal to the courts from a judgment assessing damages in a drainage proceeding, such remedy will be regarded as adequate as to all errors which may be reviewed thereby, so that certiorari will not lie, although the lien of the judgment may attach to the property assessed pending the appeal. *State ex rel. Nelson v. King County Super. Ct.* (Wash.) 71 Pac. 601.

<sup>2</sup> *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

The order of a board of supervisors creating the district for the reclamation of swamp lands is an act of legislation in the exercise of the taxing or police power of the state which is not reviewable by certiorari. *Williams v. Sacramento County*, 65 Cal. 160, 3 Pac. 667.

The case must be very clear to au-

thorize the court in interfering with the action of the legislature in providing for drainage. *Hartwell v. Armstrong*, 19 Barb. 166.

In an action to restrain a township from maintaining an unauthorized culvert across a highway to the injury of private land, the court has no power to direct the township officers how and when the drain shall be constructed, inasmuch as the control of that matter is committed to those officers, and not to the court. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896.

<sup>3</sup> *Philips v. Wickham*, 1 Paige, 590; *Horton v. Nashville*, 4 Lea, 39, 40 Am. Rep. 1; *Sample v. Carroll*, 132 Ind. 496, 32 N. E. 220; *Chandler v. Beal*, 132 Ind. 596, 32 N. E. 597.

It is entirely within the discretion of the drain commissioner to fix the width or depth of a drain, or to decide to what extent a stream may be deepened or widened so as to drain adjoining land, and the courts cannot substitute their judgment for that of the commissioner. *Smith v. Carlrow*, 114 Mich. 67, 72 N. W. 22.

cision of a competent authority that the work was completed, cannot be thus collaterally attacked.<sup>4</sup> The taxpayer cannot attack the assessment on the ground that the work was constructed in such a manner as to constitute a public nuisance,<sup>5</sup> or that the work was inadequate or improperly constructed.<sup>6</sup> If there are material departures from the plans and specifications in the construction of the work, to the injury of complainant, that matter may be reviewed by the courts.<sup>7</sup> But a decision by the authorities in charge that the work is completed to the required width and depth is conclusive.<sup>8</sup> Matters which affect the constitutional rights of the taxpayer cannot be finally determined by the commissioners.<sup>9</sup> And the courts have a right to determine whether the exercise of their power by the local authorities is reasonable, or arbitrary and oppressive.<sup>10</sup> Also as to whether or not the direction of the statute has been complied with.<sup>11</sup>

## XII. LIABILITY FOR INJURIES DONE BY DRAIN OR SEWER.

### 254. Casting water onto abutting property because of defective plan.

—As has already been demonstrated,<sup>1</sup> public authorities cannot gather up water and cast it in a body on the land of an abutting owner; nor can they gather together water out of its true course and abandon it in such a way that it will cause injury to the abutting owner. From these premises it necessarily results that in case they attempt to collect or gather water they must make provision for carrying for it. Any plan for drainage necessarily includes the gathering

<sup>1</sup>*Simonton v. Hays*, 88 Ind. 70.

<sup>2</sup>*Walker v. Aurora*, 140 Ill. 402, 29 N. E. 41; *Soden v. Emporia*, 7 Kan. App. 583, 52 Pac. 461.

<sup>3</sup>*Murphey v. Wilmington*, 5 Del. Ch. 281; *De Gravelle v. Iberia & St. M. Drainage Dist.* 104 La. 703, 29 So. 302.

<sup>4</sup>See also *ante*, § 239.

<sup>5</sup>*Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538.

<sup>6</sup>*Patterson v. Baumer*, 43 Iowa, 477.

Abutting property owners and taxpayers cannot enjoin a municipal corporation from accepting a system of sewers constructed for it under contract and from paying therefor, on account of the defective construction thereof, where the manner of constructing and accepting sewers is placed by the statute in the hands of the council, and such landowners are afforded a full and complete remedy at law thereunder for such defective construction. *Robinson*

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*v. Valparaiso*, 136 Ind. 616, 36 N. E. 644.

<sup>7</sup>The determination of a city council as to the amount of land necessary to be taken for a proposed sewer outlet is not final, but is subject to review by the court. *Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844.

<sup>8</sup>*Title Guarantees & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

<sup>9</sup>An ordinance providing for the construction of a district sewer to connect with a stream or ravine is not conclusive as to the character of such stream as a natural course of drainage under a municipal charter declaring that district sewers must connect with another sewer or with the natural course of drainage; but such question is one for the determination of the court. *Bayha v. Taylor*, 36 Mo. App. 427.

<sup>11</sup>See *ante*, § 185.

of water, and the plan must, therefore, include the provision of an outlet which is sufficient to dispose of the water collected. A defective plan in this regard is not similar to a defect in regard to failure to supply adequate drainage, which, we have seen,<sup>2</sup> imposes no liability upon the local district because it is under no obligation to furnish the drainage in the first instance. But the public has no more right to commit a trespass upon the land of an individual than has a private citizen, and if it does so it is liable to an action whenever the statutes permit the particular subdivision which commits the act to be sued.<sup>3</sup> If a municipality gathers together a quantity of water and then fails to provide an outlet for it, so that it is cast upon the land of an abutting owner, it commits a direct trespass upon his property and cannot shield itself under the plea that it had discretion as to the adoption of plans for the drainage and is not liable for injuries caused by the exercise of its discretion. It has no discretion to commit a trespass, and, if the plans adopted by it necessarily result in so doing, it is just as liable as though it deliberately turned the water out of its course onto the abutting land. It has discretion as to whether it will drain or not, but, when it attempts to drain, it must provide for the water collected by it so that it will do no injury. It is not an insurer, but it must exercise the care which an ordinarily prudent person would exercise in making improvements of a like character, and must adopt outlets which, in the opinion of persons having knowledge of such matters, are adequate to the disposition of the water. The rule is well stated in *Dixon v. Baker*,<sup>4</sup> as follows: A municipal corporation cannot relieve itself from liability for overflow of a sewer upon the ground that the insufficiency was caused by error in judgment upon the part of the common council, as to the size of sewer necessary to carry the water, where the council might, or ought to, have known that the one provided was insufficient, and rea-

<sup>2</sup> See *ante*, § 251.

<sup>3</sup> The rule that a municipal corporation is not liable for defects in the plan of its improvements will not relieve it from liability for injuries caused by the inadequacy of culverts to carry off water collected by it in unusual quantities. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

A municipal corporation, having exclusive control of its streets and alleys and the establishing and maintenance of drains and sewers, is liable for injuries to premises from flooding caused by the adoption by it of imperfect plans for the drainage of an alley, in accordance with

which a contractor executed the work, whereby a large body of surface water was collected in a basin in the alley adjoining such premises without any outlet therefor. *New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. 611.

It is no defense to an action against a municipality for damages caused by the flowing of the contents of a sewer onto plaintiff's land through openings left therein, that such openings were a part of the general plan of construction adopted by it. *Lehn v. San Francisco*, 66 Cal. 76, 4 Pac. 966.

<sup>4</sup> 65 Ill. 518, 16 Am. Rep. 591.

sonable care was not exercised in its construction.<sup>5</sup> As said in *King v. Kansas City*,<sup>6</sup> the collection and inevitable precipitation, during frequently recurring freshets, of water and sewage upon the private property of an owner in such a way as to constitute a direct invasion of the owner's rights, and to be in the nature of a trespass upon his property, by reason of the plan of construction of the sewerage system, will create a liability against the city, regardless of good faith in the devising of the plan, and of the fact that the best material is used in its construction. The fact that the city adopted a plan in which there was no defect, and exercised its best judgment as to the proper location of the outfall, being guilty of no negligence, will not absolve it from liability to indictment in case it actually creates a nuisance.<sup>7</sup> In the absence of direct trespass, if there is any negligence in devising the plan, by reason of which injury is done to abutting property, the municipality is liable, but it is not liable for injury caused by a mere error of judgment, honestly and intelligently exercised.<sup>8</sup>

*Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Indianapolis v. Huffer*, 30 Ind. 235. (These decisions seem to be overruled by *Rozell v. Anderson*, 91 Ind. 591, but the court again places itself in line with correct principle in *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686); *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912; *Chicago v. Schen*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758; *Louisville v. Vorris*, 23 Ky. L. Rep. 1195, 64 S. W. 958.

A city, although it builds a sewer with due care and in strict conformity with the plan adopted by the council, is liable for the injury sustained by a property owner whose premises are flooded by water which overflows from a gutter by reason of the inadequacy of the outlet. *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484.

The decision as to the sufficiency of the capacity of a culvert to carry water under a public street is not such a judicial function as to relieve the municipality from liability for injuries caused by negligent performance of such duty. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

Failure to provide flood gates over the mouths of sewers, which would have prevented injury to property at their sources from inundation, which it was manifest to those selecting the plans, as

well as to everyone else, would result from regularly recurring rises in the river setting back the water, is negligence which renders the city liable for resulting damage. *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88.

A city is liable for damages to an abutting owner by the flooding of his cellars through the insufficiency of its sewers,—especially when such sewers are improperly constructed by making the sewers of several streets, and notably one of 15 inches in diameter, flow into one of but 12 inches in diameter, manifestly insufficient in heavy rains to receive the waters of the sewer flowing into it. *Papineau v. de Longueuil*, Rap. Jud. Quebec, 11 C. S. 98.

A municipal corporation is liable for damages caused by the overflowing of property by reason of the insufficiency of the catch basin of a sewer, unless its insufficiency was due to an extraordinary storm such as a person of ordinary prudence would not anticipate and provide against, although the property damaged was located below the grade of the street. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

<sup>5</sup> 58 Kan. 334, 49 Pac. 88.

<sup>7</sup> *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

<sup>8</sup> *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Peru v. Brown*, 10 Ind. App. 597, 38 N. E. 223; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Johnston v. District of Columbia*,

If the sewer is insufficient to carry all the water which is turned into it, so that it bursts, to the injury of abutting property, the municipality is liable.<sup>9</sup> And it is immaterial that the injury is caused to property in an area constructed in the street.<sup>10</sup> If, because of defective plans, the drains constitute a nuisance, the municipality is liable to private individuals.<sup>11</sup> And if, after notice of the defect, no steps are taken to remedy the defect, the ground of liability is greater.<sup>12</sup> The fact that the injury is increased by the efforts of private citizens to protect their property does not relieve the municipality from liability.<sup>13</sup> A distinction is made by the Vermont court between sewage and surface water, holding that with regard to the former there is a duty to keep it off the land of private individuals, while no such duty exists as to the latter.<sup>14</sup> The principle upon which the doctrine of this section rests is well stated in *Seifert v. Brooklyn*,<sup>15</sup> which held that a city was liable to a property owner whose land was inundated by the overflow from city sewers which were of insufficient capacity. The court said: "It is a principle of the fundamental law of the state that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual

<sup>1</sup> Mackey, 427; *Bannaghan v. District of Columbia*, 2 Mackey, 285; *Collins v. Philadelphia*, 93 Pa. 272.

<sup>9</sup> *Louventhal v. New York*, 61 Barb. 511, 5 Lans. 532.

<sup>10</sup> A landowner, in extending his cellar under a sidewalk, is not required to guard against possible defective construction of sewers in the highway. *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519.

An abutting lot owner, who owns the fee of the street, has a right to construct therein an area, and to use the same, subject to the public easement; and where a city negligently constructs sewers and drains in such a manner that they do not carry off the rainfall, and, as a consequence, water is discharged into the area, the tenant on the abutting lot may recover for the damages resulting from the discharge of the water into the area, where it does not appear that the area was negligently constructed or out of repair, so that its condition contributed to the injury. *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 75 N. W. 898.

<sup>11</sup> *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

<sup>12</sup> *Tate v. St. Paul*, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321, 15 Abb. N. C. 97; *Munk v. Watertown*, 67 Hun, 201, 22 N. Y. Supp. 227.

A municipal corporation is liable for the flooding of private premises from back water, caused either by the inability of a sewer to carry off the water delivered to it by another sewer, as well as surface water, or by such sewer being obstructed at the time, of which insufficiency the city had actual or constructive notice, or, if caused by the obstructions, the same were due to its neglect, unless the flood was caused by a rain fall of such extraordinary nature as could not reasonably be anticipated. *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

<sup>14</sup> *Martin v. Brooklyn*, 32 App. Div. 411, 52 N. Y. Supp. 1086.

<sup>15</sup> *Winn v. Rutland*, 52 Vt. 481.

<sup>16</sup> 101 N. Y. 139, 54 Am. Rep. 664, 4 N. E. 321.

to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences following the exercise of judicial or discretionary power by a municipal body . . . presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences." As has already been stated, to render the municipality liable it must fail to take some steps which it was required to take. The municipal authorities cannot devise and adopt a plan for drainage when they are ignorant of engineering, or of the kind of drain which would be sufficient to dispose of a certain quantity of water. But the Ohio court has held that if they have provided a system which is adequate at the time of its construction, and which there is no reason to believe will become inadequate, the municipality is not responsible to a lot owner for damages from its overflow because the drainage system becomes insufficient in times of heavy rain, due solely to the increased quantity of water turned into it by the improvement of other lots by individual owners thereof.<sup>16</sup> Whether such doctrine is correct or not in its application to any particular case must depend upon the facts of the case. If the drain was constructed with the understanding that the water from the property, as it was improved, would be turned into the drain, the municipality cannot escape liability; but if the water was turned into the drain by private individuals without the knowledge or consent of the municipality, it, of course, would not be liable. In case, after the construction of an adequate sewer, the city changes the grade of its streets and turns water into the sewer which exceeds its capacity, the municipality is liable for the injuries thereby caused.<sup>17</sup>

**254a. Who is to devise plan.**— To make the exercise of judgment as

<sup>16</sup>*Springfield v. Spence*, 39 Ohio St. 665. ground that in that case the incapacity of the sewer, when constructed, to serve

<sup>17</sup>*King v. Granger*, 21 R. I. 93, 41 Atl. 1012. This case is distinguished from *complaind of*.

*Baxter v. Tripp*, 12 R. I. 310, on the

to the capacity of a drainage ditch an honest one, so as to relieve the municipality from liability in case the drain proves to be inadequate, it must be done by one having knowledge of the matter to be determined. Members of the common council having no expert knowledge of the size of pipe necessary to carry a certain quantity of water cannot be permitted to determine that water from a certain section shall all be made to flow in one direction, and that a pipe of a certain size shall be provided to carry it away, when such pipe may be entirely inadequate for the purpose. The question must be submitted to a competent engineer and the size determined by scientific means; and it is not until that has been done that the municipality can claim that it has exercised an honest discretion in the matter.<sup>1</sup> If a competent engineer has been employed and the plan devised by him followed, the municipality cannot be held liable by reason of the system failing to carry all the water which is offered to it.<sup>2</sup> Carelessness in the selection of an agent to prepare the plans is as much a ground for liability on the part of the municipality as is negligence in the construction of the work.<sup>3</sup> The public authorities, and not the citizens, have the right to select the plan.<sup>4</sup> But to relieve itself from liability the municipality must show that the authorities exercised the power given them.<sup>5</sup> It cannot relieve itself from liability if it contracts to permit the one over whose property the drain is constructed to decide upon the plan.<sup>6</sup>

<sup>1</sup>*Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

<sup>2</sup>*Diamond Match Co. v. New Haven*, 55 Conn. 510, 3 Am. St. Rep. 70, 13 Atl. 409; *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *Ellice Twp. v. Hiles*, 23 Can. S. C. 429.

Turnpike trustees authorized to cut drains in lands adjoining the roads on making reasonable satisfaction to the owners thereof are not liable for overflowing adjoining land by the construction of a drain where they acted according to the plans of a competent surveyor. *Sutton v. Clarke*, 1 Marsh. 437, 6 Taunt. 29, 16 Revised Rep. 563.

<sup>3</sup>*Herring v. District of Columbia*, 2 Mackey, 87.

<sup>4</sup>*Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

<sup>5</sup>*Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519.

<sup>6</sup>A municipal corporation cannot escape liability to one injured by the negligent construction of a sewer on the ground that, in order to obtain an outlet for the sewer, it was necessary to construct it across a canal, to obtain permission for which it consented to construct the sewer according to the plans and specifications prepared by the canal company's engineer, where the street on the line of which the sewer was built crossed the canal at right angles, and was a lawfully existing highway, having been used as a public street for more than twenty years, by virtue of which the municipal corporation had the power and authority to construct the sewer under the canal according to its own plans, without submitting to the demands of the company, provided it did no injury to the canal. *Pt. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

**254b. Cases denying all liability.**—There are decisions which carry the doctrine of nonliability for defects in plans to the full extent of denying liability even when a trespass is committed. Some of these cases rest upon principles which are not of general application, and others which appear to subscribe to that doctrine will be found upon careful examination not to do so to the full extent. Thus, in *Dixon v. Metropolitan Bd. of Works*,<sup>1</sup> it was held that, in England, where there are no constitutional safeguards, if the duty of constructing a sewer system is imposed upon the local board by statute, it will not be liable for injuries caused by works which are constructed with due care. Some of the confusion on this subject rises from the failure to distinguish between the several elements which may enter into a general plan of drainage. There may first be the determination to enter upon a scheme of drainage. This is merely a legislative matter, and there is no liability for failure to exercise it, or in exercising it in an imperfect manner. Then there is a choice of route. This is also a legislative matter, and there is no liability for failure to select the best route. There is also the legislative power to adopt the plan which shall be applied to the route selected. There is no obligation to select the best plan that can be devised. All that is required is that the plan must be reasonably sufficient for the purpose contemplated.<sup>2</sup>

<sup>1</sup> L. R. 7 Q. B. Div. 418, 50 L. J. Q. B. N. S. 772, 45 L. T. N. S. 312, 30 Week. Rep. 83, 46 J. P. 4. In that case it was held that the principle of *Fletcher v. Rylands*, L. R. 1 Exch. 265, 35 L. J. Exch. N. S. 154, 12 Jur. N. S. 603, 14 L. T. N. S. 523, 14 Week. Rep. 199, 4 Hurlst. & C. 263, does not apply.

In the absence of negligence, a municipal corporation is not liable for the flooding of cellars caused by the overflow from the sewer backing into them, unless made so by statute, either by express provision or by reasonable intentment. And a statute requiring them to keep the sewers so as not to create a nuisance does not make them liable in the absence of negligence. *Stretton's Derby Breccery Co. v. Derby* [1894] 1 Ch. 431, 63 L. J. Ch. N. S. 135, 8 Reports, 608, 69 L. T. N. S. 791, 42 Week. Rep. 583.

<sup>2</sup>*Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88; *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

In laying out a street across a ravine in which there is a flow of water to be

provided for, when it is deciding what route the street shall take, the expediency of laying it out, or its grade, the city is exercising judicial duties, and it will not be responsible for errors of judgment, but, having decided it expedient to obstruct the natural channel of these waters, and to divert them into another and artificial channel, then in executing this plan, including the construction of the sewer and fixing upon its size or capacity, the city exercises purely ministerial duties, in the performance of which it is held to the exercise of reasonable care. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

In *Winn v. Rutland*, 52 Vt. 481, the court says: In acting under the charter power to construct sewers, the municipal authorities must necessarily deliberate and adjudge upon the system or plan of the work,—when to perform it and where to locate it. So far no liability to private action is incurred for errors of judgment or want of foresight. If the plan is carried out in a proper manner, the charter power is a complete bar to a claim for consequential damages to persons or property, although



The next step is the caring for the water which has been collected by the drainage system. This is no longer a discretionary or legislative matter, but a duty which the municipality has brought upon itself by its attempt to interfere with the natural course of the drainage, and it cannot relieve itself from liability for failure to perform that duty in an ordinarily prudent manner.<sup>3</sup> The reason for the liability of the municipality for some of its acts and not for others is well stated by Judge Hall in *Young v. Kansas*,<sup>4</sup> where, in distinguishing ministerial from judicial duties, he says: The distinction between the ministerial and judicial duties of a municipality would seem necessarily to rest upon a discretion had by the city to discharge or not discharge the duty, because where the duty is absolute and imperative, and the city has no discretion, the duty is ministerial, its discharge not depending upon the exercise of judgment, but being required by law. It is by force of this reason for the distinction between ministerial and judicial duties that a duty which is judicial before the municipality has entered upon the performance of it frequently becomes, when its performance is entered upon, ministerial. The municipality has a discretion to do or not to do the work; the duty is, therefore, judicial up to the time that it is determined to do the work; but when the work is ordered, the law often requires that it be done in a particular manner, or that it be not done in a certain way, and, therefore, after the work is ordered, the duty of the municipality to do the work in the manner required, and not to do it in the way forbidden, is ministerial. The municipality, as to these two things, has no discretion; as to them its judgment is superseded, controlled, and directed by the requirements of the law, and its duty is to comply with these requirements. Failure to keep this distinction in mind has led to some decisions which seem to hold that there is no liability even if the plan is so defective as to cast collected water onto abutting property.<sup>5</sup>

the same act, if done without legislative sanction, would be actionable. *Salus populi suprema lex.*

But the court further says it is difficult to see why the location of a sewer is not one of the most important factors in the problem how to build the sewer with reasonable skill. When the plan fixes the location through a certain section of a municipality, the duty to assume is to construct the sewer in that location with due care and proper skill to the end that it shall convey the drainage emptied into it to its ultimate destination without injury to residents along its route.

<sup>3</sup> See *ante*, § 254.

<sup>4</sup> 27 Mo. App. 101.

<sup>5</sup> *Pressman v. Dickson City*, 13 Pa. Super. Ct. 236; *Cummings v. Toledo*, 12 Ohio C. C. 650; *White v. Yazoo City*, 27 Miss. 357; *Magarity v. Wilmington*, 5 Houst. (Del.) 530; *Beach v. Scranton*, 5 Iack. Legal News, 25; *Sullivan v. Pittsburg*, 5 Pa. Super. Ct. 357.

A municipal corporation is not liable for the flooding of low-lying lands by the construction of a drain under its lawful powers, because of an error of judgment in making a culvert too small, in the absence of wantonness or malice. *Thibodaux v. Thibodaux*, 46 La. Ann. 1523, 16 So. 450.

A city is not liable to one injured by

These decisions are not supported by true principle, and are, for the most part, decisions by courts not of last resort. Negligence in devising the plan of a culvert having an outlet in another culvert intersecting it nearly at right angles, whereby it became filled up by accumulation of sand and dirt, will not be imputed, as a matter of law, to a municipal corporation, so as to render it liable for the overflow of adjacent land, in the absence of evidence showing the details as to size and construction of both culverts and the care exercised in adopting the plan,—especially when the work was done with the knowledge and consent of the complaining owner, and upon the recommendation of the street committee of which he was a member.<sup>6</sup> In addition to the above cases there are a few decided under the peculiar New England theory that the officers in charge of the work are not the servants of the municipality, so that it is not liable for their acts. Thus, in *Boston Belting Co. v. Boston*,<sup>7</sup> it is said that the reason of exempting a municipal corporation from liability for injuries caused by a defect in the plan or system of sewerage built by order of mayor and aldermen is that the mayor and aldermen, in laying out sewers, act as an independent body of officers, and that the city has no control over, and no responsibility for, the plan or system adopted.<sup>8</sup> Where general laws place the duty of constructing drains and sewers on municipal officers, such officers, in the performance of such duty, act as public officers, and not as agents of the municipality; and the municipality cannot be held liable for injuries resulting from their negligence.<sup>9</sup> The construction of sewers is not within the scope of the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers, and for

falling into a partially covered sewer, where the charge of negligence is based upon the plan of the work, and not upon the execution of the plan. The plan of such a work is in the nature of legislative action, the lawful exercise of which cannot be a wrong. *Lansing v. Toolan*, 37 Mich. 152.

A municipal corporation is not liable for damages to goods in a cellar from the flooding thereof by back water, by the cutting, either of a private drain established by permission, or of a public sewer, unless the cutting was unnecessary, or the repairing thereof by the municipal authorities was done in a negligent, unskilful, and unworkmanlike manner. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

<sup>6</sup>*Perry v. Brown*, 10 Ind. App. 597, 38 N. E. 223.

<sup>7</sup>149 Mass. 44, 20 N. E. 320.

<sup>8</sup>*Estes v. China*, 56 Me. 407; *Gilpatrick v. Biddeford*, 86 Me. 534, 30 Atl. 99; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

So, where county commissioners are authorized to improve the channel of a stream running through a city for drainage purposes, the sufficiency of an existing culvert to carry the increased flow of water is a matter for their determination, and the city cannot be made liable for injuries caused by the damming back of the water because of its insufficiency. *Cochrane v. Malden*, 152 Mass. 365, 25 N. E. 620.

<sup>9</sup>*Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680.

the torts of this tribunal the town is not responsible.<sup>10</sup> But that rule does not apply where the peculiar New England doctrine is not in force.<sup>11</sup>

When town officers are not actuated by any malice they are not personally liable, even for the negligent location and construction, for the preservation of a highway, of a ditch, due to an error in judgment, whereby the waters flowing through the ditch injure private property.<sup>12</sup>

**255. Liability for defective construction.**—The municipality in carrying out the plan and actually constructing the work acts in a ministerial capacity, and is liable in case the work is done in such a careless manner as to cause water to be cast upon abutting property.<sup>1</sup> Therefore, if, by reason of faulty workmanship or material employed, or by reason of failure to follow the plan or keep the work in repair, water is caused to flow upon abutting property, the municipality is liable for the injury.<sup>2</sup>

<sup>1</sup>*Brunswick Gaslight Co. v. Brunswick*, 92 Me. 403, 43 Atl. 104.

<sup>2</sup>*Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244.

So, a municipal corporation is liable for the maintenance of a sewer in such a manner as to constitute a nuisance, although the entire charge and control of the sewers is vested in commissioners, where they are not independent officers acting for themselves, but constitute one of the instruments of the municipality and government. *Bolton v. New Rochelle*, 84 Hun. 281, 32 N. Y. Supp. 442.

<sup>3</sup>*Smith v. Gould*, 61 Wis. 31, 20 N. W. 369.

<sup>4</sup>*Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Gift v. Reading*, 3 Pa. Super. Ct. 359; *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469.

If a city exercises legislative functions in adopting a plan for disposing of water which sometimes runs through a swale the outlet of which is stopped by grading a street, and if it would not be liable for the deficiency and imperfection of the plan, nevertheless, as its execution would be a ministerial act, the city would be liable for negligence in executing it by constructing the ditches of insufficient capacity, if, as a proximate result, injury is done by the water stopped by the street grade. *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, 63 N. W. 370.

<sup>5</sup>*Winn v. Rutland*, 52 Vt. 481; *Willott v. St. Albans*, 69 Vt. 330, 38 Atl. 72;

*Butler v. Edgewater*, 2 Silv. Sup. Ct. 3, 6 N. Y. Supp. 174; *Litchfield v. Southworth*, 67 Ill. App. 398; *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729; *Logansport v. Wright*, 25 Ind. 512; *Munn v. Hudson*, 61 App. Div. 343, 70 N. Y. Supp. 525.

Departure from the plan will render the municipality liable for injuries thereby inflicted. *Hardy v. Brooklyn*, 7 Abb. N. C. 407.

It is no answer to a charge of negligent construction of a municipal ditch so that injury results to say that it was constructed under authority of law, compensation having been tendered for the land taken. *Stonehouse v. Ennis-killen Twp.* 32 U. C. Q. B. 562.

A city is answerable for negligent original construction of a sewer or drain, or failure to keep the same in repair, or a discontinuance thereof by walling up the outlet so as to cause water to gather therein and burst out or otherwise escape therefrom in large quantities into cellars and basements, whether located above or below the street grade. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

In *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463, which was an action by a lot owner to recover for damages resulting from the negligent construction of a sewer, Adams, J., in delivering the opinion of the court, not only held that the plaintiff might recover, in which he was supported by his associates, but went farther, and expressly overruled the case of *St. Louis v. Gurno*, 12 Mo. 414, in which it had been held that a municipality was not liable for

The liability of a municipal corporation for the flooding of private property, caused by the unskilful or improper manner in which the work of constructing a sewer was performed, is the same as that of an individual under like circumstances, who is held to competent skill in any work he may undertake that may affect the rights of others.<sup>3</sup> The municipality is not relieved from liability by the fact that the injured person has connected his property with the sewer.<sup>4</sup> Although the municipality does not authorize the defective construction, it will be liable if it ratifies it.<sup>5</sup> A landowner need not incur expense, or take precaution, to protect his premises from the possible consequences of the negligent acts of a local board in constructing a defective sewer.<sup>6</sup> Where an injury is inflicted by the negligent construction of a sewer, the person injured need not proceed under the statutory remedy, but may bring an action to recover the damages.<sup>7</sup> And the fact that the city's indebtedness exceeds the constitutional limit is no defense to an action for injuries caused by negligent construction of a gutter, so as to cause injury to abutting property.<sup>8</sup>

**256. Wrongful or negligent acts.**—The principles discussed in the section immediately preceding stand out in a much clearer light as soon as we get away from any idea of the adoption of plans, and look at the act as it really is. So, whenever it is seen that the municipality has committed a wrongful act in turning water or sewage onto abutting property, there is no hesitation in holding that it is liable for the injury. Municipal corporations are by statute generally made liable for their acts of negligence the same as private individuals. When the question arises, however, as to the liability of a county or drainage district, a different principle applies. Such organizations are merely subdivisions of the state and they cannot be sued any more than the state can, unless authority to bring the suit is granted by stat-

damages consequential upon the grading and paving of a street, in pursuance of its charter authority. With him Sherwood and Ewing, J.J., concurred, the latter in the result only, while Wagner, J., wrote a separate opinion concurring in the result, but expressly dissenting from the opinion of Adams, J., so far as it overruled such case. *Vories, J.*, having been of counsel, did not sit in the case.

A New Jersey case is out of line on this question in holding that a municipality is not responsible for the consequences of a break in a public sewer due to faulty construction, even though the result of carelessness of its own agents: but, after such break has occurred, and

occasions a private nuisance, and the public authorities have notice of the accident, a duty to repair arises, for the breach of which an injured individual has a private action. *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170.

<sup>3</sup>*Magarity v. Wilmington*, 5 Houst. (Del.) 530; *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

<sup>4</sup>*Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

<sup>5</sup>*Munk v. Watertown*, 67 Hun, 261, 22 N. Y. Supp. 227.

<sup>6</sup>*Brown v. Sargent*, 1 Foat. & F. 112.

<sup>7</sup>*Clothier v. Webster*, 12 C. B. N. S. 790, 9 Jur. N. S. 231.

<sup>8</sup>*Bartle v. Des Moines*, 38 Iowa, 414.

ute. Therefore, in determining whether or not they are liable for their negligent acts, attention must be given to the provisions of the statute. Unless a county is made liable, either by general statutory provisions or by the statute under which it attempts to carry on drainage proceedings, no suit can be brought for injury caused by it; but the action must be against the officials causing the injury.<sup>1</sup> In *Packard v. Voltz*<sup>2</sup> it is said that, since the county itself is not liable, its agents cannot be made liable. But that conclusion is an obvious *non sequitur*. Everyone committing a trespass on the property of another is liable for his acts, whether he is principal or agent.<sup>3</sup> And the agent is not relieved from the acts committed by him merely because there is no redress against the principal. The same principle which applies to a county applies to a drainage district. Unless the statute gives a right of action against it, no suit can be brought against it.<sup>4</sup> The remedy in such cases is also against the officers personally.<sup>5</sup> And the same rule

<sup>1</sup>*Dashner v. Mills County*, 88 Iowa, 401, 55 N. W. 468; *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757.

A county is not liable for the negligence of the contractor to whom the work of excavating a drain is let, or for his failure to do the work in accordance with the plan adopted, to one whose land is flooded as the result of such imperfect work. *Thompson v. Polk County*, 38 Minn. 130, 36 N. W. 267.

One whose crop is destroyed by reason of the overflow of water in a ditch constructed by the authority and direction of the county, when the overflow was caused by the accumulation of sediment in the ditch, may not recover the value of his crop from the county. *Green v. Harrison County*, 61 Iowa, 311, 16 N. W. 136; *Nutt v. Mills County*, 61 Iowa, 754, 16 N. W. 536.

<sup>2</sup>94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757.

<sup>3</sup>See note to *Mayer v. Thompson-Hutchison Building Co.* 28 L. R. A. 433. This principle is emphasized by the holding that drainage commissioners, although acting as public servants, carrying out a public purpose, are liable for the negligence of their servants whereby adjoining lands are flooded. *Coe v. Wise*, L. R. 1 Q. B. 711, 37 L. J. Q. B. N. S. 262, 14 L. T. N. S. 891, 7 Best & S. 831, Reversing 5 Best & S. 440, 33 L. J. Q. B. N. S. 281, 10 Jur. N. S. 1019, 10 L. T. N. S. 666, 12 Week. Rep. 1036, where it was held that drainage commissioners acting without reward, hav-

ing employed skilful and competent persons in constructing and maintaining a sluice near the opening of a cut for the purpose of excluding tidal waters, are not liable for the negligence of their agents which results in the bursting of the sluice whereby tidal waters come in and flood the neighboring lands.

So, a drain commissioner who casts upon land water which does not belong there is liable in damages to the owner, unless he provides a proper outlet to take it away from the premises. *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69.

But drainage commissioners are not personally liable for the overflow of an owner's land caused by the construction by contractors of a dam necessary in prosecuting the work of the district, where they merely acted under the order of the court in letting the contract for the work, and had no immediate supervision of its execution. *McGillis v. Willis*, 39 Ill. App. 311.

<sup>4</sup>*Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010, Affirming 32 Ill. App. 122; *McGillis v. Willis*, 39 Ill. App. 311.

A drainage district is not liable for damages to an owner of land lying outside the same, from overflow caused by the wrongful and injurious manner in which a district levee was constructed, so as to obstruct the natural flow of water. *Santa Fé Drainage Dist. v. Waeltz*, 41 Ill. App. 575; *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010.

<sup>5</sup>*Russell & A. Drainage Dist. v. Pinkstaff*, 41 Ill. App. 504.

applies with respect to a township.<sup>6</sup> At common law the same rule applies in the case of a municipal corporation.<sup>7</sup> But, since municipal corporations are at the present time universally made liable for their acts of negligence, the fact that at common law they were not liable is immaterial.

Taking up, then, the consideration of the liability for wrongful or negligent acts, no one will dispute that there is a liability both upon the part of the municipality and of its agents for throwing earth upon private property in the construction of a sewer.<sup>8</sup> So, if, in the construction of the sewer, a nuisance is created to the injury of private property, the property owner has a right of action therefor.<sup>9</sup> And, if sewage is permitted to escape from the sewer to the injury of private property the municipality is liable.<sup>10</sup> And the same rule applies to the bursting of a sewer, due to the wrongful act or neglect of the municipality;<sup>11</sup> and to negligently constructing a sewer so as to cast water onto abutting property or to permit it to flow there.<sup>12</sup>

<sup>6</sup>*Taylor v. Avon Twp.* 73 Mich. 604, 41 N. W. 703.

<sup>7</sup>*Little Rock v. Willis*, 27 Ark. 572.

<sup>8</sup>*Clark v. Wiles*, 54 Mich. 323, 20 N. W. 63.

In an action of trespass against drainage commissioners for the construction of certain ditches upon an owner's land within the drainage district, it must be presumed that the entire damages "consequent upon the construction of the proposed work" resulting to such landowner were considered by the jury in the original condemnation proceedings, and the only question for the jury to determine is whether damages sustained by him by reason of the construction of such ditch in a particular manner were such as were consequent upon its construction, and therefore included within the condemnation proceedings. *Doyle v. Baughman*, 24 Ill. App. 614.

<sup>9</sup>*Clark v. Peckham*, 9 R. I. 455; *Edmondson v. Moberly*, 98 Mo. 523, 11 S. W. 990.

Ordinarily, a city will be enjoined from using or constructing a sewer or drain so as to create a nuisance by causing a deposit of filth or noisome smells adjacent to private property. *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Beach v. Elmira*, 22 Hun, 158; *Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496; *Buller v. Thomasville*, 74 Ga. 570; *Danbury & N. E. Co. v. Norwalk*, 37 Conn. 100; *Meotry v. Danbury*, 45 Conn. 550,

29 Am. Rep. 703; *Flower v. Low Leyton Local Board*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. N. S. 621, 36 L. T. N. S. 760, 25 Week. Rep. 545.

Whether or not the overflowing of sewage alleged to obstruct the use of premises by giving rise to noxious and offensive smells renders them unfit for habitation is a question of fact. *Requena v. Los Angeles*, 45 Cal. 55.

<sup>10</sup>*Chalkley v. Richmond*, 88 Va. 402, 29 Am. St. Rep. 730, 14 S. E. 339; *Closs v. Woodstock*, 23 Ont. Rep. 90.

But in Massachusetts, in accordance with the doctrine of *Barry v. Lowell*, 8 Allen, 127, 85 Am. Dec. 690, it is held that a town is not liable for injury to property owners by the percolating of water from its catch basins or gutters through the soil into adjoining closes. The only remedy of the landowners is to raise such barriers against the water as will prevent its injuring them. *Kenison v. Beverly*, 146 Mass. 467, 16 N. E. 278.

<sup>11</sup>*Bloom v. San Francisco*, 64 Cal. 503, 3 Pac. 129.

<sup>12</sup>*Valparaiso v. Ramsey*, 11 Ind. App. 215, 38 N. E. 875; *Montgomery v. Gilmore*, 33 Ala. 116, 70 Am. Dec. 562.

Where a municipality entered into a contract for the construction of a sewer, providing that it should be done according to the directions and to the satisfaction of the city engineer; and where, during the progress of construction, in order to get rid of water coming down, it was dammed back to raise it to the

So, if the municipality turns waste water from a canal constructed for the introduction of a water supply into the city into the sewers, in such quantities that the water is caused to flow upon lands through which the drains run, the city is liable, although the water may run in its natural course in the drains and sewers of the city.<sup>13</sup> And the liability extends to collecting and casting such quantities of water into the sewers as to overtax them to the injury of abutting owners.<sup>14</sup> The municipality is not, however, liable for accidents; but, in order to hold it liable, it must be shown to have been negligent or to have committed an intentional trespass.<sup>15</sup> The municipality may be made an insurer by statute, and, in case it is so, it will be liable for injuries caused, whether it was negligent or not.<sup>16</sup> In case the injury is the necessary result of the construction of the drain the remedy is under the statute for compensation, and not by action of trespass.<sup>17</sup> And in any event a recovery can be based only upon the ground for which damages were sought in the petition.<sup>18</sup> If the sewer is a continuing

level of another sewer which was used as an outlet, and, in consequence of heavy rains, the water thus penned back overflowed into plaintiff's cellar,—the city, and not the contractors, is liable, as the work was done under the city's control and supervision. *Grassick v. Toronto*, 39 U. C. Q. B. 306.

Turnpike trustees are liable for negligently constructing drains with insufficient catch basins, whereby adjoining land is flooded, although acting for the public benefit. *Whitehouse v. Fellowes*, 10 C. B. N. S. 765, 30 L. J. C. P. N. S. 306, 4 L. T. N. S. 177, 9 Week. Rep. 557.

Drainage commissioners are liable for the entire damages resulting from the flooding of lands caused by the negligent construction of their works, although the damages may have been increased by the act of different landowners in attempting to protect their property from the action of the water, as, although such adjoining owners may have been wrongdoers, the primary cause of the injury was the negligence of the commissioners, and the damages cannot be apportioned between the several wrongdoers. *Collins v. Middle Level Comrs.* L. R. 4 C. P. 279, 38 L. J. C. P. N. S. 236, 20 L. T. N. S. 442.

<sup>13</sup>*Phinizz v. Augusta*, 47 Ga. 260.

<sup>14</sup>*Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844.

<sup>15</sup>*Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 63, Affirming 4 Hun, 637.

The mere fact that water came into a cellar from a drain running from

thence into the city drain is not sufficient to establish a prima facie case of negligence against the city; a specific ground of negligence must be proved. *Noble v. Toronto*, 46 U. C. Q. B. 519.

<sup>16</sup>Under a statutory obligation to maintain a public drain in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it, a municipal corporation is liable for damage resulting from so overcharging a drain that in time of excessive rains premises entitled to drainage are flowed thereby. *Blood v. Bangor*, 66 Me. 154.

<sup>17</sup>Where, as a necessary and unavoidable consequence of the grading and sewerage of a street, and not through lack of care or negligence, a space formerly occupied by the plaintiff's drain was filled up, thus cutting off his drain, his remedy is not by an action of trespass, but by a proceeding before viewers, as his injury must be regarded on the same footing as a taking for public use: and in the proceeding before viewers the question is, Was the injury the necessary consequence of the plan adopted? and whether a better plan might have been adopted cannot be considered. *Curran v. East Pittsburg*, 20 Pa. Super. Ct. 590.

<sup>18</sup>Where, before a sewer was constructed by a city, an owner of land abutting on the street had the use of an aqueduct as a sewer, and no injury to such land resulted therefrom, and such owner sues the city for injury to his estate by reason of the insufficient

nuisance the action may be brought only for the damages which have accrued up to the time of bringing the suit; and a recovery will not bar an action for those which subsequently accrue.<sup>19</sup> The property owner will not be left to his action for damages if that is not adequate, but he may have an injunction to restrain the continuation of the injury.<sup>20</sup> But in case large expenditure will be incurred, and the structure will not necessarily be a nuisance, but may become so by its operation, to be entitled to an injunction against the structure the complainant must proceed promptly.<sup>21</sup> If, in draining a lake for the construction of a road across it, injury is caused to the lands of an abutting owner, the one responsible for the drainage is liable in damages, although the lands are situated over 7 miles from the road-bed.<sup>22</sup> One interested in a drain only so far as it operates to drain his lands is not entitled to use the water flowing therein for power, and is not injured by the diversion of the flow of the water where his drainage is not interfered with.<sup>23</sup>

*Negligent operation*.—After the sewer is completed the municipal corporation may be liable for injuries caused by its negligent use, although it does not of itself cause injury.<sup>24</sup> Upon this principle there is liability for obstructing the drains from private dwellings.<sup>25</sup>

size of the sewer, he cannot in such action recover for the destruction of the aqueduct, as there is no principle of law by which he can transmute his claim for damages for the destruction of the aqueduct into a claim for damages for the insufficiency of the sewer; and if, instead of suing for the destruction of the aqueduct, he sees fit to connect with the sewer, he can have no better right of action for damages resulting from the connection than if the aqueduct had never existed. *Baxter v. Tripp*, 12 R. I. 310.

<sup>19</sup>*Mulligan v. Augusta*, 115 Ga. 337, 41 S. E. 604.

<sup>20</sup>*Bruggink v. Thomas*, 125 Mich. 9, 83 N. W. 1019.

It is not necessary to give the statutory month's notice for a cause of action against a local board, where the object of the action is an injunction to restrain the board from permitting its sewage ditch to overflow onto the plaintiff's land, as that entitles him to immediate relief. *Flower v. Low Leyton Local Board*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. N. S. 621, 36 L. T. N. S. 236, 25 Week. Rep. 545.

<sup>21</sup>Where the construction of an engine for the purpose of draining lands into a river is not of itself a nuisance, but its

operation may result in injury to the navigation, and in flooding other lands, the possibility of its so doing being uncertain, the party asking that the construction of the engine be restrained must do so in the first instance before work upon it has commenced; but, if he delays application to the court until after that time, he must first prove the injury by an action at law. *Ripon v. Hobart*, 3 Myl. & K. 169, 3 L. J. Ch. N. S. 145, Coop. Sel. Cas. 333.

<sup>22</sup>*Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

<sup>23</sup>*Berry v. Tinsman*, 108 Mich. 672, 66 N. W. 579.

<sup>24</sup>*Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181.

But a municipal corporation is not liable for the misuse, or the improper use, of its drains or sewers by third parties, so as to injure another, unless it has consented to such use, or negligently permitted its continuance after knowledge thereof. *Champaign v. Maguire*, 56 Ill. App. 618.

<sup>25</sup>*Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758; *Bragg v. Rutland*, 70 Vt. 606, 41 Atl. 578.

A municipality is liable to a property owner for injuries resulting from the



So, a municipal corporation is liable for damages to private property from flooding caused by the negligent work of a plumber, acting under a license from the city, in connecting a house drain with that in the street, which could have been prevented if the city had exercised that supervision over the work incumbent upon it in the proper maintenance of its public streets.<sup>26</sup> Where an act incorporating a town provides that, where a landowner desires to connect his private drain with the main of the municipality, he may do so at his own cost, under the surveillance of an officer appointed by a corporation, the private owner, by complying with such privilege, is not constituted an employee of the municipality or under its control, so as to render the latter liable for damages caused by his acts.<sup>27</sup> A municipality is liable for negligence which replaces a broken sewer with a new one without compelling a connection of abutting property with the improvement.<sup>28</sup> As has been seen in another place,<sup>29</sup> a right granted by a municipality to place a private sewer in a street is a mere revocable license, and therefore there is no liability for obstructing it by work done in the street.<sup>30</sup> A city is not liable for damage done to an iron foundry and machine shop which was overflowed because of the failure of the municipality to keep in operation the draining machine erected for public utility. A city is not responsible for the injury of private property by an act of omission or commission, unless such act is without the authority of, or against, law, or is improperly or wantonly executed.<sup>31</sup> If, in constructing the drain, wells or ponds on private property are needlessly drained, the municipality will be liable for the injury.<sup>32</sup> It is no defense to an action against a municipal corporation for injuries caused by a sewer, that it was placed on private property where the municipality had no power to control it. It is its duty to obtain the right to control sewers which it con-

negligent reconstruction of a sewer by a tunnel company acting under a statute authorizing it to build the tunnel, and requiring it to reconstruct, under the supervision of the city engineer, any sewer cut in so doing; and the fact that neither such officer nor the municipality exercised any control over such reconstruction does not relieve the city, as it was their duty to have done so. *Fink v. St. Louis*, 71 Mo. 52.

A city need not, in permitting a gas pipe to be laid through a sewer, act through its city council while in regular session, to be liable for the result; but it is sufficient if the council had notice of the proposed action, and of its effect,

and assented thereto. *Powers v. Council Bluffs*, 50 Iowa, 197.

<sup>26</sup>*Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509.

<sup>27</sup>*Dallas v. St. Louis*, 32 Can. S. C. 120.

<sup>28</sup>*Betterly v. Soranton*, 5 Lack. Legal News, 179.

<sup>29</sup>See *ante*, § 217a.

<sup>30</sup>*Eddy v. Granger*, 19 R. I. 105, 23 L. R. A. 517, 31 Atl. 831.

<sup>31</sup>*Bennett v. New Orleans*, 14 La. Ann. 120.

<sup>32</sup>*Ambrose v. Buffalo*, 29 Abb. N. C. 140, 20 N. Y. Supp. 129; *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796.

structs, and it will be liable for injuries caused by failure to do so.<sup>33</sup> And the fact that the sewer was located over private property with the consent of the owner will not absolve the municipality from liability to the landowner for negligently constructing it.<sup>34</sup> The rights of one whose property is injured by a deposit of sewage near it are not affected in any way by the fact that the sewer was wrongfully constructed through the private property of another person.<sup>35</sup>

**257. Public liability for injury by private or adopted drain.**—In case of injury by negligent construction of a sewer in a street it will be presumed that the work was done by the proper authorities, and no proof of that fact will be necessary for a recovery.<sup>1</sup> So that, in the absence of evidence that the municipality was not the owner of the drain, it will be presumed to be liable for every drain in a public street. But the municipality is not liable as such for injuries caused by failure to keep open drains on its private property, by reason of which persons who are permitted to use them are injured.<sup>2</sup> So, a city is not liable to a private individual for damages due to the flooding of his cellar with water set back from a sewer through a private drain maintained for his private advantage and convenience.<sup>3</sup> If the municipal corporation adopts and uses private drains it will be liable for injuries caused by them the same as though it had constructed them.<sup>4</sup> But if the sewer is under control of a private individual the municipality does not become responsible for it by connecting its drains therewith.<sup>5</sup>

<sup>1</sup>*Ft. Wayne v. Coombs*, 107 Ind. 75, N. E. 945, Affirming 53 Hun, 329, 6 N. Y. Supp. 453.

<sup>2</sup>*Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030, Affirming 22 N. Y. S. R. 215, 4 N. Y. Supp. 745.

But in another case it was held that, if a municipal corporation has built a sewer upon private property with the knowledge and consent, or at the request, of the owner, it will not be liable for the discharge of sewage thereon through a defect in the pipe, since the remedy is to remove the sewer. *Searing v. Saratoga Springs*, 39 Hun, 307, Affirmed in 110 N. Y. 643, 17 N. W. 873.

<sup>3</sup>*Clark v. Peckham*, 9 R. I. 455.

<sup>4</sup>*Peoria v. Crawl*, 28 Ill. App. 154.

<sup>5</sup>The transfer of property connected by a private drain with a sewer to a city as a site for one of its structures does not make the city responsible for injuries caused to a neighboring owner who has, under license from the city, connected his property with the private drain, by reason of water backing up. *Kormak v. New York*, 117 N. Y. 361, 22

*Dermont v. Detroit*, 4 Mich. 435.

<sup>4</sup>*Keecanee v. Ladd*, 68 Ill. App. 154; *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442; *Chalkley v. Richmond*, 88 Va. 402, 29 Am. St. Rep. 730, 14 S. E. 339; *Taylor v. Austin*, 32 Minn. 247, 20 N. W. 157; *Hamlin v. Biddeford*, 95 Me. 308, 49 Atl. 1100.

A municipality using a private sewer with the consent of the owner, as part of its drainage system, is liable for negligently connecting it with two large drains of more than double its capacity, thereby causing the water to back into and flood a cellar of the owner of the private drain. *Coghlan v. Ottawa*, 1 Ont. App. Rep. 54.

<sup>5</sup>*Munn v. Pittsburgh*, 40 Pa. 364.

A town is not liable for the defective construction or want of repair of a tile drain established and constructed almost wholly within its corporate limits upon petition of landowners in pursuance of a drainage law, and for which the

Where a ditch is cut through private property within the limits of a city by private persons, acting without sufficient authority from the city and for their own benefit, the fact that the city is incidentally benefited thereby in the matter of street drainage will not render it liable for the damages so caused to the lots.<sup>6</sup> If a public drain is extended by private individuals under the supervision of the municipality, it will be liable for injuries resulting from the drain proving insufficient to carry the water turned into it.<sup>7</sup> The fact that a municipality occasionally and voluntarily makes repairs to a drain does not place upon it the duty of maintaining it.<sup>8</sup> A ditch is authorized to be constructed by a city, and the city is liable for the damages resulting to an owner of land over which it passes, where it is actually constructed by the servants of the city under the instructions of the city engineer, although a resolution passed by the common council authorized an appropriation for the construction of the ditch, providing the adjacent landowners would raise an additional sum of money, the amount appropriated not to be paid until such adjacent owners had raised the required amount, and although the ditch is constructed before the city authorities have collected all the moneys raised by the adjacent landowners.<sup>9</sup> The city is not liable for damages caused by a sewer from a private enterprise, which, though put in by aldermen, was an unauthorized act on their part, and *ultra vires*.<sup>10</sup> The mu-

town was assessed for benefits to certain highways, but with the construction of which it had nothing to do, and which it never repaired or drained into, or otherwise assumed control of; as no liability exists for failure of a municipal corporation to exercise its power to provide drainage. *Monticello v. Fox*, 3 Ind. App. 481, 28 N. E. 1025.

<sup>6</sup>*Dallas v. Beeman*, 12 Tex. Civ. App. 344, 34 S. W. 340.

<sup>7</sup>*Haus v. Bethlehem*, 134 Pa. 12, 19 Atl. 437.

A municipal corporation, which has knowledge of, and adopts, a change made by a private individual in the outlet of a sewer, by which the sewage is turned into a new channel and the old channel closed up, by reason of which the new outlet, because of its insufficiency, becomes clogged up and causes a backing up of water to the injury of private owners, will be liable for the injury. *Nims v. Troy*, 59 N. Y. 500.

<sup>8</sup>*Muns v. Pittsburgh*, 40 Pa. 364.

<sup>9</sup>*Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 702.

<sup>10</sup>*Barger v. Hickory*, 130 N. C. 550, 41 N. E. 708.

A property owner may not recover for injuries to his property caused by the defective construction of a sewer, when the sewer in question was extended to the premises by his predecessor in title at his own expense and in violation of city ordinances, requiring the consent of the city authorities to be first obtained. the payment of a fee for the privilege of connecting, and that the construction shall be done under the supervision of the city engineer; and the fact that the city supervisor afterwards connected with the extension for the purpose of preventing rubbish from being carried into the sewer, but without his action being authorized or ratified by the proper municipal authorities, is not sufficient to impose liability for the damages sustained upon the city. *Dasher v. Harrisburg*, 20 Pa. Super. Ct. 79.

municipality is not liable for the care of a private sewer constructed on private property by the fact that it consents to its construction.<sup>11</sup>

**258. Liability for injury caused by adopting stream as sewer.**—As has been seen,<sup>1</sup> while there is no authority on the part of a municipal corporation to adopt and use a stream flowing through it as a sewer without statutory permission, such permission may be given it.<sup>2</sup> And the statute may even require the keeping of streams clear for drainage purposes.<sup>3</sup> And in case the municipality receives permission to adopt a stream as a sewer, and attempts to make use of the stream as such, it must use due care to make the necessary changes in such a way as not to cause injury to private individuals.<sup>4</sup> Therefore, if it attempts to make the stream flow under cover, it is bound to keep the passage-way unobstructed, so that the water will not be dammed up and cast onto abutting property to its injury.<sup>5</sup> Where, after a landowner had constructed a covered channel for a brook running through his land, a municipality instituted proceedings to take it for a sewer, the liability, as between the city and the landowner, for injuries to adjoining

<sup>11</sup> *McCaffrey v. Albany*, 11 Hun, 613.

<sup>1</sup> See *ante*, § 76.

<sup>2</sup> A statute authorizing the widening and deepening of a channel within a city to prevent overflow, and providing for condemnation proceedings, does not preclude the removal, under a resolution of the city council and permit of the board of public works, of sediment deposited in the channel which, if allowed to remain, will cause an overflow and consequent injury to property, where there is no removal or attempt to remove land of a private owner, or any attempt to widen or deepen the channel; and that such deposit results from United States government work for the improvement of the navigable portion of the stream below is immaterial, since the city, under the charter power of control and protection of water courses and channels, has the right to remove obstructions from the water course so as to preserve its natural form, without regard to the cause of the obstruction. *Weber v. Gill*, 98 Cal. 462, 33 Pac. 330.

<sup>3</sup> *State v. Tucker*, 54 S. C. 251, 32 S. E. 361.

<sup>4</sup> In the absence of any authorized declarations to the contrary, it will be assumed that the rights of riparian proprietors in a stream are not lost, so far as they are capable of subsisting therein, by the action of drainage commissioners in improving the bed of the stream. *Palmer v. Persee*, Ir. Rep. 11 Eq. 616.

<sup>5</sup> *South Bend v. Pason*, 67 Ind. 228; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706.

A city is bound to keep in repair, and is responsible for injuries to, property through which a stream flows, resulting from negligence in making necessary repairs, as well as from the negligent and unskilful manner in which the work of repairing is actually done, where, for many years, it has used the stream as a common sewer, has arched and paved over it when crossed by streets on the extension of the city, or, when running within the limits of a street, has provided by ordinance for tunneling and paving of the stream between streets on their being gradually built up, and has controlled the connection of private drains therewith, acquiring the right to the sewer by virtue of its power to open and condemn streets where crossing or flowing along streets, and by adoption wherever it passes through private property whereon it was originally arched or covered by private owners; so that the stream has for a long time been made a complete and continuous arched, covered, and underground drain or sewer, and has come to be as completely under the control and management of the city as any other public sewer within its limits. *Kranz v. Baltimore*, 64 Md. 491, 2 Atl. 908.

land, arising from an overflow of the water of the brook, rests upon the party in possession and control of the channel; and the city, and not the landowner, is liable if it has assumed such possession and control, although the proceedings instituted by it were irregular.<sup>6</sup> Where the selectmen of a town act with due care in deepening and straightening the channel of a stream for the purpose of preventing its flooding low lands to the injury of public health, the town is not liable for an injury to property caused by the insufficiency of the new channel to carry off the water during an unusual, though not unprecedented, flood.<sup>7</sup> And in case the size of the stream is diminished the municipal corporation must make compensation to mill owners on it for the loss of their power.<sup>8</sup>

A mill owner, who, for more than twenty years, has utilized the flow of a brook as it has been regulated by natural obstructions and by culverts, is within the meaning of a statute giving a municipal corporation power to remove such obstructions for the purpose of surface drainage, making compensation to any person injured in his property by any of the acts done, the effect of which is to hasten the discharge of the water so that he is deprived of its flow during certain seasons of the year.<sup>9</sup>

**259. Injury caused by open drains.**—If the attempt is made to maintain an open drain it must be kept in a wholesome condition, and so guarded that no injury will result from it. The use of an open sewer in a city in the vicinity of a residence, whereby the comfortable enjoyment thereof is interfered with, is a nuisance.<sup>1</sup> A municipal corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, is required to keep such banks or embankments along such canal as will securely keep the waters within the channels thereof, and to keep the canal open and in order for the protection of proprietors of adjacent lands, in such a manner as to provide against the changes of weather which are usual and ordinary at different seasons of the year.<sup>2</sup> The municipality will be liable in case it constructs an open ditch so close to private property as to cause the soil

<sup>6</sup>*Sellick v. Hall*, 47 Conn. 280.

<sup>7</sup>*Diamond Match Co. v. New Haven*, 55 Conn. 510, 3 Am. St. Rep. 70, 13 Atl. 409.

<sup>8</sup>*Washburn & M. Mfg. Co. v. Worcester*, 153 Mass. 494, 27 N. E. 664.

<sup>9</sup>*Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613.

<sup>1</sup>*Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083.

<sup>2</sup>*Savannah v. Cleary*, 67 Ga. 153.

to fall into it.<sup>3</sup> A claim for damages from interference with the use of premises by an open city sewer is not a demand which must be presented to the board of trustees under a statute requiring that all demands against a city or town shall be presented and audited, since the purpose for which such presentment is required—that they may be audited—is not applicable to demands arising from torts.<sup>4</sup> An open drainage ditch may be put to any use of which it is capable.<sup>5</sup> The question of liability for rendering highways insufficient by the maintenance of open drains will be treated in a subsequent chapter.<sup>6</sup>

**260. Assumption of risk by attempted use of drain.**— Under the doctrine that the municipality is not bound to provide drainage, and that, when it does so, individuals can profit by the improvement only to the extent to which it is carried by the municipal authorities, they take the risk of attempting to use the improvement. A municipal corporation is not liable for damages resulting to an owner's premises from back water of a sewer through the connecting pipe by which such premises are drained into the sewer, whereby the basement is frequently overflowed, due to the insufficiency in the capacity of the sewer, where all danger from back water can be avoided by the stopping up and disuse of the connecting pipe, although that would deprive the premises of the benefits of the sewer, for the construction of which the owner has been assessed his proportionate part of the cost.<sup>1</sup> So, a city is not liable for the flooding of the basement of premises through its sewer on the ground that it was not constructed large enough, where the trouble only arises in times of high water, and would be remedied by removing the closet overflowed from the base-

<sup>3</sup>*Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

<sup>4</sup>*Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083.

<sup>5</sup>The power of a sanitary or drainage district to lease and control its water-power, and to construct, lease, and control docks along its proposed channel, does not arise until the channel is constructed and the district is in a position to exercise the power if it exists; and in a proceeding to test the constitutionality of the act creating the district the court will not determine that question. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

<sup>6</sup>See post, chapter XVII.

<sup>1</sup>*Roll v. Indianapolis*, 52 Ind. 547.

A municipal corporation is not liable in tort for setting back water into the cellar of the house of one who connected his private drain with a sewer which had been constructed with an outlet so

narrow that it would not carry the sewage and the water of a brook which had been turned into it. This is put upon the ground that the right of the landowner was to connect only with the existing system, and he could not complain that it was not sufficient to drain his property. He could not complain that the sewer would not drain the land below a certain grade above its own level if its inability to do so was due to the plan on which it was constructed. But in that case the action was not for momentary damage caused by the landowner doing what he was led to suppose, or had a right to suppose, he might do in safety, but was brought for a continuing nuisance on the footing of a right of property which was infringed. His right, however, was simply to connect a pipe having a mouth at such height as would be safe under the existing system. If he connected one having

ment to an upper floor.<sup>2</sup> A municipal corporation is not liable for damages from the backing of sewage into a cellar because of the clogging up of a private sewer connecting therewith by reason of the negligence of the city authorities in voluntarily and gratuitously reconnecting such private sewer with the main sewer after the breaking of such connection by the lowering of the main sewer.<sup>3</sup> An agreement by one who connects with a sewer built by a city, that no claim for damages which may be occasioned to his estate or any property thereon in any manner by the construction, use, or existence of such sewer or connection shall be made against the city, is equivalent to the release required by statute to be executed when such connection is made.<sup>4</sup> Where a city constructs a sewer under a state statute which provides that the owner of land on a street through which a sewer is laid is liable to assessment, and, being so assessed, is entitled to connect his estate with the sewer, "upon executing to said city a release of all damages which may at any time happen to such estate in any way resulting from such connection;" and the owner makes an agreement not to make any claim against the city for damages occasioned by the construction, use, or existence of the sewer or his connection with it,—such agreement is valid as a release, and he cannot recover against the city for injuries to his estate from the reflux of filth from the sewer owing to its insufficient size.<sup>5</sup> Where some active duty is placed on the municipality, either by its charter, or by a contract, express or implied, with the landowner, the latter does not take the risk, but the municipality must construct a sewer which will be reasonably adequate for the use intended.<sup>6</sup> Under this rule the municipality

a mouth lower than that, he maintained it at his own risk after experience had shown its dangers. *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201.

<sup>2</sup>*Graves v. Olean*, 64 App. Div. 598, 72 N. Y. Supp. 799.

<sup>3</sup>*Streich v. Milwaukee*, 89 Wis. 218, 61 N. W. 770.

<sup>4</sup>*King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. 1012, Following *Baxter v. Tripp*, 12 R. I. 310.

But the release required to be executed to the city under R. I. Pub. Laws, chap. 313, § 5, by the owner of an estate when he connects with the city sewer, by which the city is released from any damages that may result from such connection, must be construed with reference to the conditions existing at the time the release is made, as well as the condition that could have been reasonably anticipated; and where a sewer

was of sufficient capacity when the connection was made, and the city subsequently changes the grade of other streets so that surface water and sewage are turned into the sewer, which had theretofore flowed in a different direction, the city is liable where the sewer overflows the estate of the landowner, who connected with the sewer, notwithstanding the release. *King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. 1012.

<sup>5</sup>*Baxter v. Tripp*, 12 R. I. 310.

<sup>6</sup>A property owner, in connecting his drain with a public sewer, is not bound to guard against negligence of the municipal corporation in its want of care in failing to preserve the sewer in repair. *Barton v. Syracuse*, 37 Barb. 292; *Daygett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

cannot claim exemption from liability for injuries caused by its act of negligence or wrongdoing by the fact that the landowner has voluntarily connected his property with the sewer.<sup>7</sup> There is no right of action on the part of one who wrongfully connects his property with the sewer.<sup>8</sup>

**261. Estoppel and contributory negligence.**— A landowner must take the steps provided by statute to procure the damages for the injuries which will be caused by the construction of a sewer, and he cannot refuse to do so and then seek to hold the public authorities liable for a tort. Thus, it is a good defense to an action against an adjoining landowner for wrongfully digging a ditch opening into an existing ditch on an owner's land and thereby overflowing his land, that the new ditch was duly established in pursuance of law in a proceeding to which such owner was a party, and he had notice of and was assessed for its construction, from which he took no appeal, but stood by and allowed the work to be done on his land without objections; although an action would lie under the statute for failure to enlarge the capacity of the old ditch so as to accommodate the increased flow caused by connecting the new ditch therewith.<sup>1</sup> The landowner may also be prevented from recovering for injuries caused

<sup>7</sup> That a person's house drain is connected with a sewer maintained by the village in such a manner as to constitute a nuisance does not debar him from maintaining an action to recover damages. *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442.

A municipal corporation may not claim immunity from a liability to respond in damages for injuries resulting from its negligent maintenance of a defective sewer, by virtue of an ordinance permitting sewer connections only on condition that the city shall be held harmless from loss or damage in any way resulting from such connection. *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469.

<sup>8</sup> *Darling v. Bangor*, 68 Me. 108; *Breuck v. Holyoke*, 167 Mass. 258, 45 N. E. 732; *Dasher v. Harrisburg*, 5 Dauphin Co. Rep. 46.

And it has been held that if the owner of property abutting on a sewer makes such a connection as to bring the general flow of sewage onto his lot, it is his own fault, the remedy being to make it higher. *Betterly v. Scranton*, 5 Lack. Legal News, 179.

In an action for damages caused by the backing up into plaintiff's drain of a sewer which was allowed by the city

to get out of repair, the defense relied upon was that the drain was unlawfully connected, no payment having been made before connecting the same, as required by Boston Rev. Ord. 1885, chap. 27, § 15; but, it appearing that the then owner of the land had conveyed certain land to the city on condition that he should be required to pay nothing for sewer assessments, and that the city still holds the land so conveyed; also that the plaintiff, who afterwards purchased the property in question, before doing so, was informed by the city that there were no assessments standing against it; it was held that, as the city still held the land conveyed to it, until he had notice to the contrary, plaintiff had a right to assume that he was entitled to protection as one lawfully connected with the sewer. *Hendrie v. Boston*, 179 Mass. 50, 60 N. E. 386.

<sup>1</sup> *Powell v. Clelland*, 82 Ind. 24.

But one who will be injured by the construction of a proposed ditch is not estopped from complaining of it because the contract for its construction was awarded to him at a public bidding, where he bid for it to keep the work in abeyance until he could have time to file his bill for an injunction. *Conrad v. Smith*, 32 Mich. 429.



by the construction of the sewer if he expressly consents to what is done.<sup>2</sup> And from recovering for his injuries, by contributory negligence on his part. Thus, where he knows of a defect of which the city is ignorant, and takes no steps to notify the officials or have the condition remedied, he cannot recover for injuries caused by the defect.<sup>3</sup> So, if, by ordinary care and reasonable expense the landowner might have prevented the injury, he cannot hold the municipality liable for it.<sup>4</sup> And he cannot recover if he has done acts which directly contribute to the injury.<sup>5</sup> Or if he voluntarily connects his property with the sewer, knowing that it is insufficient.<sup>6</sup> The facts that a city promised to repair defects in a sewer causing the overflow of abutting property, and that the owner relied on such promise, will not relieve him from the effect of contributory negligence by continuing, during the time of such reliance, one of the concurrent causes of his injury, arising from defects in the construction of the building or arrangement of his premises.<sup>7</sup> If the owner of a boat moors it beneath the outlet of a main sewer, the existence of which is obvious, he cannot recover dam-

<sup>2</sup> But consenting to the changing of the grade of a sewer upon promise to hold the landowner harmless from the consequences will not deprive him of maintaining an action for obstruction of the sewer through negligence in its maintenance and use, where water is backed into his cellar, although the change of grade increased the liability of obstruction. *Emery v. Lowell*, 109 Mass. 197.

And after a landowner has established his right to be free from the casting of sewage by a municipality upon his property by a judgment, he cannot be estopped from enforcing his right by permitting the city to advertise and let a contract for the construction of work to do so, and to expend money in carrying out the contract, where it does not appear that he remains quiet so long as to be guilty of laches. *Vick v. Rochester*, 46 Hun, 607.

<sup>3</sup> *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

<sup>4</sup> *Simpson v. Keokuk*, 34 Iowa, 568.

Where the owner of premises injured by water set back from a sewer could have prevented such injury by properly placing the check valve in making his connection, he cannot recover from the municipality. *Wilson v. Waterbury*, 73 Conn. 416, 47 Atl. 687.

But a property owner injured by the flow of water from the public sewer through his drain into his cellar may

recover damages, although he has failed to place a gate in his drain as required by ordinance, where his neglect to do so did not contribute to the injury. *Nutt v. Manchester*, 58 N. H. 226.

<sup>5</sup> A landowner may not recover for the flooding of his premises caused by the turning of a stream above into a water course running through his close, by the city, in the course of its repair of streets and drains, where it appears that he had previously altered the natural course of the stream through his close by making it much narrower than in its natural state, and the evidence was not clear that the damage was not occasioned, in part at least, by his own acts. *Bellamy v. Hamilton*, 4 U. C. C. P. 526.

A municipal corporation acting under legal authority to grade streets is not liable for damages to adjacent property from the overflowing thereof by the obstruction of the mouth of a sewer, caused by the work of raising the grade of a street, where the proof shows that all the damage sustained by plaintiff was the result of his building his house before a permanent water grade had been determined upon by the city, and before the passage of the act giving damages for the change thereof. *Fuller v. Atlanta*, 66 Ga. 80.

<sup>6</sup> *Sheriff v. Oskaloosa* (Iowa) 94 N. W. 904.

<sup>7</sup> *Valparaiso v. Ramsey*, 11 Ind. App. 215, 38 N. E. 875.

ages occasioned by the filling and sinking of his boat, due to a great discharge of water from the sewer after a sudden shower.<sup>8</sup>

**262. The municipality is not liable for unforeseen accidents.**—The municipality in constructing and caring for its sewers is bound to use only the care and skill which a reasonably prudent person would exercise. It is not liable for injuries from accidents, or acts of God. Therefore, it is not liable for injuries which are caused by an unprecedented rain storm or flood.<sup>1</sup> The measure of its liability in this regard is to provide for such floods as may have been reasonably expected, judging from such as have previously occurred, although they may have been at wide and irregular intervals of time.<sup>2</sup> A city is liable for the destruction of crops by the discharge of surface water and sewage upon the plaintiff's land by means of a large sewer constituting the common outlet of a district, although at the time there was a heavy fall of rain, where the sewer commenced to discharge its contents on the land before the fall of rain had become exceptional.<sup>3</sup> Whether or not a flood which causes an injury was ordinary or extraordinary is a question of fact for the jury to decide.<sup>4</sup> If the flood was so great that the sewer could not have carried the water had it been in proper condition, the municipality will not be liable, although it negligently permitted it to become stopped up.<sup>5</sup> But a municipal

<sup>1</sup>*Behan v. New York*, 24 Fed. 239.

<sup>2</sup>*Chicago v. Rustin*, 99 Ill. App. 47; *Garfield v. Toronto*, 22 Ont. App. Rep. 128; *Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749; *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779; *Capital Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33; *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748, 9 N. W. 284; *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27; *Haney v. Kansas*, 94 Mo. 334, 7 S. W. 417; *Alden v. Minneapolis*, 24 Minn. 254; *Baltimore v. Schnitker*, 84 Md. 34, 34 Atl. 1132; *Vanderslice v. Philadelphia*, 103 Pa. 102; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767; *Savannah v. Cleary*, 67 Ga. 153; *German Theological School v. Dubuque*, 64 Iowa, 736, 17 N. W. 153; *Sundheimer v. New York*, 77 App. Div. 53, 79 N. Y. Supp. 278.

<sup>3</sup>*Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478; *Powers v. Council Bluffs*, 50 Iowa, 197.

An extraordinary flood, against which ordinary care does not require a city to guard, is not merely an unusual flood, but one which an ordinarily prudent man, in the exercise of reasonable judg-

ment, would not expect to occur; and it is for the jury to determine whether a flood is of that character. *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609.

The ordinary and reasonable care which it is the duty of a municipal corporation to exercise in the maintenance of the dams and banks of a canal for drainage purposes, constructed under an act requiring that any private canal taken as a part of the system must be kept open and in such order as to protect the proprietors of adjacent lands, requires the taking into consideration of and providing for their efficiency, not only under ordinary circumstances, but at certain seasons of the year when heavy rains and freshets ordinarily occur. *Savannah v. Spears*, 66 Ga. 304.

<sup>5</sup>*Magee v. Brooklyn*, 18 App. Div. 22, 45 N. Y. Supp. 473.

<sup>4</sup>*Peoria v. Eisler*, 62 Ill. App. 26.

<sup>5</sup>*Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

But a city is not relieved from liability for an injury to property caused by its failure to remove an obstruction in a sewer, by the fact that it occurred during the progress of a severe, but not

corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, which is at fault in obstructing the canal and keeping the banks thereof in such condition as necessarily to cause adjacent lands to be flooded and crops thereon injured, is liable for the damages resulting therefrom, and is not excused by extraordinary rains, if such original fault as to the condition of the canal was the proximate and immediate cause of the injury.<sup>6</sup> Even a contract by the municipality to maintain the ditch over private property will not require it to provide against extraordinary floods.<sup>7</sup> In an action against a municipal corporation for injury to private property by overflow, caused by the failure of street drains to carry off the water during unusual storms, evidence in regard to the dimensions and fall of the drains and their manner of connection with other drains is admissible to determine whether they are of sufficient capacity, when unobstructed, to carry off the waters caused by unusual storms; as the city would not be liable, even if such drains were not in proper repair, if the fall and unobstructed capacity thereof would not be sufficient to prevent overflow at such times.<sup>8</sup>

*Fletcher v. Rylands.* There is an element of this question which may impose a liability on the municipality even in case of extraordinary floods. In constructing a drainage system the municipality has created a condition for its own advantage which may inflict serious injury upon private property in case circumstances combine in a way necessary to effect that result. The construction of a conduit to carry water, which in times of heavy rains may become an uncontrollable torrent, is a proceeding which involves consequences so serious that due consideration of them should be required before the plan is adopted; and no plan should be chosen, the inevitable effect of which will be, in such times, to cast the contents of the sewer on to private property to its injury. In *Dixon v. Metropolitan Bd. of Works*<sup>9</sup> the attempt was made to apply to the collection of water in sewers the

extraordinary, storm. *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510.

Where the bursting of a defective sewer was caused by an unusual rainfall, and would have occurred had not the sewer been defective, the city is not liable for injuries to adjacent property; but if the defects therein and the unusual rainfall were concurring causes,

the city is liable. *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808.

<sup>6</sup>*Savannah v. Cleary*, 67 Ga. 153.

<sup>7</sup>*Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

<sup>8</sup>*Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

<sup>9</sup>L. R. 7 Q. B. Div. 418, 50 L. J. Q. B. N. S. 772, 45 L. T. N. S. 312, 30 Week. Rep. 83, 46 J. P. 4.

principal of *Fletcher v. Rylands*,<sup>10</sup> to the effect that one who brings a dangerous substance upon his property must care for it. The court held that, by reason of the public character of the defendant, it was not liable for the injuries inflicted by its sewage system, but the court said that, had it not been for such exemption from liability, the principle of *Fletcher v. Rylands* would have controlled, and the defendant would have been liable for injuries to a wharf and barge moored thereto, caused by the defendant opening the gates of the sewer during an unusual but not unprecedented storm at a point where the sewer emptied into the water course on which the wharf was located. But supposing that, instead of its merely collecting the water into its drains, it had gone further and made their outlets in such a place that in times of extraordinary rains they must of necessity have cast water on to private property to its injury. In *Ruck v. Williams*<sup>11</sup> the court held that improvement commissioners were liable for negligently constructing a sewer where, during an extraordinary flood, water was thrown upon defendant's premises. It would seem that true principle would hold the municipality liable in case the plan of its improvement was such that the injury was inevitable from a flood, even though the flood was such as there was no reason to anticipate. Floods of such character may occur and the municipality should not be permitted negligently to adopt a plan which will inflict injury in case of flood which could not have occurred except for its act.

**263. Notice of defect.**—Before a municipal corporation can be held liable for failure to remedy a defect in its sewer system it must have notice of the existence of the defect, unless it was due to its own negligence, or it was negligent in failing to discover the defect by making proper inspection.<sup>1</sup> But the municipality may be chargeable without

<sup>10</sup> L. R. 1 Exch. 265, 35 L. J. Exch. N. S. 154, 12 Jur. N. S. 603, 14 Week. Rep. 799, 4 Hurlst. & C. 263, 14 L. T. N. S. 523.

<sup>11</sup> 3 Hurlst. & N. 308, 27 L. J. Exch. N. S. 357.

<sup>1</sup> *Parker v. Laredo*, 9 Tex. Civ. App. 224, 28 S. W. 1048; *McCarthy v. Syracuse*, 46 N. Y. 194; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Krans v. Baltimore*, 64 Md. 491, 2 Atl. 908.

The provision of a city charter that no action shall be sustained in any case in which it might be liable for damages caused from streets, culverts, or sewers being out of repair, from gross negligence of the city, unless the same have

remained so for ten days after special notice given to the mayor or city engineer, does not apply to a case where the damage resulted from causing water to flood the property of the plaintiff by reason of the erection of embankments by the city raising the grade of the street without providing sufficient waterways and by causing the flow from a sewer to be forced upon the land by the flood. *Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1036.

In an action against a city for negligently closing up the manhole of a sewer so as to allow surface water to overflow upon the property of the plaintiff to his damage, the city is not in a condition to invoke the right of notice of the condition of the sewer and the in-

notice in case the defect is permitted to exist a sufficient length of time.<sup>2</sup> There is no liability for injury caused by the continued escape of water from a hidden source if the defect is remedied as soon as it is known that it is the cause of the injury complained of.<sup>3</sup> Whether the city would be charged with constructive notice of the defect in a drain pipe by reason of the length of time it may have existed is a question of fact for the jury, dependent on the circumstances of the case, such as the remote or exposed locality of the defect, and the like.<sup>4</sup>

**264. Who may sue.**—A citizen who suffers special injury from the discharge of sewage upon his premises by a city may maintain a suit in equity to abate the nuisance, and can recover such damages as it is shown he has sustained up to the time the decree is rendered.<sup>1</sup> Conversely, one whose land is not injured by the construction of a drain may not maintain an action against the drainage commissioners to enjoin its completion.<sup>2</sup> A corporation having the exclusive possession, care, and charge of a raceway leading from a dam to the mills of its stockholders and others, and whose duty it is to keep the same in repair at the expense of the corporation, although it does not own the same, can maintain an action against the city to recover the expense of removing dirt, gravel, and refuse therefrom, deposited therein from a sewer which was so constructed by such city as to make the raceway its outlet.<sup>3</sup> Damages for the depreciation in value of land caused by the wrongful and negligent construction by a municipal corporation

jury, where it appears that the manhole was stopped up by the servants of the city, whose attention was called to it. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

<sup>2</sup>*Vanderslice v. Philadelphia*, 103 Pa. 102.

The law will charge a municipal corporation with notice of want of repair of a sewer, so as to render it liable for injuries to land caused thereby, where it allowed it so to remain out of repair for two years prior to the date of the injury. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

The provision of a city charter, that no suit for damages shall be sustained against the city for injuries caused from streets, sewers, etc., being out of repair from the "gross" negligence of the city, unless the same have remained so for ten days after special notice in writing given to the mayor or city engineer, does not apply to a case where damage is caused by the caving-in of a sewer about 20 feet distant from a place

where the sewer had two months previously caved in, and had not been repaired, as in such a case the city is guilty of "ordinary" and not "gross" negligence. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

<sup>3</sup>*Gabrylewitz v. Philadelphia*, 9 Phila. 271.

<sup>4</sup>*Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

<sup>1</sup>*Carmichael v. Texarkana*, 94 Fed. 561.

One on whose land large quantities of noxious matter are deposited from a sewer emptying into a creek, in addition to a stench affecting the community in general, arising from the use of the creek for sewer purposes, is specially injured thereby, so as to be entitled to maintain an action for the abatement of the nuisance. *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437.

<sup>2</sup>*Swan Creek Twp. v. Brown* (Mich.) 9 Det. L. N. 52, 90 N. W. 38.

<sup>3</sup>*Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

of a ditch accrue to the owner at the time of the injury.<sup>4</sup> In an action against a municipal corporation for injuries to an owner's land from flooding occasioned by the negligent and improper manner in which a sewer was constructed, such owner does not need to show an actual paper title in himself in order to entitle him to a recovery, where he was in the actual possession of the lot at the time of the injury complained of, and had been for many years prior thereto.<sup>5</sup> A cause of action accruing to a person in his lifetime, against a municipal corporation, for damages to his property from the construction of a ditch, survives, and is properly continued in the name of his administrator.<sup>6</sup> Several owners of land abutting on a street may sue jointly for an injunction against a municipal corporation for wrongfully constructing a drain in the street from which they will all suffer injury by overflow, although in different degree.<sup>7</sup> A mortgagee may maintain an action for the protection of his interests.<sup>8</sup> Damages recovered for injuries caused to a house by the defective construction of a street drain, causing water to be diverted into the cellar, being an injury to the freehold, must be treated by an executor as principal, and not income.<sup>9</sup>

**265. Who is liable.**—Not only the municipal corporation but the officers who are responsible for the work, and the contractor actually engaged in its performance, are liable for injuries due to an actual trespass caused by it.<sup>1</sup> And in case the trustees of a turnpike construct a drain which overflows the land of a private owner, he need not join all of them in an action to recover damages, but may proceed against one.<sup>2</sup> If, however, the statute provides a method of recovering the damage, a highway supervisor will not be personally liable where he acted in the regular course of his duties, in the absence of

<sup>1</sup>*Logansport v. Wright*, 25 Ind. 512.

His right to recover is not affected by a sale of the premises after the commencement of the action under a mortgage foreclosure. *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

An alienee of property damaged by the overflowing thereof by water from sewers or ditches constructed by a municipal corporation in such a manner as would naturally turn thereon a large portion of the water diverted from the street, cannot recover therefor if the former owner of the premises authorized its construction. *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654.

<sup>2</sup>*Peoria v. Crawl*, 28 Ill. App. 154.

<sup>3</sup>*Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

<sup>4</sup>*Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300.

<sup>5</sup>*Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170; *Clapp v. Spokane*, 53 Fed. 515.

<sup>6</sup>*Witzel's Estate*, 26 Pa. Co. Ct. 58.

<sup>7</sup>The mayor and common council of a city are properly joined as defendants in a suit to enjoin the maintenance of a condition of the sewers which amounts to a nuisance where it is their duty to abate nuisances, though they were not responsible for the construction of the sewer system. *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

<sup>8</sup>*Sutton v. Clarke*, 1 Marsh. 437, 6 Taunt. 29, 16 Revised Rep. 563.

evidence showing that he acted improperly or in bad faith.<sup>3</sup> While injury to land from the overflow thereof by reason of the neglect of a city to repair broken sewers and the negligence of its officers in repairing them results from one cause, yet the two acts producing the cause are not joint so as to make the city and its officers joint tortfeasors, liable to be jointly sued.<sup>4</sup> Owners of real property, who petition the city, as directed by statute, for the construction of a sewer, and agree to use it, are not liable jointly with the city for damages to third parties, when the city constructs and operates the sewer so unskilfully and negligently that its contents are poured into a brook of pure water, which afterwards flows by the premises of other parties, to their damage.<sup>5</sup> And, as a general rule, the persons who simply make the use of the drain which was intended are not personally liable for injuries thereby inflicted.<sup>6</sup> But the drain must be used in the manner intended and so as not to cause needless injury to other persons, so that

<sup>3</sup>*Spitznogle v. Ward*, 64 Ind. 30.

<sup>4</sup>*Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386.

<sup>5</sup>*Carmichael v. Tewarkana*, 116 Fed. 845, Affirming 94 Fed. 561.

The landowners upon whose petition drainage proceedings were instituted and a judgment of a court of competent jurisdiction obtained, establishing a ditch and ordering its construction, are not liable in a civil action for damages for injuries resulting to the land of another by its overflow from the ditch, upon a reversal of the judgment establishing it on the ground of error, and a dismissal of the proceedings upon appeal, during the pendency of which the ditch was constructed, where the appeal was taken by such landowner without a stay of proceedings, and no showing is made that such petitioners have, by means of the erroneous judgment, received benefits in excess of the amount paid by them for the construction of the ditch equal to the amount of such owner's damages, or that such damages inured to the special benefit of their property. *Thompson v. Reasoner*, 122 Ind. 454, 7 L. R. A. 495, 24 N. E. 223.

<sup>6</sup>Persons who independently and without co-operation or concert of action turn surface water into a drain and cause injury to property through which the drain flows cannot be jointly liable as joint tortfeasors. *Bonte v. Postel*, 109 Ky. 64, 51 L. R. A. 187, 58 S. W. 536.

Where a nuisance is created by the action of several persons in discharging

the sewage from their premises into a drain belonging to the local sanitary authorities, which drain is inadequate, the local authorities, being bound to comply with the duty imposed upon them by the public health act of 1875 requiring them to provide sewers for effectually draining their district, cannot proceed against one of the persons discharging sewage into such drain to compel the abatement of the nuisance, as it is the duty of the local authority to provide a proper sewer. *Fordom v. Parsons* [1894] 2 Q. B. 780, 64 L. J. M. C. N. S. 22, 10 Reports, 426, 71 L. T. N. S. 428, 58 J. P. 765.

A canal company acting pursuant to statutory authority is not liable, in the absence of negligence on its part, for injuries resulting from its discharging the water of its canal into a sewer through which it would have flowed into a river except for an obstruction in the sewer, of which it had no knowledge at the time. *Boughton v. Midland G. W. R. Co.* Ir. Rep. 7 C. L. 169.

Such company is not guilty of negligence in not discontinuing its discharge upon discovering the existence of the obstruction, where to do so would necessitate suspending traffic on the canal. This is upon the ground that, the original discharge of the water having been lawful, it did not become unlawful by reason of the knowledge of its consequences. *Ibid.*

But, under a statute authorizing local authorities to compel abatement of a nuisance by one by whose act or suf-

a person discharging noxious matter into the sewer will be liable and cannot escape liability on the ground that the municipality might have prevented the nuisance by properly flushing and trapping the sewer.<sup>7</sup>

**286. When action must be brought.**—The action must be brought within the time limited by the statute,<sup>1</sup> but the time does not begin to run until the injury is actually done.<sup>2</sup> The construction of the drain may of itself be a wrongful act, and in such case the right of action accrues when the act is done, and the time begins to run then. If, however, the injury is done by the use made of the sewer, the cause of action does not arise until such use of it is made as to cause an injury. If the wrongful act is a continuing nuisance a right of action accrues at each injury; and one action will not be barred by the fact that an action for a former injury is barred.<sup>3</sup> If the injury is caused by the obstruction of the improvement itself, which is a permanent one, the entire cause of action arises at that time and the statute of limitations begins to run then.<sup>4</sup> The statute providing that actions to recover for injuries sustained by the failure of a municipal corporation to

tolerate the nuisance arises, one of several persons discharging sewage into a drain, from which it flows into an open sewer creating a nuisance, may be proceeded against, where the sewage discharged by him is of itself sufficient to create a nuisance: although it was said by the court that such a person could probably not have been proceeded against where his contribution was not sufficient in itself to create a nuisance, though the aggregate amounted to one. *Brown v. Bussell*, L. R. 3 Q. B. 251.

<sup>1</sup>*St. Helena Chemical Co. v. St. Helena*, L. R. 1 Exch. Div. 196, 45 L. J. M. C. N. S. 150, 34 L. T. N. S. 397.

<sup>2</sup>A claim for damages for the wrongful cutting of a drainage canal is under the Louisiana Civil Code barred in two years from the time of the occupation of the land. *Jefferson & L. P. R. Co. v. New Orleans*, 31 La. Ann. 478.

<sup>3</sup>*Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287; *Louisville v. Norris*, 23 Ky. L. Rep. 1195, 64 S. W. 958; *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093.

A cause of action for injuries sustained from a public nuisance created by the filling up of a stream or harbor basin with sewage and sand, preventing the free access of vessels to a private dock, and emitting a noxious odor, caused by the construction by a municipal corporation of a system of sewers having an outlet into such stream and

basin near the dock, accrues from the date when actual damage results, and not when the sewers were built. *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800; *Miller v. Keokuk & D. M. R. Co.* 63 Iowa, 680, 16 N. W. 567.

Whether conditions which caused the overflow of property were produced by a city within fifteen years next before the institution of an action for damages is immaterial; it is only material to find whether such conditions were produced by the city, and whether they existed at the time of, and were the cause of, the overflow, and whether the overflow occurred within the five years next before the bringing of the action. *Finley v. Williamsburgh*, 24 Ky. L. Rep. 1336, 71 S. W. 502.

<sup>4</sup>*Smith v. Atlanta*, 75 Ga. 110; *Roid v. Atlanta*, 73 Ga. 523.

<sup>5</sup>*Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. 602; *Dallas v. Ross*, 2 Tex. App. Civ. Case (Willson) § 279, p. 211.

The statute of limitations begins to run against an action to recover damages for the insufficient construction of a ditch in such a manner that the flow cuts the earth away backward up the stream by an adjoining owner, as soon as it becomes apparent that such will be the result of the action of the water, although his land is not yet affected. *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792.



keep in repair public roads, streets, bridges, and highways must be brought within three months after the damages have been sustained, does not apply to an action against the town for negligence in the construction and maintenance of drains whereby they were choked, causing sewage matter to overflow plaintiff's premises.<sup>5</sup>

**267. Form of action.**—All injuries which will necessarily accrue from the construction of the improvement must be recovered in the proceedings for the acquisition of the right of way.<sup>1</sup> But if no property of the complainant is taken, so that he is not a necessary party to the proceedings to acquire a right of way, he may resort to the common-law action to recover his damages; and if irreparable injury is inflicted on him and he has no adequate remedy at law, he may resort to a court of equity to enjoin the continuance of the injury.<sup>2</sup>

**268. Damages.**—If there is a taking of the property of a complainant he is entitled to recover its value; and, in case injury is caused to it, he is entitled to full compensation for the injury. If the statute prescribes what damages shall be awarded for injuries, it must be followed.<sup>1</sup> In case the statute is silent on the question the landowner is entitled to full compensation for the injuries inflicted on him,<sup>2</sup> and the only question is, How shall such compensation be ascertained? In

<sup>5</sup>*Sullivan v. Barrie*, 45 U. C. Q. B. 12.

<sup>1</sup>If the statute, in giving a municipal corporation power to improve a stream to prevent its overflow, provides a method of assessing damages, that method is exclusive, and an action at law cannot be maintained for the injury. *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320.

The Massachusetts drainage laws provide no remedy, where, for the purpose of draining certain land, a ditch is dug which throws the water onto lands of persons not parties to the proceeding. *Day v. Hulburt*, 11 Met. 321.

<sup>2</sup>The fact that, after the passage of an act for the drainage of a marsh, the stream through which the water flows is appropriated for canal purposes, the effect of which is that in case the marsh is drained away from the stream mill sites along its course will be injured, will not give the mill owners the right to injunction against such drainage,—especially where they have an adequate remedy at law to ascertain and collect any damage for injuries sustained by them. *French v. Kirkland*, 1 Paige, 117.

<sup>1</sup>Under § 384 of the local government act of 1874, the owners and occupiers of land injured by the construction of a ditch or drain authorized by the statute

are entitled to recover compensation, not only for past damages, but for all future and prospective damages. *Colac v. Summerfield* [1893] A. C. 187.

A statute empowering canal commissioners to hear and determine the claim of a certain person for damages sustained by the appropriation of land for the deposit of shale and stone taken from a river in the prosecution of work for draining certain marshes for private benefit will not give them authority to include damages for destruction of property by fire negligently set out by workmen engaged in prosecuting the work upon property of the claimant not taken. *People ex rel. Wasson v. Schuyler*, 69 N. Y. 242.

<sup>2</sup>*Massengale v. Atlanta*, 113 Ga. 966, 39 S. E. 578.

The measure of damages for injuries to lands caused by reason of the defective and unskillful construction of a sewer, so that in times of unusual freshet, storm and sewage water are discharged through the owner's private tributary sewer upon his lands, is the actual damages sustained at the time of the commencement of the action, and for continued or recurrent injury from the same cause he must seek relief by successive action. *Nashville v. Comar*,

case the injury is permanent<sup>3</sup> the measure of damages which most nearly works justice is the difference in the value of the property before and after the improvement was made.<sup>4</sup> In determining this difference in value the jury may consider all facts which tend to show a diminished value. Therefore, it may be shown that a well was drained.<sup>5</sup> When the injury is merely temporary the damages are to be arrived at by the best method practicable. If the injury is exclusively to real property which has a rental value the most accurate measure of damages is the diminished rental value during the continuance of the injury.<sup>6</sup> If the conditions are such that there has been

88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027.

A city which maintains a sewer which is inadequate to carry off the surface water in heavy rain storms is liable where neighboring property is thereby flooded so that the water enters the cellar and soaks a quantity of lime, which set fire to the building. *Martin v. Brooklyn*, 32 App. Div. 411, 52 N. Y. Supp. 1086.

A property owner, injured by the negligence of a municipal corporation in constructing or maintaining a sewer, may recover for all damages directly caused thereby; so that the corporation is liable for rents lost during the reasonable time occupied by the contractor in pumping out the water and filling the pit with earth after such a sewer has broken. *Vanderlice v. Philadelphia*, 103 Pa. 102.

If a city, upon constructing a new sewer, walls up an old one which had been in use, so that water and sewage are set back upon premises connected with it, the owner is entitled to recover for the injury to his estate, including loss of rents and reasonable compensation for his trouble and expense in respect to his property; but no recovery can be had for the expense of connecting the premises with the new sewer. *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 385.

<sup>3</sup> Damages to land are properly allowed on the theory that they are permanent, where a city sewer is constructed so as to empty into a stream of water flowing through the land, rendering it unwholesome, and the sewer was constructed with the intention that it should be permanent, and has been so treated ever since its construction. *Paris v. Alfred*, 17 Tex. Civ. App. 125, 43 S. W. 62.

*Bungenstock v. Nishnabotna Drainage*  
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*Dist.* 163 Mo. 198, 64 S. W. 149; *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882; *Cummings v. Toledo*, 12 Ohio C. C. 650.

The measure of damages the owner of a lot is entitled to recover from a municipal corporation by reason of the negligent construction of a drain, causing portions of such lot to fall in and be washed away, is the diminished value of the lot caused thereby; in estimating which the jury may take into consideration the expense reasonably incurred in the protection of the property, but not so as to charge the city with that which would restore the property to its former condition in addition to the diminished value caused by the original wrong. The annoyance and trouble caused the owner in reference to the wrong are not an element of damage in such a case. *Maysville v. Stanton*, 12 Ky. L. Rep. 586, 14 S. W. 675.

The measure of damages for injury to a lot owner by the settling of the lot and the cracking and breaking of the walls of his building in consequence thereof, necessitating their rebuilding, resulting from the bad condition or want of repair of a sewer, either by reason of negligent construction or failure to examine and inspect it, is the difference between the value of the building in the condition in which it was before it was so injured and its value immediately after the injury happened, and not the cost of repairs. *Toledo v. Grasser*, 12 Ohio C. C. 520.

<sup>4</sup> *Bickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343.

<sup>5</sup> *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287; *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236; *Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47; *Foncannon v. Kirksville*, 88 Mo. App. 279.

Where it appears that the lands of a riparian owner have been rendered

no injury to rental value, or if there are injuries in addition to those caused to rental value, then the damages are to be arrived at by determining, so far as possible, the actual injury done.<sup>7</sup> But a rule cannot be adopted which will result in double damages. Therefore, if the recovery is for permanent injury, the damages cannot be enhanced by showing special injury by loss of grass, loss of water, the expense of digging a pool, and the building of fences.<sup>8</sup> So, in an action against a municipal corporation to recover damages to an owner's dwelling house and premises from the overflow of water thereon, caused by an insufficient and carelessly constructed sewer, the assessment of damages is excessive where the same were made up from the loss sustained by injury to his realty, garden crops, and personal property, such as household goods, etc., and, in addition thereto, the decrease in the rental value of the premises during the period of the flooding.<sup>9</sup> One who purchases the premises after the erection of the

barren and unfit for human habitation on account of the discharge of the sewer outlet of a city into a stream thereon, evidence of the annual value and net income of the lands before the discharge of sewage into the stream is admissible as a basis for arriving at the rental value (the property never having been rented), in computing temporary damages. *Umscheid v. San Antonio* (Tex. Civ. App.) 69 S. W. 496.

<sup>7</sup> Plaintiff in a suit to recover for a nuisance caused by the defendant constructing and maintaining a sewer which empties into a street near plaintiff's dwelling house is not limited to the damage sustained by reason of depreciation in the rental value of the property, but is entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. *Randolf v. Bloomfield*, 77 Iowa, 50, 41 N. W. 562; *Champaign v. Forrester*, 29 Ill. App. 117.

The measure of damages for injury to the house and furniture of an owner from backwater from a sewer is the actual damages the movable goods suffered from the water, and such a sum of money in addition as shall equal the aggregate diminution of the rental value of the house to the date of bringing the action, less taxes, repairs, insurance, and rebate of interest. *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

The measure of damages for injuries to land by the discharge of sewage there-

on from the terminal of a sewer, where it does not appear that the owner and his family have suffered any considerable annoyance, and the work at the time of the trial had been so changed that it was no longer a nuisance, is the damage actually sustained during its continuance, the amount of which should be proved with reasonable certainty, and should not include any punitive damages, where the sewer was constructed in good faith, of good material, and in a skilful manner; and should not be based upon the loss of profits that might have been realized on sales of land that might otherwise have been made. *Jacksonville v. Lambert*, 62 Ill. 519.

In an action by an individual against a municipal corporation for injuries sustained by being deprived of the comfortable use and enjoyment of his home by the noxious odors arising from a sewer, where the same is discharged into an open ravine near his premises and allowed to stand in pools, there is no legally established rule as to the quantity of damages to be awarded, but it is the peculiar province of the jury, under appropriate instructions, to decide such cases; and the law does not recognize in the court the power to substitute its own judgment for that of the jury. *Litchfield v. Whitenack*, 78 Ill. App. 364.

<sup>8</sup>*Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. 62.

<sup>9</sup>*Indianapolis v. Huffer*, 30 Ind. 235.

structure which causes the injury can recover for only such injury as is received after he acquires title.<sup>10</sup> In case of injury to property, no damage can be recovered for injury to property rights, except those which accrue to the complainant; and therefore a township can recover only the cost of repairing and restoring its roads which are washed away, although a considerable portion of its area is flooded and damaged by the negligent construction of an artificial drain.<sup>11</sup>

**268a. For injuries to health.**—In case the drain is maintained in such a condition as to cause injury to health, that fact may form an element of recovery against the municipality.<sup>1</sup> Therefore, a city which drains sewage into a sewer not intended or suitable for such purpose, whereby it is discharged into the cellar of a property owner, is liable for the sickness and death of a child caused thereby.<sup>2</sup>

**268b. For injury to business.**—Damages for injuries caused by the negligent construction or maintenance of a sewer may include a recovery for injuries thereby caused to the complainant's business.<sup>1</sup> Thus, where, previous to the construction by the city of a sewer, plaintiff's premises, used for a lumber yard, were safe from overflow, and by the terms of its contract with the plaintiff, the city agreed so to construct such sewer as to prevent all overflows to plaintiff's lands caused by such sewer, the damage to the lumber caused by an overflow, and the expense of labor and machinery in pumping out water, thereby diminishing the damage to the lumber, are proper elements of damage.<sup>2</sup> One whose cellar is flooded with water in consequence of the negligence of the city may recover such damages as he has sustained which are the natural and probable consequences of the flooding, including the injury to goods and loss of the use of the cellar; but

<sup>10</sup>*Union Springs v. Jones*, 58 Ala. 654.

<sup>11</sup>*Sombra Twp. v. Chatham Twp.* 21 Can. S. C. 305, Reversing 18 Ont. App. Rep. 252.

<sup>1</sup>*Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Paris v. Alford*, 17 Tex. Civ. App. 125, 43 S. W. 62.

Loss of time from sickness caused by the wrongful emptying of a sewer near a private residence may be considered in estimating the damages to be awarded for the injury. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172.

But in North Carolina it is held that the liability of a municipality to damages for permitting a drainage ditch to become obstructed and filled with filth and offal so that the water flows onto adjoining land and causes sickness in the family of its owner is limited to the

injury to the property, and does not include the injury by sickness or death, nor by loss of time, increase of family expenses, nor by doctor's bills and medicines resulting from the sickness. *Williams v. Greenville*, 130 N. C. 93, 57 L. R. A. 207, 80 Am. St. Rep. 860, 40 S. E. 977.

<sup>2</sup>*Hughes v. Auburn*, 21 App. Div. 311, 47 N. Y. Supp. 235.

<sup>1</sup>*Allen v. Boston*, 159 Mass. 324, 34 Am. St. Rep. 423, 34 N. E. 519.

The damages for interruption of a business by flood water from a sewer cannot be limited to the mere rental value of the property during the time the business is idle. *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

<sup>2</sup>*Nashville v. Sutherland*, 94 Tenn. 356, 29 S. W. 228.

no damages can be recovered for injury to goods afterwards, which could have been avoided by taking proper measures or precautions.<sup>2</sup> The owner of goods damaged by the backing of water in a drain due to the negligent repair thereof by municipal authorities who had cut the drain may recover, in addition to the damage to the goods, any expense incurred in the preservation of the property from further injury by the water.<sup>4</sup>

### XIII. REPAIR AND MAINTENANCE.

**269. Duty to maintain drain.**— Where a drain has once been legally laid out there is a presumption that, if necessary at all, it must be kept in reasonable order, and the necessity and propriety of cleaning it out need not be determined by commissioners or jurors.<sup>1</sup> So long as the municipality undertakes to maintain and use the system it must use reasonable care to keep it in such a reasonable state of repair that it will not inflict injury on individuals.<sup>2</sup> The duty to keep sewers in repair involves a reasonable degree of watchfulness in ascertaining their condition from time to time.<sup>3</sup> While the municipal corporation is not an insurer of the condition of its sewers, it is bound to use ordinary care and skill in constructing and maintaining them; and this care and skill require it to take notice of the liability of timbers to decay from time to time, and to take such measures as ordinary care and skill indicate to guard against the sewer becoming unsafe because

<sup>1</sup>*Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509.

The measure of damages in an action against a municipal corporation for goods injured or destroyed by the backing of water in a drain is the diminution of the market value of the goods injured, and the market value of goods destroyed at the time of their destruction. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

<sup>4</sup>*Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

<sup>2</sup>*Barker v. Vernon Twp.* 63 Mich. 516, 30 N. W. 175.

<sup>3</sup>*Chicago v. Schen*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Burnett v. New York*, 36 App. Div. 458, 55 N. Y. Supp. 893; *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508; *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *Frostburg v. Dufty*, 70 Md. 47, 16 Atl. 642.

When a municipal corporation has evidently taken charge of the drainage

of certain lots, it is liable for damages resulting from failure to maintain its works in repair. *Fitzgerald v. Ottawa*, 22 Ont. App. Rep. 297.

A municipal corporation is bound to keep a sewer constructed by it, in the public streets within the corporate limits and exclusively under its control, in repair, and one outside the corporate limits, permitted to connect with the sewer, can compel it to abate a nuisance by making needed repairs thereon. *Kankakee v. Illinois Eastern Hospital*, 66 Ill. App. 112.

The owners and occupiers of houses and lots in the neighborhood, having been charged with the expense of the sewers, acquire a right to the common use of them, and a corresponding duty devolves upon the corporation to keep them in proper condition and repair. *New York v. Furze*, 3 Hill, 612.

<sup>2</sup>*McCarthy v. Syracuse*, 46 N. Y. 194; *Fleming v. Manchester*, 44 L. T. N. S. 517, 45 J. P. 423.

When a municipal corporation can

of the decay of timbers used in its construction.<sup>4</sup> A municipality is liable for damages to land and a building thereon, although below the level of the street, flooded during a rainy season in which there was an unusual and extraordinary fall of water which could not be carried off because of its failure to keep in repair a sewer which received the water of a natural stream, with the flow of which the grading of a street had interfered, and surface water accustomed to flow into the bed thereof, where the sewer was of sufficient capacity to have carried off all the water that fell had it been in proper repair.<sup>5</sup> When a state, for its own purposes, replaces a municipal sewer, leaving openings for connections from private property, it must use reasonable care in the management of the sewer so that injury shall not result to private individuals.<sup>6</sup> Officers who attempt to make repairs without authority are personally liable for injuries caused by them.<sup>7</sup>

The New York act of 1862 exempted the city of Brooklyn from liability for injuries caused by the negligence of its officers in permitting a sewer to become out of repair so that private premises were flooded. The court defends this statute upon the ground that the officers are not appointed by the municipality, but elected by the people.<sup>8</sup> It is, doubtless, within the power of the legislature to exempt a municipal corporation from all liability unless the provisions of the Constitution are violated, and the individual has no ground of complaint; but the mere fact that the officers are elected rather than appointed cannot be regarded as having any bearing upon the question. When one municipal corporation is incorporated into another the title to the sewers remains unchanged, and the right to control, regulate, and maintain them is vested exclusively in the corporation which erected them within its limits.<sup>9</sup> In altering a drainage ditch, on application to the freeholders the same notice must be given to the landowners as is required for laying it out originally; and an applicant requesting such change cannot have damages assessed to him therefor. In all other respects the statute must be strictly pursued.<sup>10</sup> The statute may im-

have notice of an obstruction in no other way, it must inspect its sewers from time to time, and is liable for damage resulting from its neglect so to do. *District of Columbia v. Gray*, 6 App. D. C. 314.

<sup>4</sup> *Pt. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

<sup>5</sup> *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

<sup>6</sup> *Ballou v. State*, 111 N. Y. 496, 18 N. E. 627.

<sup>7</sup> *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

It has been held that for violation of a statute making it the duty of the officers to make all needed repairs, the guilty individuals may be indicted and punished; but there is no civil remedy against them on behalf of persons injured by the default. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

<sup>8</sup> *Gray v. Brooklyn*, 50 Barb. 365.

<sup>9</sup> *Bloomfield v. Glen Ridge*, 55 N. J. Eq. 505, 37 Atl. 63, Overruling 54 N. J. Eq. 276, 33 Atl. 925, 928.

<sup>10</sup> *State, Scattergood, Prosecutor, v. Lord*, 26 N. J. L. 140.

pose upon the municipality the duty of maintaining and repairing sewers constructed by private individuals, if they are not exclusively for their own benefit.<sup>11</sup>

*Barry v. Lowell*:—An example of the length to which the Massachusetts court has gone in its endeavor to shield the municipal corporation from liability is afforded by *Barry v. Lowell*;<sup>12</sup> and the fine distinctions to which the court resorts for that purpose are well illustrated by comparing that decision with others from the same court. In *Child v. Boston*,<sup>13</sup> a plan was adopted for the drainage of a section of Boston, a portion of which was below high tide. The plan contemplated an emptying of the sewers at low tide, with a provision for an emergency outlet in case of storms during high tide. The right and duty to provide the drainage were conferred by statute, which was duly accepted. After plaintiff had connected his premises with the sewer, the emergency outlet became stopped up, and his property was injured in consequence. The court held that a municipal corporation is liable for permitting a sewer to become a nuisance to the estates of persons whose private drains enter into it, if the nuisance does not result from the original plan of construction, or could be avoided by keeping it in proper condition. The charge of sewers and drains is not an obligation imposed upon the city by legislative authority exclusively for public purposes and without its corporate assent. It was voluntarily assumed by the acceptance of the act conferring the power. In *Barry v. Lowell* the catch-basin of a sewer, with which plaintiff's property was not connected, became stopped up, and storm water flowed onto plaintiff's property. The court held that no action lies against a city for failure to keep a public sewer and cesspool in repair, whereby waste water accumulates and flows into the cellar of a neighboring house which is not connected by a drain with the sewer. This is put upon the ground that no action lies against a municipal corporation at common law for negligence, and no action has been given by statute. It was the duty of the adjoining landowner to protect his property from such flooding as best he could. The court distinguishes

<sup>11</sup> A drain constructed by the owner of a quarry for the purpose of carrying off surface water coming onto his land is not one constructed by the owner for his own profit within the meaning of a statute vesting in the local authority all sewers except those made by a person for his own profit. *Sykes v. Sowerby* [1899] 1 Q. B. 979.

A sewer made by a landowner for the sole purpose of draining houses owned by him, on his own land, is not made

for his own profit within the meaning of the public health act of 1875, providing that all sewers shall vest in and be under the control of the local authorities except sewers made by any person for his own profit. *Ferrand v. Hallos Land & Bldg. Co.* [1893] 2 Q. B. 135. 62 L. J. Q. B. N. S. 479, 4 Reports, 430, 69 L. T. N. S. 8, 41 Week. Rep. 580, 57 J. P. 602.

<sup>12</sup> 8 Allen, 127, 85 Am. Dec. 690.

<sup>13</sup> 4 Allen, 41, 81 Am. Dec. 680.

the *Child Case* upon the ground that in it the city ordinance required all the particular drains from private estates to be entered into the common drains of the city, and to be laid and constructed under the direction of the board of aldermen. The owner of a private estate had, therefore, in such case, no means of protecting it against the accumulation of water by the fall of rain, or by the melting of snow, if the city suffered its common sewer to be out of repair or negligently stopped up and obstructed. As the city assumed to regulate the whole subject, and compelled individuals to conform to and comply with its ordinances, it results by necessary implication that it made itself liable for whatever mischief or injuries necessarily result from any negligence or omission of duty on its part. But in the *Barry Case* the city never required plaintiff to drain water from his land, or connect with the common sewer, but left him to manage his estate as he should think most for his own interest or advantage. In *Allen v. Boston*,<sup>14</sup> however, it was held that the fact that premises injured by leakage from a street sewer are not connected with the sewer will not prevent a recovery for the injuries thereby caused if it was negligently constructed or maintained. Therefore, we have the court deciding that if the municipality requires a private citizen to connect his property with the sewer it is liable for injuries caused by permitting it to become out of repair; but if it does not do so, it is not liable for injuries caused by water flowing over the surface, but is liable if the water percolates through the ground. The *Barry* decision violates many of the principles and maxims of the law with reference to surface water, unless it can be regarded as merely a case of temporary clogging, and it is doubtful if it would be recognized as authority outside of Massachusetts, except in states whose law is derived from that source.

**270. Duty to keep unobstructed.**—One element in the maintenance of a drain in an effective condition is that it be kept free from obstructions. Therefore, it is the duty of the authorities in charge of a drain to see that it does not become so far obstructed that it will not perform the service for which it is constructed.<sup>1</sup> A city is liable to a

<sup>14</sup> 159 Mass. 324, 34 N. E. 519. A municipal corporation is liable for injury caused by its negligently permitting a sewer to be filled with dirt and rubbish and back the water through laterals into adjoining cellars. *Barton v. Syracuse*, 36 N. Y. 54, Affirming 37 Barb. 292.

<sup>1</sup> *Bates v. Westborough*, 151 Mass. 174, 17 L. R. A. 156, 23 N. E. 1070; *McCarthy v. Syracuse*, 46 N. Y. 194; *Evers v. Long Island City*, 78 Hun, 242, 28 N. Y. Supp. 825; *Boehm v. Bethlehem*, 4 Pa. Super. Ct. 385; *Savannah v. O'leary*, 67 Ga. 153; *Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

When a city is liable for certain damages arising from the stopping up or lack of repair of a sewer, the capacity



property owner for permitting a sewer to become so obstructed as to cause his premises to become overflowed, if the obstruction or inadequacy of the sewer was known, or could have been inferred, from the frequent recurrence of overflows and of the use of a boat on the street.<sup>2</sup> As seen in the preceding section, it is the duty of the municipality to exercise some vigilance to see that its drains do not become obstructed.<sup>3</sup> The municipality will be charged with notice which has been obtained by its officers.<sup>4</sup> But if it has not been negligent in regard to the obtaining of notice, it will not be liable for injuries caused by obstructions until it has received notice of them, and had an opportunity to remove them.<sup>5</sup> The municipality will be charged with notice of obstructions placed in the sewer by workmen under charge of its own officers.<sup>6</sup> Even though the duty of constructing or altering a sewer be a governmental one, relieving the municipality from liability for negligence in its performance, the duty of removing an obstruction left in the sewer is ministerial, and the municipality negligently permitting it to remain is liable for an injury resulting from it, causing the water to back up and flood the adjacent property.<sup>7</sup> The overflow of water from the sewer at times when there is no storm or other unusual condition is evidence of negligence on the part of the municipality.<sup>8</sup> The municipality is not liable for the wash of sand or dirt from a higher to a lower level in such a way as to clog the sewer, unless it permits the clogged condition to continue after having notice of it or being charged with notice by lapse of time.<sup>9</sup> The property owner

of the sewer is immaterial. *Markle v. Berwick*, 142 Pa. 84, 21 Atl. 794.

<sup>2</sup>*Louisville v. Gimpeel*, 22 Ky. L. Rep. 1110, 59 S. W. 1096.

It is sufficient notice to a municipality of the obstructed condition of a sewer where the superintendent of streets and the mayor are informed that a certain cellar is flooded with water and sewage. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

<sup>3</sup>It is the duty of a city to inspect its sewers as often as may be necessary to ascertain obstructions; but it need only act in this regard as would a person of ordinary care. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

<sup>4</sup>*Harper v. Milwaukee*, 30 Wis. 365.

<sup>5</sup>*Bannagan v. District of Columbia*, 2 Mackey, 285; *Schreiber v. New York*, 11 Misc. 551, 32 N. Y. Supp. 744.

A local board charged with the duty of cleansing sewers is not liable for injuries resulting from an obstruction which was unknown to it, and which could not have become known to it by

the exercise of reasonable care. *Hammond v. St. Pancras*, L. R. 9 C. P. 316, 43 L. J. C. P. N. S. 157, 30 L. T. N. S. 296, 22 Week. Rep. 826.

<sup>6</sup>*Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758.

<sup>7</sup>*Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510.

<sup>8</sup>*Talcoott v. New York*, 58 App. Div. 514, 69 N. Y. Supp. 360.

When a municipal corporation negligently permits its sewer to become clogged so that the water it should drain runs through a sidewalk grating into one cellar and thence into another, it is liable for damage done to the latter, the owners not having contributed to their injury. *Scroggie v. Guelph*, 36 U. C. Q. B. 534.

<sup>9</sup>*Beach v. Scranton*, 5 Lack. Legal News, 25.

So, a municipal corporation is not liable for injuries caused by the overflow of a sewer on account of its obstruction by sand washed in from the street during a heavy shower, where

may be estopped from claiming damages if he knew of the clogged condition of the sewer and took no steps to have it remedied.<sup>10</sup> And he may also be prevented from recovering in case the injury was caused in part by his own improper use of the drain.<sup>11</sup> Persons doing the work may be individually liable for injuries caused by the obstruction of the drain.<sup>12</sup> The municipality will be liable for injuries caused by its attempting to keep its sewers clean.<sup>13</sup> Mandamus will not lie to compel a township trustee to remove obstructions from a drain, where the provisions of the statute making it his duty to repair and remove obstructions from ditches or drains theretofore obstructed are unconstitutional and void.<sup>14</sup> A sewerage company having entered into an agreement with a local board whereby it leased the sewerage works of the town, covenanting to keep the works in proper order to admit the free flow of the sewage, will be restrained from permitting the sewage to remain in the sewers or drains, and from preventing its free flow.<sup>15</sup> Damages may be recovered for injury from a sewer being out of repair, although at some periods during the time referred to the sewer was not out of repair.<sup>16</sup> The duty to keep the drains unobstructed extends to the removal of obstructions from a catch-basin; but the city will not be liable for damages caused by the temporary clogging of a catch-basin which is not negligently constructed, and which is occasioned by a sudden overflow of water, if it did not have sufficient notice of the clogging to enable it to remedy the difficulty.<sup>17</sup>

**271. The making of repairs.—** Jurisdiction to make repairs to a

there is no proof of any prior obstruction, or of any defect in the construction of the sewer. *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53, Affirming 4 Hun, 637.

<sup>10</sup>*Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

<sup>11</sup>*Macon v. Small*, 106 Ga. 309, 34 S. E. 152.

<sup>12</sup>*Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

<sup>13</sup>Where a city in the performance of its duty to keep a stream, used as an open sewer, free from dirt and refuse, dug a ditch down to the center of the bed of the stream to a dam, and cut a V-shaped section out of the dam, it is a question for the jury, in an action of trespass to recover damage for injuries, whether such acts on the part of the city were not the proximate cause of the subsequent washing away of the dam by an unusual flood. *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609.

<sup>14</sup>*Tyler v. State*, 83 Ind. 563.

<sup>15</sup>*Nuneaton Local Board v. General Sewage Co.* L. R. 20 Eq. 127, 44 L. J. Ch. N. S. 561.

<sup>16</sup>*Cohen v. Belenot*, 1 Va. S. C. Rep. 82, 32 S. E. 455.

<sup>17</sup>*Knotman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

A municipal corporation will not be enjoined from maintaining a grating over the inlet from a street to a sewer, although the effect of it is, in time of storms, by reason of becoming filled with sticks and leaves, to cause the overflow of water onto adjoining property, and although some better device might have been adopted; where the effect of leaving the grating off would be to leave an open hole which would endanger the safety of the public. *Paine v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405.

drain does not authorize the construction of a new one or the material alteration of the plan upon which the old one was constructed.<sup>1</sup> Even where a local authority accepts a sewer, although it has no out-fall and is incapable of being used as a sewer, it cannot compel the frontagers to construct a new sewer; neither can it, upon their failure to do so, construct a sewer itself, and charge the expense to the frontagers.<sup>2</sup> But a drain commissioner has jurisdiction, under a petition for the location and assessment of a drain, to clean out an old drain or a water course which is part of the new drain to be established, and a separate proceeding is not necessary for that purpose.<sup>3</sup> If only a portion of the drain has been completed, it may be put in repair.<sup>4</sup> The plan upon which the repairs shall be made is within the discretion of the officer having charge of it,<sup>5</sup> and the courts will not interfere with his acts.<sup>6</sup> The proceedings may be instituted by petition of a person interested in the maintenance of the ditch.<sup>7</sup> And the entire

<sup>1</sup>*Deuyer v. Shonert*, 1 Ohio C. C. 73; *Wcaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958.

A county surveyor has no power under a statute authorizing him to repair public ditches to the full dimensions as required in the original specifications, to depart therefrom and construct a ditch wider and deeper than the original ditch was constructed or to complete an incomplete one or to correct what he deems to be faults in the original construction; nor can he justify his acts, in an action to set aside the assessment levied therefor, on the ground that part of the original proceedings were void, or collaterally attack those proceedings by proof that those who constructed the original ditch did not dig it as deep as the specifications required. *Romack v. Hobbs* (Ind.) 32 N. E. 307.

<sup>2</sup>*Hornsey Local Board v. Davis* [1893], 1 Q. B. 756, 62 L. J. Q. B. N. S. 427, 68 L. T. N. S. 503, 57 J. P. 612.

<sup>3</sup>*Strum v. Kelly*, 120 Mich. 685, 79 N. W. 930.

<sup>4</sup>*Artman v. Wynkoop*, 132 Ind. 17, 31 N. E. 468.

A county surveyor who is not authorized to repair a public ditch until "after the construction of such work" will not be enjoined from repairing such a ditch on the ground that the same had never been constructed according to the original plans and specifications, in the absence of an averment that the ditch has never been accepted, where 7 years has elapsed since its construction, after

which lapse of time it will be presumed that the work was duly accepted as required by law, and that in making the repairs the surveyor is acting within his authority. *Bunnell v. Peet*, 123 Ind. 436, 24 N. E. 146.

<sup>5</sup>The question whether a county surveyor, acting within the scope of his authority in repairing a public ditch, adopted the best or cheapest plan for its performance is not open to inquiry on appeal from an assessment made by him for the cost thereof; and, in the absence of statutory provision requiring him to advertise for bids, he may hire the work done by the day, if no fraud or collusion intervenes. *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

<sup>6</sup>The courts have no power to enjoin a county surveyor from repairing a public ditch by cleaning it out to its full dimensions, where he was served by an interested landowner with the statutory notice to make such repairs, and exercised the discretion committed to him by the law by determining that it was his duty to make such repairs, in the absence of a showing that he proposed to exceed his authority by doing something beyond the mere restoration of the ditch to its original dimensions. *Amoss v. Lassell*, 122 Ind. 36, 23 N. E. 525.

<sup>7</sup>The land of a single owner through which is constructed a ditch proposed to be cleaned and widened is "adjacent" thereto within the meaning of a statute requiring, as a condition precedent to the exercise of the power to clean and widen, the filing of a petition by

improvement may be completed under one proceeding.<sup>8</sup> The authority to make the repairs may be delegated to the township trustee.<sup>9</sup> All the proceedings necessary for the original opening of the ditch are not necessary.<sup>10</sup> The statutory notice must, however, be given.<sup>11</sup> The power conferred on county surveyors by a statute making it their duty to keep public ditches in repair, to certify the cost of such repairs as well as the amount of his own *per diem* to the county auditor, is not judicial, but merely a discretionary power, and such as the legislature has the power to confer upon administrative and ministerial officers.<sup>12</sup> The validity of the proceedings cannot be attacked by certiorari.<sup>13</sup>

**271a. Duty of individual to repair.**— The owner of a private drain is under no obligation to keep it in repair for the benefit of the municipality or of his neighbors.<sup>1</sup> But when a public drain is constructed and he is given a right to use it, the duty of keeping a portion of it in repair which adjoins his property may be imposed upon him as his share of the common burden.<sup>2</sup> Or he may assume the duty by contract.<sup>3</sup> If a duty is imposed upon land for the maintenance of a

"one or more" persons owning lands adjacent to the ditch to be cleaned: *Kent v. Perkins*, 36 Ohio St. 639.

"A township drain constructed as one continuous drain by the joint action of the township commissioners of several townships constitutes one drain, and but a single proceeding is necessary for widening and deepening it. *Tinsman v. Monroe County Probate Judge*, 82 Mich. 562, 46 N. W. 780.

"*Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600.

"*Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886.

The law contemplates, in providing a drain, that it will need to be kept in repair in order to preserve its usefulness, and does not, in requiring notice to adjoining owners when the ditch is originally opened, demand that notice of its repair or reopening shall be given in the same manner, in order to validate an assessment for such repair. *Ibid.*

A statutory provision that notice of the time and place of letting contracts for the work of widening or extending a drain be served upon every person whose lines are affected by such assessment does not require such notice to be given in a proceeding to clean out a drain. *Lenning v. Palmer*, 117 Mich. 529, 76 N. W. 2.

"A citation in a proceeding to widen a ditch need not be in the exact lan-

guage of the statute, where it contains the substance of its requirement and the party upon whom it is served is not misled. *Wolpert v. Newcomb*, 106 Mich. 357, 64 N. W. 326.

One properly served with a citation in a proceeding to widen a ditch cannot raise the objection of a defective service upon others who have granted the right of way and thereby waived all irregularities. *Ibid.*

"*State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553.

"*Wolpert v. Newcomb*, 106 Mich. 357, 64 N. W. 326.

"*Bangor v. Lansil*, 51 Me. 521.

"A landowner who connects his premises with the municipal sewer, and whose duty it is to repair the same if the city consents, is liable for any nuisance caused by want of such repair if the municipality has not refused to allow him to repair. *Cohen v. Belletot* (Va.) 32 S. E. 455.

A covenant for the use of a public drainage canal cannot escape from his obligations thereunder, because of the omission of the other parties to repair the lower portion thereof, since his covenant points out the remedy for such misuser of their franchise. *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787.

"*Britten v. Dunning*, 55 Mich. 158, 20 N. W. 883.

drain which passes through it, the charge is a permanent one in the nature of a servitude.<sup>4</sup> The duty prima facie rests on the occupant of the property, and not on the owner.<sup>5</sup> Some of the drainage statutes expressly provide for allotting to the landowner the portion of the drain which passes through his property, to keep it in repair. The duties imposed by law on county surveyors to reallocate county ditches to the various landowners for repair, and to inspect and accept completed allotments, although requiring the exercise of judgment and discretion, do not impose upon that officer a judicial function within the meaning of the constitutional prohibition against the imposing of judicial functions upon ministerial officers.<sup>6</sup> The notice required by statute to be given of the time and place of allotments must be given.<sup>7</sup> But failure to serve one person interested does not avoid the allotments as to others properly served.<sup>8</sup> Under the allotment the landowner cannot be required to enlarge the capacity of the drain to accommodate an additional flow of water.<sup>9</sup> But the allottee may be required to take up and relay the tiles of a tile drain so as to be level with the grade line established by the original specifications, to correct that fault in the original construction, where by reason of such fault the ditch failed to answer its purpose to drain all the land assessed therefor, although the ditch was accepted as completed and according to the specifications.<sup>10</sup> County commissioners as conservators of the public health, convenience, and general welfare have power to cause a ditch, lawfully established but in part imperfectly constructed on a line other than the prescribed line, by the owner of the land on which that part was located, and who was ordered by the commissioners to construct that portion, to be reconstructed under a statute authorizing them to exercise jurisdiction and cause an established ditch to be cleaned out, and to cause the ditch to be widened and deepened; and such owner, having neglected to perform in the prescribed

<sup>4</sup>*McCann v. Hinchinbrooke Twp.* Rap. Jud. Quebec, 8 B. R. 149.

<sup>5</sup>*Russell v. Shenton*, 3 Q. B. 449, 2 Gale & D. 573, 6 Jur. 1083, 11 L. J. Q. B. N. S. 289.

<sup>6</sup>*Ellis v. Steuben County*, 153 Ind. 91, 54 N. E. 382.

<sup>7</sup>*Hendricks County v. Trotter*, 19 Ind. App. 626, 49 N. E. 976.

But the allotment of a portion of a ditch to a landowner, to be by him kept in repair, is valid although no personal notice was given him of the time and place to hear objections thereto, as required by statute, where he voluntarily appeared and presented his objections. *Ibid.*

An assessment on land for the cost of repairing the owner's allotment of a public ditch is invalid and unenforceable where no notice by copy of the making of the allotment was served upon the owner as required by law, rendering the allotment without jurisdiction and subject to collateral attack. *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.

<sup>8</sup>*Hendricks County v. Trotter*, 19 Ind. App. 626, 49 N. E. 976.

<sup>9</sup>*Sharpe v. Hancock*, 7 Mann. & G. 354, 8 Scott N. R. 46, 13 L. J. C. P. N. S. 138.

<sup>10</sup>*Cochran v. White*, 151 Ind. 435, 51 N. E. 723.

manner the work so ordered done by him is in no position to complain of its proper completion by another under the orders of the commissioners, and the charging of the costs upon his land.<sup>11</sup> In case the allottee fails to perform his work, it may be taken up by a third person and the cost of it collected from the allottee.<sup>12</sup> The allottee will be liable for the injuries caused to third persons by failure to perform his work properly.<sup>13</sup>

**272. Duty as to sanitary condition.**— The maintenance of the sewer in proper condition involves to some extent its sanitary condition and its freedom from deleterious odors and gases. A drainage system certainly could not be tolerated which should gather filth and permit it to fester and decompose, spreading sickness and death through the atmosphere.<sup>1</sup> A municipal corporation is liable for the special damages sustained by a landowner from the odors arising from a sewer so constructed that during dry weather, when but little water is flowing in the natural creek forming the outlet, the solid matter in the sewage

<sup>1</sup>*Crawford v. McClure*, 30 Ohio St. 216. ment. *Fletcher v. White*, 151 Ind. 401,

<sup>2</sup>*Zimmerman v. Savage*, 145 Ind. 124, 51 N. E. 482.

44 N. E. 252.

A landowner failing to repair his share of a public ditch within the time specified in a statutory notice is liable for a tax imposed on account of the repairs being made by the trustee of the ditch, although the trustee agreed that the landowner might complete the repairs after the time admitted by the notice had expired. *Davison v. Campbell*, 28 Ind. App. 688, 63 N. E. 779.

A personal judgment may be recovered against a landowner for the cost of repairing his allotment of a public ditch, under a statute which provides that the claim when placed on the tax duplicate shall be collected as other taxes, and also that, independent of this method of collection, the amount may be recovered in an action before a justice of the peace whose jurisdiction does not extend to foreclosures. *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.

A landowner to whom was allotted a portion of a public ditch to keep in repair, and who stood by and received benefit from the repairs, is not entitled to enjoin the collection of the cost of making such repairs upon his failure so to do because the trustee of the wrong township, under a misapprehension of his duty, gave him notice to do the work, and afterwards, upon his failure to comply therewith, repaired the allot-

<sup>13</sup>The owner of land across which a drain passes onto adjoining land is liable if, by reason of the poor repair of the portion of the drain which crosses his premises, any of the sewage escapes and flows onto the adjoining land, even though he did not know of the existence of the drain, it being his duty to keep the sewage, which he was himself bound to receive, from passing from his own premises to the adjoining premises otherwise than through the drain. *Humphries v. Cousins*, L. R. 2 C. P. Div. 239, 46 L. J. C. P. N. S. 438, 36 L. T. N. S. 180, 25 Week. Rep. 371.

<sup>1</sup>*Lindsay v. Sherman* (Tex. Civ. App.) 36 S. W. 1019.

A municipality may be liable to one living in contiguity to a defective sewer that it has negligently permitted to become a nuisance, for illness caused by sewer gas, although there is no direct discharge of sewage upon the lands of the injured party; but exemplary damages are not recoverable. *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

A municipal corporation is liable for negligence if, having the care of an open sewer, it allows refuse and impure matter to accumulate in the stream and upon its banks, obstructing the flowage and emitting poisonous odors, to the injury of health and property. *Orens v. Lancaster*, 193 Pa. 436, 44 Atl. 559.

accumulates there, and does not flow off.<sup>2</sup> The construction of a wooden sluice to carry the contents from a sewer so far as constructed, which, according to the plan, is to be a main or trunk sewer, by reason of which deadly fumes and gases are emitted, causing a nuisance to adjoining property, is not a mere exercise of discretion on the part of officials, but a neglect of duty, for injury arising from which the municipal corporation will be liable; nor is it within the terms of a statute providing that the municipal corporation will not be liable for any misfeasance, upon the part of the officers of the city, of any duty enjoined upon them as officers of government; because the primary duty to keep the sewer in condition is imposed upon the municipal corporation.<sup>3</sup> But, from the fact that it cannot be absolutely known what is the source of a particular disease, or what sanitary precautions might or might not have averted it, this doctrine cannot be carried too far. It is not possible to throw upon the municipality liability for illness that may result to the inhabitants along the route of a sewer merely because it was not in the best sanitary condition.<sup>4</sup> A statute imposing upon a district board the duty of keeping its sewers so as not to create a nuisance does not impose an absolute duty, but only requires them to use reasonable care and diligence; and they are not liable for a nuisance created by the sewer by the emission of noxious odors in the absence of negligence on their part.<sup>5</sup> Indictment

<sup>2</sup>*Bloomington v. Murnin*, 36 Ill. App. 647.

A municipal corporation emptying its sewers into a stream is liable for injury inflicted by its negligently allowing offensive and injurious odors and smells to issue from the polluting substances discharged. *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 838.

A municipal corporation cannot acquire a prescriptive right to discharge a sewer into a ravine so as to be of great injury to a property owner residing in the vicinity, on account of noxious odors. *Litchfield v. Whitenack*, 78 Ill. App. 304.

<sup>3</sup>*Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182.

<sup>4</sup>A city is not liable in damages for disease suffered by an individual in consequence of the neglect of the city authorities to observe proper sanitary precautions in the construction or maintenance of a sewer system. *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389.

So, a municipal corporation is not liable for injuries to an owner's premises

abutting on a street outside the corporate limits, from noxious smells caused by the construction by the municipality of an open drain in the street, through which the waters of a stagnant pond, city sewage, and polluted water from woolen mills within the city limits are made to flow in a direction other than the natural flow or from interference with the use of the highway, in the absence of anything to show that the ditch is a permanent one, or that it is to be kept open, or that there was a lack of diligence, skill, or care in its construction. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

No such imminent danger as will justify interference by injunction with the construction of proposed sewers is shown by the fact that fecal matter may possibly settle in such sewers, and that the gas generated therefrom will escape and operate as a nuisance, because of present insufficiency of the water supply to force the sewage through them. *Johnson v. Arondale*, 1 Ohio C. C. 229.

<sup>5</sup>*Bateman v. Poplar Dist. Bd. of Works*, L. R. 37 Ch. Div. 272, 57 L. J.

will lie against the councilmen of a municipal corporation for a nuisance existing by reason of the filthy condition of a sewer, when the power to abate nuisances vested exclusively in them.<sup>6</sup>

*Fuchs v. St. Louis*:—A very interesting case arose in Missouri involving the duty of the city with respect to gases in the sewer. A fire had caused some petroleum to flow into the sewer, and high water in the river into which the sewer emptied prevented its escape. The weather was warm, and gas formed, which exploded causing injury, for which the suit was brought. On the first hearing the supreme court held that the fact of the explosion of a sewer is itself evidence of negligence in its care;<sup>7</sup> that the facts that a city makes no attempt to remove the covers to the vents, manholes, or inlets to a public sewer, or to free the outlet of such sewer, blocked by high water, for four days after a large quantity of inflammable oil has been turned into such sewer by the engineer of the fire department of the city while attempting to extinguish a large fire attracting general public attention, and that the sewer runs under large buildings in a populous part of the city, are evidence of negligence on the part of the city in its care of the sewer; and that a jury must be permitted to pass upon the question of due care by a municipal corporation which in midsummer turns a large quantity of crude petroleum into a public sewer, the natural outlet of which is obstructed, and leaves it four days without taking any precaution to avoid a resulting explosion. But when the case reached the court the second time, it held that the mere fact of an explosion of gases in a sewer is not sufficient to charge the municipality with liability for the injury caused thereby;<sup>8</sup> that the explosion of gases in a sewer, to the injury of abutting property owners, cannot reasonably be anticipated from the fact of the escape of a quantity of crude petroleum into it, so as to charge the municipality with negligence in failing to provide for the escape of the gases generated thereby; that a city is not bound to open vents and manholes leading to its sewers, to permit the escape of gases which are generated therein, as a means of avoiding an explosion, although it may have notice that a quantity of crude petroleum has found its way into the sewer

Ch. N. S. 579, 58 L. T. N. S. 720, 36 Week. Rep. 501.

The public health act of 1891, declaring foul water courses or drains to be a nuisance to be summarily dealt with, does not apply to nuisances arising from defects in the sewers of London, which are vested in the county council, but applies only to nuisances arising from private sources. *Fulham v. Lon-*

*don County* [1897] 2 Q. B. 76, 66 L. J. Q. B. N. S. 515, 76 L. T. N. S. 691, 45 Week. Rep. 620, 61 J. P. 440.

<sup>6</sup>*Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921.

<sup>7</sup>*Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508.

<sup>8</sup>*Fuchs v. St. Louis*, 167 Mo. 620, 57 L. R. A. 136, 67 S. W. 610.



as a result of a fire at the refinery; that no recovery can be had against a city for injuries caused by an explosion in a sewer, which is alleged to have resulted from negligently permitting petroleum to be turned into it, where the evidence shows that the explosion might have resulted from another cause, and there is nothing to show that it did not do so; and that, under an allegation of negligence on the part of a municipality in failing to prevent the formation and accumulation of gases in a sewer, and in failing to open the vents to permit their escape, which resulted in an explosion, evidence is not admissible that the explosion might have been prevented by the use of ventilating apparatus.

§ 73. **Duty of public to pay for repair.**—The question as to how far the cost of maintaining a drainage system must be a public charge or may be assessed upon abutting property owners depends for its answer, to some extent, upon the character in which is viewed the right to require the abutting property owners to pay for the drainage in the first instance. The courts which adhere to the benefit theory hold that the renewal and maintenance of drains do not confer sufficient benefit on abutting owners to justify charging them with the cost.<sup>1</sup> On the theory that the drain is for the benefit of the district which constructed it, there would, however, seem to be no difficulty in holding that the district was equally benefited by the maintenance of the drains as by the original construction, and that its residents should bear the burden necessitated thereby. There is no doubt that the expense of maintaining the sewers may be made a general charge, and so far as the supervision of them is part of the work of the municipality it should be made so.<sup>2</sup> The statutory duty imposed upon township trustees to keep drains and ditches in repair and free from obstructions, and to pay for the same out of the general township funds, is not unconstitutional, but is a valid and effectual provision, notwithstanding a further provision in the statute—that, in order to

<sup>1</sup>A sewer, having been constructed at the expense of benefited property owners, and having become a part of the general sewage system, confers benefits which are general, and the expense of maintaining it must be provided by general taxation. Expense of reconstruction cannot be assessed "by the frontage rule." *Erie v. Russell*, 148 Pa. 384, 23 Atl. 1102.

Although first built at the expense of the municipality, the expense of reconstructing a sewer cannot be assessed upon abutting property, as no special

benefit is conferred thereby. A sewer once constructed gives to the abutting property owner every benefit and advantage that a sewer gives him over the general public. The benefits thereafter derived, either from repairing or reconstructing the same, are only such as he enjoys in common with the public. *Re West Third Street Sewer*, 187 Pa. 565, 41 Atl. 476; *Re Williamsport Sewers*, 18 Pa. Co. Ct. 670.

<sup>2</sup>*Scars v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

reimburse that fund, he is authorized to apportion and assess the cost thereof upon the lands benefited—has been declared unconstitutional and void because no provision is made for a hearing of the landowners affected.<sup>3</sup> The part of an act making it the duty of county surveyors to keep public ditches in repair at public expense, which requires the issuing of warrants upon the county treasurer for the amount of such repairs, is a sufficient appropriation made by law within the meaning of the constitutional provision prohibiting the paying out of money from the county treasury except in pursuance of an appropriation made by law.<sup>4</sup>

**274. Assessment of abutting property.**—As stated in the preceding section, some of the courts regard the maintenance of a sewer after it has been completed, as a public charge the expense of which cannot be assessed upon the abutting property. But the better rule is that the district which was sufficiently benefited to be charged with the cost of construction is sufficiently benefited by the maintenance so that a special assessment can be levied for that purpose. This is, of course, true where the old sewer has become so insufficient as to be of no further use and must be replaced by a new one.<sup>1</sup> There is no constitutional objection to requiring the local district to maintain the drainage system.<sup>2</sup> But the question of the right to make the assessment depends upon statutory authority. The state may make the maintenance a public charge, or it may place the burden on the local district. If the attempt is made to make a special assessment for the cost, authority for such proceedings must be found in the statute.<sup>3</sup> To

<sup>1</sup>*Ingerman v. Noblesville Twp.* 90 Ind. 393.

<sup>2</sup>*State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553.

<sup>3</sup>*State, McKevitt, Prosecutor, v. Hoboken*, 45 N. J. L. 482.

<sup>4</sup>The imposition of the cost of maintaining public sewers by special assessment upon property owners who have already been assessed for the cost of their construction, in case they make use of them, does not deprive them of property without due process of law, but the question is one of public policy for the legislature, since they receive a special benefit from the construction of the sewer in the privilege of discharging their private sewers into it, even if they are not entitled to the free use of it. *Carson v. Brockton Sewerage Comrs.* 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860; *Briggs v. Union Drainage Dist. No. 1*, 140 Ill. 53, 29 N. E. 721; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886; 164,

*McClesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

<sup>1</sup>A sewer constructed in a street in which one had formerly been laid is a "new sewer," within a charter provision authorizing an assessment for a new sewer to be levied upon the property benefited thereby, where the second sewer consists of a new and larger pipe, which is laid deeper, and not in the same place in the street. *Denise v. Fairport*, 11 Misc. 199, 32 N. Y. Supp. 97.

A municipality empowered to assess only for laying main sewers, not for maintaining or repairing them, the property served or benefited thereby, cannot levy an assessment on property upon the line of a sewer built by private persons and conveyed to it, either for the expense of relaying it at a different grade to accommodate an extension, or of constructing the extension. *Boyd v. Brattleboro*, 65 Vt. 504, 27 Atl.

authorize the assessment, however, the lands upon which it is laid must be so situated as to receive a benefit from the improvement,<sup>4</sup> and therefore, where a culvert constructed as part of a street improvement at the expense of all the lot owners abutting on the street breaks down, the property cannot be assessed for the cost of a new one to replace it merely because it abuts on the street, if it does not abut on the culvert.<sup>5</sup> The fact that it was not assessed for the construction of the drain is immaterial.<sup>6</sup> The assessment cannot be actually laid without giving the taxpayer notice and an opportunity to be heard.<sup>7</sup> But any notice which the legislature designates is sufficient, provided the landowners are not subjected to unreasonable inconvenience and embarrassment.<sup>8</sup> In making the assessment lands not benefited need not be assessed, although they were assessed for the original improve-

The right to enforce the collection of the cost of repairs of a public ditch against lands, under the law existing at the time a contract therefor was entered into and part of the work done, is not lost by a repeal of that law, by virtue of a general law providing that repealed laws shall remain in force for the purpose of sustaining actions to enforce liabilities incurred thereunder, and also by the constitutional provision forbidding the passage of any law impairing the obligation of contracts. *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771.

A municipal corporation cannot raise money for the cost of operating or paying running expenses of a drainage system and pumping works connected therewith, after the same have been constructed, by special assessment, where the statute under which the same was constructed does not confer that power. The words "maintain" and "keep in repair" are used in such statute synonymously, and do not authorize the levying of money by special assessment for other purposes than to keep such system in repair. *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

\*The commissioners of sewers cannot assess a person in respect to drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer that the stopping of the sewer cannot possibly throw back the water so as to injure his premises, and if he is not, and it does not appear that he is likely to be, benefited by the work done upon the sewer. *Masters v. Scroggs*, 3 Maule & S. 447.

But lands in an incorporated village may be assessed by the trustees of a township in which the village is situated, for the cost of cleaning and widening a ditch within the township but outside of the village limits, under a statute authorizing the township trustees to construct, clean, and widen "any ditch, drain, or water course within such township," and impose the cost on adjacent lands, when the lands, though within the village, are adjacent to, and benefited by, the ditch. *Kent v. Perkins*, 36 Ohio St. 639.

<sup>4</sup>*Watterson v. Bradley*, 43 Ohio St. 456, 3 N. E. 372.

<sup>5</sup>*Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510.

<sup>6</sup>*Campbell v. Dwiggins*, 83 Ind. 473.

<sup>7</sup>*Wearer v. Templin*, 113 Ind. 298, 14 N. E. 600; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958.

A provision in a drainage law authorizing county surveyors to repair public ditches and assess the cost thereof upon the lands adjudged by the court to have been benefited by the original construction in proportion to that assessment is not unconstitutional as a taking of property without due process of law, because no notice is required to be given landowners of the intention to make repairs or assessments, where notice of the assessment, after it is made, is provided for, and opportunity is given to appeal therefrom to a court having jurisdiction to determine whether the amount expended was in fact for repairs and whether the repairs were made in good faith and according to law. *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7.

ment.<sup>9</sup> And an assessment is not invalid because another tract through which the ditch runs was not assessed, where the statute provides that the assessment for repairs shall be levied on lands assessed for the original construction, and the land in question was not so assessed.<sup>10</sup> Work which benefits the whole district cannot be assessed against the abutting property only.<sup>11</sup> A township trustee is not estopped from making an assessment on lands benefited by repairs to a public ditch because eighteen months elapsed from the completion of the work to the making of the assessment, in the absence of any statutory provisions as to time, where the cost of such repairs have been paid out of the public treasury and it does not appear that the work was not necessary or that the trustee acted in bad faith; and the rights of parties have not been changed or those of third parties affected by the delay.<sup>12</sup> The question to be reviewed by the courts may be limited to the cost of the repairs and what amount should be assessed on each parcel of land affected.<sup>13</sup> But such limitation does not prevent an examination by the court of the questions which are necessary to give the commissioners jurisdiction of the proceedings.<sup>14</sup> The court cannot make and levy an assessment for annual benefits upon lands in a drainage district for keeping the improvements therein in repair, where the statute under which the district was organized requires such assessments to be made by a jury and nowhere authorizes the court to do so without a jury,—especially where such assessment is made without notice to the landowners, and no opportunity is given them to be heard in the matter.<sup>15</sup> Objections to the assessment must be raised

<sup>9</sup>*Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59.

A statute requiring county surveyors, whose duty it is to repair public ditches, to "apportion and assess the costs of such repairs upon the lands adjudged by the court benefited by the construction of the ditch in like proportion as benefits were assessed against said lands for the construction of said ditch," will be construed as authorizing the assessment of lands only in proportion as they will be benefited by the repairs, and not on all the lands originally assessed in the same relative proportion to such assessment regardless of the benefits accruing by the repairs, as the latter interpretation would render the act unconstitutional as a taking of private property by law without compensation. *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558.

<sup>10</sup>*Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

<sup>11</sup>The erection of a stone wall and brick arches for the escape of sewage along the line of an existing timbered way or race which had caved in, rendering the street impassable, is the construction of a sewer, and the tax therefor should be levied and collected in the manner appropriate to such an improvement and with a view to the district drained by it, and cannot be laid wholly on the property fronting on the street as a local street improvement. *Clay v. Grand Rapids*, 60 Mich. 451, 27 N. W. 596.

<sup>12</sup>*Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760.

<sup>13</sup>*Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83; *Wisman v. McGee*, 112 Ind. 600, 14 N. E. 375; *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553.

<sup>14</sup>*Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50.

<sup>15</sup>*Robeson v. People*, 161 Ill. 176, 43 N. E. 619.

in the proceedings themselves and cannot be made the subject of collateral attack, so far as there is provided a mode for making them in that way.<sup>16</sup> Equity will afford relief where the drainage proceedings were invalid and conferred no benefit on the complaining party.<sup>17</sup> But it will not interfere if there is an adequate remedy at law.<sup>18</sup> Nor will it interfere where the objection sought to be raised might have been brought forward and decided in the drainage proceeding.<sup>19</sup> An assessment is not void *in toto* because the officers exceeded their authority in making the ditch wider than the specifications called for.<sup>20</sup> But if, under the guise of a repair, the authorities depart from the line of the original ditch and construct a new one, the assessment is invalid.<sup>21</sup> Mere irregularities will not avail to defeat the as-

<sup>16</sup> Upon appeal by a landowner from an assessment for the repair of a public ditch by the county surveyor under a statute limiting the questions to be tried on appeal to a determination of the cost of the repairs and what amount thereof should be assessed against the owner's land, it is proper to determine whether his land is subject to any assessment for such repairs; and hence the validity of such an assessment cannot be collaterally attacked on the ground that the land was not subject, under the statute, to any assessment. *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

A landowner cannot maintain a collateral suit to be relieved from an assessment for the repair of a public ditch on the ground that the township trustee performing the work exceeded his statutory authority by proceeding, under the guise of repairing, to widen and deepen the ditch beyond its original dimensions, although such a defense might have defeated the assessment, at least to the extent of the excess of cost created by such unauthorized work, in case of an appeal from the assessment. *Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12.

<sup>17</sup> Equity will relieve a landowner from the payment of an assessment for the repair of a public ditch, on the grounds that the officer whose duty it was to make such repairs had exceeded his authority by enlarging the ditch beyond its original dimensions and that the proceedings establishing a connecting ditch which furnished an outlet for the repaired ditch had been declared void, rendering the repaired ditch valueless and

the repairs of no benefit, where such landowner had no knowledge, and was not charged by law with knowledge, of its worthlessness until after the expiration of the time to appeal from the assessment. *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828.

<sup>18</sup> *Goff v. McGee*, 128 Ind. 394, 27 N. E. 754.

<sup>19</sup> A railroad company cannot enjoin the collection of an assessment upon its right of way for the cost of repairing a public ditch upon the ground that the ditch, as originally established and constructed, was not rightfully located upon its right of way, and that no right existed to go upon such land for the purpose of making repairs. *Davis v. Lake Shore & M. S. R. Co.* 114 Ind. 364, 16 N. E. 639.

An injunction will not lie to restrain the collection of an assessment against a railroad right of way for the cost of repairing a public ditch by a county surveyor, who is invested with the statutory power to repair public ditches and to assess the cost thereof against the lands originally assessed for its construction, and from whose assessment the right of appeal is given, unless it is affirmatively shown that the acts of the surveyor are not merely erroneous, but absolutely void and without any authority. *Terre Haute & L. R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429.

<sup>20</sup> *Romack v. Hobbs*, 13 Ind. App. 138, 41 N. E. 391; *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486; *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

<sup>21</sup> *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822.

assessment.<sup>22</sup> An assessment on land for the repair of a public ditch by a county surveyor under a statute making it his duty to repair such ditches is not void because the ditch was never completed according to the original specifications, since the propriety of making such repairs is committed by the statute to the discretion of that official and his decision is final.<sup>23</sup> Drainage commissioners of drainage districts, organized under the Illinois farm drainage act, have the right to use funds on hand to repair work already done or to more fully protect the lands of the district; but, if there are no funds on hand, they must first make a new tax levy before contracting additional indebtedness. They cannot legally make an assessment to meet a prior indebtedness.<sup>24</sup> A landowner may estop himself from objecting to work which was done, by standing by and permitting the work to go forward without objection. But he will not be estopped to raise the objection if the proceedings were void.<sup>25</sup>

#### XIV. PRIVATE CONNECTION WITH DRAIN.

**275. Right of taxpayer to use drain.**— Since drains are constructed, in part at least, for the accommodation of the owners of land which abut upon them, and largely at their expense, the question arises as to their right to make use of the drains after they are finished. There certainly is a strong equity in favor of one who has been charged with the cost of a drain that he be permitted to enjoy the benefit of it.<sup>1</sup> On the other hand, there are stronger rights on behalf of the public. A drain is constructed for the general welfare, and some representative of the public must have general supervision of it in order that it may be preserved for the purpose for which it was intended. If no rules and regulations were made and enforced for the enjoyment of the drain, it would not long be preserved. So, for the general good, the individual must submit to reasonable rules and regulations, which may be promulgated by the proper authority. Such regulations must, however, be reasonable and such as may be complied with by all. There is, therefore, no right on the part of the landowner to connect his property with the drain, except under such regulations as

<sup>22</sup>*Lanning v. Palmer*, 117 Mich. 529, *Morrow v. Geeting* (Ind. App.) 37 N. 76 N. W. 2. E. 739.

<sup>23</sup>*Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

<sup>24</sup>*First Nat. Bank v. Union Dist. No. 1*, 82 Ill. App. 626.

<sup>25</sup>*Deuyer v. Shonert*, 1 Ohio C. C. 73;

<sup>1</sup>In *Barton v. Syracuse*, 37 Barb. 292, it is said that there is something very like a contract, to be implied from the construction of a sewer at the expense of adjacent property, that it may be

the public may provide.<sup>2</sup> Even though he makes a connection with the drain secretly, he acquires no right thereby.<sup>3</sup> And a license to use the drain will be limited to the purpose intended.<sup>4</sup> And rights acquired by prescription will be strictly limited to the use which has been made.<sup>5</sup> A landowner who attempts to make use of the drain without right will be enjoined from so doing.<sup>6</sup> Therefore, drainage commissioners may enjoin the act of one outside the district in connecting a ditch so as to divert the water of a natural drain or slough from its natural course, and cast it into the ditch of the district, the

used to drain the property thus charged with its construction.

<sup>2</sup>*Baxter v. Tripp*, 12 R. I. 310; *People ex rel. Caldwell v. Wild Cat Drainage Dist.* 181 Ill. 177, 54 N. E. 923.

The fact that highway drains constructed for the purpose of carrying off surface waters were paid for by general taxation does not give the taxpayers a right to mingle their sewage with the surface waters, and the granting of such right confers a benefit for which grantees are liable to assessment. *Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557.

It is no defense to a prosecution, under the statute for obstructing a public ditch, that the obstruction was caused by the connection by a landowner of his private drain therewith. Such connection cannot be made if the effect is to obstruct or destroy the ditch constructed under the statute as a work of public utility. *Toops v. State*, 92 Ind. 13.

The right to conduct into a public ditch water falling or flowing by natural means upon lands assessed for the construction thereof, by means of lateral drains, does not extend to lands not assessed therefor, nor authorize the owner of assessed lands to collect, by artificial means, water from lands not so assessed, the natural outlet of which is in another direction, and discharge the same into the ditch in such quantities as to overtax the capacity thereof and overflow lower lands. *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.

<sup>3</sup>*Toledo ex rel. Gates v. Brown*, 2 Ohio N. P. 45.

<sup>4</sup>*Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557.

An abutting owner who, by consent of the public authorities and by the payment of half the cost of a sluiceway across the highway, is permitted to empty household drainage into an open sewer, acquires no property right in the street entitling him to damages, when,

on the closing of the open sewer as offensive and his neglect after notice to connect with a new closed sewer in the highway, the officials cut off his drain. *Camp v. Barre*, 66 Vt. 563, 29 Atl. 1022.

<sup>5</sup>A township does not acquire a prescriptive right to discharge its sewage into the sewers and water course of an adjoining township by the fact that several of its householders have discharged their sewage in such manner for the prescriptive period, as the rights thereby acquired are personal to such householders. *Kingstown v. Blackrock Twp.* Ir. Rep. 10 Eq. 160; *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

<sup>6</sup>A landowner will be enjoined from constructing private drains on his land, and connecting them with a public ditch having its head on his land, thereby draining therein water from a portion of his farm not naturally flowing in that direction, and overtaxing the capacity of the public ditch to the injury of a lower proprietor, where the ditch was constructed with a limited capacity, calculated to drain only a small portion of his land immediately surrounding its head, and the amount of the assessment therefor was made accordingly, although assessed on the entire tract. *Drake v. Schoenstedt*, 149 Ind. 90, 48 N. E. 629.

An injunction will lie to prevent one whose lands were not affected by the construction of a public ditch from cutting a ditch on his own land and that of another through a natural elevation so as to turn the waters of a large swamp partly on his land with an outlet, to which the waters flowed in a well-defined channel, in another direction, into such ditch, the effect of which would be to overtax its capacity and submerge and injure an owner's land. *Pence v. Garrison*, 93 Ind. 345.

effect of which will be to drain, not only his own land, but water coming from other lands, which would not, by virtue of his connecting with the drainage ditches, permit the district to include such lands in its assessment roll.<sup>7</sup> This rule imposes no undue hardship upon the individual, because he has all the rights of the public generally, and the interests of the public demand that regulations be adopted which will permit a use of the drain; so that, although he has no absolute rights as an individual, his rights are fully protected as one of the public. So much is this so that the increased difficulty in the use of a sewer which will be caused by a change in the street grade may be taken into account in awarding the damages for such change.<sup>8</sup> Abutting landowners may take advantage of the ditches constructed for road drainage which follow the natural course of drainage, to rid their property of surplus water, if they do not inconvenience the public or injure its works.<sup>9</sup> But such drainage may be regulated by statute.<sup>10</sup>

<sup>7</sup>*Dayton v. Rutherford*, 29 Ill. App. 31. Affirmed in 128 Ill. 271, 21 N. E. 198.

<sup>8</sup>*Chicago v. Jackson*, 88 Ill. App. 130. But the owner of private property in a drainage district has no such vested property right in the sewers of the district as to entitle him to claim protection of a court of chancery, by injunction, to prevent one outside of the district from connecting drains from his premises with the district sewers under a license from the corporate authorities of the district, merely because he has paid special assessments for the cost of such sewers, in the absence of any showing that his private property, or the sewers for which he has been assessed as a special benefit, will certainly be materially diminished in value by reason of the connection. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761, Affirming 37 Ill. App. 326.

<sup>9</sup>*Thom v. Dodge County* (Neb.) 90 N. W. 763.

But a landowner has no right by means of artificial ditches to drain his land into a highway ditch in a different direction than the natural flow, so as to increase the flow of water upon the land of an adjacent owner; and the fact that the latter consented to allow the highway commissioners to drain the highway over his land by means of a tile drain is no defense. *Larkin v. Lamping*, 44 Ill. App. 649.

And highway commissioners in the exercise of their powers to take charge of, keep in repair, and improve highways,

may prevent an owner of land adjoining a highway from diverting the surface water upon his land from its natural channel, and draining it upon the highway out of its natural course, if, in their opinion, the increased flow of water resulting thereby would render a ditch along the highway more dangerous for public travel. *Davis v. Highway Comrs.* 143 Ill. 9, 33 N. E. 58, Affirming 42 Ill. App. 422.

<sup>10</sup>A clause in a statute which authorizes highway commissioners to remove obstructions and fill up ditches in a highway, unlawfully placed therein by others, "excepting ditches necessary to the drainage of an adjoining farm emptying into a ditch upon the highway," does not authorize the adjoining owner to turn water from its natural course from his land into a highway ditch, and does not prevent the commissioners from filling up such ditch when used for that purpose. *Davis v. Highway Comrs.* 143 Ill. 9, 33 N. E. 58.

A remark made by a landowner adjoining a highway, to one of the highway commissioners, that if the latter put a culvert opposite his land he would have to throw up an embankment, is not due notice of his intention to dig a drain from his land into the highway for the purpose of draining such land, within the proviso in a statute making it unlawful to construct ditches or turn water into a highway, that the act should not apply to "any person through whose land a public road shall pass, who shall desire to drain his land and shall



**276. Compulsory connection with drain.**—The necessity of adequate drainage is so intimately connected with the public health that the municipality, under statutory authority, has the right to compel the connection of houses within its limits with public sewers which are conveniently located.<sup>1</sup> And the property owner is not entitled to notice and opportunity to be heard before the passage of an order requiring him to make such connection.<sup>2</sup> The public authorities have a right to arrange for the house connections when constructing the sewer, and may put in the necessary slants at the expense of the property owner.<sup>3</sup> The regulation as to the distance between the connections must, however, be reasonable, and have some regard to the probable use of the property. Provision may be made for as many as may be needed.<sup>4</sup> And they must not be placed so close together as to become an unnecessary burden upon the property owner.<sup>5</sup>

give due notice to the commissioners of such intention." *Canoe Creek v. McEniry*, 23 Ill. App. 227.

<sup>1</sup>In determining the question of the duty of a mill owner to comply with a statute requiring him to connect his premises with a public sewer because of the objection that the sewer adjacent to his premises is not a public one, it is sufficient if the sewer is a public one below the premises in question, although it may not be above that point. *Com. v. Abbott*, 160 Mass. 285, 35 N. E. 782.

Under the statute of Arkansas, which provides that property owners near or adjacent to any city sewer shall connect their premises with the sewer when required to do so by the board of health, one whose property is not within a sewer district may connect with the sewer when ordered to do so by the board of health, and he is not required to pay any part of the cost of the construction of the sewer before so doing. *Martin v. Hilb*, 53 Ark. 300, 14 S. W. 94.

Under the New York statutes the plan of draining houses in New York is under the control of the board of health, and it may forbid the construction of a private sewer through the lots of a third person and compel its being placed in the public streets. *New York Health Department v. Lalor*, 38 Hun, 542.

<sup>2</sup>*Harrington v. Providence*, 20 R. I. 233, 38 L. R. A. 305, 38 Atl. 1.

<sup>3</sup>*Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

An ordinance of a municipal corporation providing for the putting in of lateral sewer pipes for house connections

on a street by special tax is not void because such improvement does not constitute a local improvement within the meaning of the law, and is not an abuse of the power of the city council to levy special taxation for the cost of local improvements. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

<sup>4</sup>A provision in a sewer ordinance that only one house-connection slant shall be provided for each abutting lot or tract of land, however large, is not a hardship to lot owners, nor unreasonable, where it is also provided that each lot owner shall have the use and benefit of the sewer, and may make additional connection with the sewer. *Gage v. Chicago*, 195 Ill. 490, 63 N. E. 184.

<sup>5</sup>The cost of house slants to connect with a sewer cannot be incorporated in the cost of the sewer and assessed upon the abutting property, where the property is vacant farm land, and the slants are planned to be 20 feet apart, while the probability is that if the property is ever subdivided into building lots it will never be divided so small as to require slants every 20 feet. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896.

But a provision in a sewer ordinance for house-connection slants every 20 feet on each side of the sewer does not vitiate the ordinance, in the absence of any proof that such provision is unreasonable or oppressive. *Vandersyde v. People*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806.

And a provision in a sewer ordinance that house-connection slants "shall be placed on both sides of said sewer oppo-

**277. Public supervision.**—The sewers are the property of the municipality and it may control the method of their use and forcibly break connections which have been unlawfully made with them.<sup>1</sup> It may regulate the use of them and protect them, by proper penalties, against invasion or injury.<sup>2</sup> It may make a charge for their use, by means of which it may provide the means necessary to keep them in repair.<sup>3</sup> But this charge cannot be made by a uniform rate per front foot, where the statute requires the rate to be taxed in proportion to the assessed value of the property.<sup>4</sup> A municipality has no power to turn the construction, maintenance, and control of its sewers over to private parties, and authorize them to compel payment by citizens of compensation for the privilege of using the sewers, in the absence of express statutory authority so to do and granting it the power to compel such payments.<sup>5</sup> The municipality may require the abutting

site each 25 feet of lot frontage" does not amount to an arbitrary subdivision of an unsubdivided lot, when the assessment was made upon the entire tract as a whole, according to its legal description. *Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>1</sup>Equity will not restrain a municipal corporation from taking out a connection illegally made with a municipal sewer. *Assay v. Baldwin*, 7 W. N. C. 160.

But a preliminary injunction will issue to restrain municipal authorities from disconnecting a private sewer from a public sewer, until the rights of the parties have been determined, when the connection was made under the usual permit issued by the municipal authorities, and at the place designated by the usual officer. *Allen v. Swarthmore*, 25 Pa. Co. Ct. 458.

<sup>2</sup>*Fisher v. Harrisburg*, 2 Grant Cas. 291.

<sup>3</sup>*Porter v. Armstrong*, 129 N. C. 101, 39 S. E. 799; *Carson v. Brookton Sewerage Comrs.* 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1, Affirmed in 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 960.

A source of revenue to a city from the amounts to be paid for the privilege of connecting private sewers with a public one may be considered in determining the division of the cost between the municipal corporation and the abutting owners. *Patton v. Springfield*, 99 Mass. 632.

A statute giving power to cities to pass by-laws charging all persons who

own or occupy property which is drained or required to be drained into a common sewer with a reasonable rent for the use of the same applies to sewers already constructed by general taxation, as well as to those which might afterwards be built. *Re McCutcheon*, 22 U. C. Q. B. 613.

A by-law permitting the owner or occupier of property required to be drained into a common sewer to commute within one year for the payment of the sewerage rate is unobjectionable. *Ibid.*

A sewer rent not being a charge upon land, but upon the owner or occupier, summary remedies given by statute for the collection of ordinary rates and assessments cannot be extended to sewerage rates. *Ibid.*

And, where the grantee of land paid over-due sewerage rates, he had no right of action therefor under the covenant in his deed for seisin and quiet enjoyment free "from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands." *Moore v. Hynes*, 22 U. C. Q. B. 107.

<sup>4</sup>*Aldwell v. Toronto*, 7 U. C. C. P. 104.

But under an ordinance requiring the owner of property abutting on a sewer to pay for a permit to connect therewith according to feet frontage, it is immaterial how deep the lot may be, although abutting also on a cross street, nor how many houses on his property may be served thereby. *Lancaster v. Myers*, 9 Lanc. L. Rev. 257.

<sup>5</sup>*Weaver v. Canon Sewer Co.* (Colo. App.) 70 Pac. 953.

owner to pay his special tax as a condition of being permitted to connect with the sewer.<sup>6</sup> But that mode cannot be used to enforce payment of illegal taxes.<sup>7</sup> A purchaser of property without notice of an unrecorded agreement signed by the prior owner thereof, to pay, in case he should make use thereof, his proportion of the cost of a sewer constructed in the street by another landowner under authority from the municipality, and which by the terms of such authority became the property of the city and part of its sewerage system on completion, is not bound thereby, and is not liable for such proportionate payment where he taps such sewer under permit from the city authorities.<sup>8</sup> And the municipality cannot discriminate unreasonably in charges for the use of a public sewer, so that it cannot require from property owners who take water of a private water company the same fees as it charges patrons of the municipal water system for both water and sewer services.<sup>9</sup> It may require the obtaining of permits to connect with the sewer.<sup>10</sup> A municipal corporation may require the payment of all fees chargeable for the connection

<sup>6</sup>*Hill v. St. Louis*, 159 Mo. 159, 60 S. 54 Ohio St. 506, 32 L. R. A. 734, 43 N. W. 116, Overruling *State ex rel. Peak v. Hermann*, 84 Mo. App. 1. E. 990.

<sup>7</sup>*Kilgour v. Groeschen*, 7 Ohio N. P. 312.

The remedy provided by a charter to the contractor building a sewer, that he shall be paid by special tax bills on the property benefited, to be enforced by suit, is not exclusive, and he may restrain the municipality from issuing to the delinquent property owners permits to connect with the sewer under a municipal ordinance providing that such permits shall not be issued until the tax is paid. *Ibid.*

<sup>8</sup>*State ex rel. Durner v. Graydon*, 6 Ohio C. C. 634; *Meyler v. Meadville*, 23 Pa. Co. Ct. 119.

<sup>9</sup>*Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445.

<sup>10</sup>*Ranlett v. Lowell*, 126 Mass. 431.

But it has been held that where a municipality constructed a system of sewers with a view to assessing the cost thereof equally upon all the abutting property, and did so assess, but a portion of the abutting property owners successfully resisted the payment thereof on the ground of fraud by the contractor, and the city was adjudged to pay the balance of the contract price, a rule of the municipality requiring those abutting property owners who had not already paid to pay their proportion of the cost of such system of sewers before being allowed to use the same is not inconsistent with the judgment that the assessments for the construction of the sewers in question were void, and is not unreasonable. *Hermann v. State*,

Neither the making of an assessment for sewer construction, nor its abatement because the owner of the land gave a right of way for the sewer, will give the right to make a connection with the sewer without the consent of the municipal authorities as provided by the city ordinances. *Livingstone v. Taunton*, 155 Mass. 363, 29 N. E. 635.

A permit for a connection with a public drain does not run with the land, unless the statutory requirement that it be in writing has been complied with. *Estes v. China*, 56 Me. 407.

A provision of an ordinance requiring a written permit to connect a private drain with a public sewer may be waived. *Sheridan v. Salem*, 148 Mass. 196, 19 N. E. 172.

Where the statute directs that both application and permit for a connection with a public drain must be in writing, the reciprocal promise is not illegal, and the statute is waived by the municipality in a suit for the breach thereof unless it is set up in the pleadings. *Estes v. China*, 56 Me. 407.

An ordinance providing that no connection shall be made with public sew-

with a sewer of a private drain which drains several pieces of property, although the owner of one has paid his fees; and it may disconnect the drain which was allowed to be connected upon payment of the one fee, where the right to disconnect upon failure in payment of the other was expressly reserved.<sup>11</sup> A municipality having the power to require property owners to connect their premises with sewers, the right to do such connecting may be vested by statute in the municipality itself at the time of the construction of a sewer.<sup>12</sup> Mandamus will not issue to compel a board of public works to permit an abutting owner to tap and make connections with a sewer, where no special duty is by statute enjoined upon the board to permit sewers to be tapped, but the matter is left entirely within the discretion of the board.<sup>13</sup> The power to regulate the use of the system includes the power to require connections to be made by licensed officers, and that material used shall be proper and subject to inspection and approval by its inspector, and that the work be done under his supervision; but it cannot compel the property owner to purchase material from it or prevent him from doing the work if he so desires.<sup>14</sup>

**278. Use of private drain.**— A private citizen has no right to make use of a sewer belonging to another private citizen and the dedication to the public of a street in which a private sewer has previously been laid by consent of the landowner does not make the sewer a public sewer; and one who connects therewith without the owner's consent commits a trespass.<sup>1</sup> But a sewer built in the public street by private individuals and given to a city becomes as much a public sewer as if built by the city itself, for tapping which no more than the usual license fee fixed by ordinance can be charged an abutting

ers except on written application to, and permission granted by, the common council does not divest the board of public works of its power, under the charter, to supervise the construction and repairing of sewers, and forbid anyone to make connection therewith without the consent of the board; but it determines the circumstances under which the council shall permit the work to be done, but leaves the time and manner of doing it to the control of the board of public works. *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

A provision in an ordinance of a municipal corporation for the construction of a sewer, which grants the use and benefit of an out-fall sewer to all property owners obtaining permission to make connection therewith, does not grant away the police power of such mu-

nicipality, as such clause does not affect its power to regulate the manner of making such connection, or abate any nuisance thereby created. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

<sup>11</sup>*Belding Bros. v. Northampton Sewer Comrs.* 177 Mass. 39, 58 N. E. 156.

<sup>12</sup>*Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>13</sup>*State ex rel. Thoms v. Board of Public Works*, 6 Ohio Dec. Reprint, 789.

<sup>14</sup>*Slaughter v. O'Berry*, 126 N. C. 181, 48 L. R. A. 442, 35 S. E. 241.

<sup>1</sup>Equity will enjoin a landowner from connecting his drain with a private sewer laid in the highway, the remedy at law being inadequate when the sewer is incapable of serving both owner and trespasser. *Smala v. Stewart*, 32 Pittsb. L. J. N. S. 207.

owner who did not participate in the building thereof, under a statute providing that parties owning property abutting upon a street or public highway, in or through which a public sewer or drain is constructed, should have the privilege of tapping and using it for the purpose of draining their premises, under such rules and regulations as may be prescribed.<sup>2</sup>

**279. Manner of using sewer.**—An individual who has made connection with a public sewer has no right to make such use of it as will interfere with equal rights of others to use it, or such as will constitute a nuisance to the public. Under this rule so large a quantity of water cannot be turned into the sewer that its capacity is exceeded and it overflows, to the injury of abutting property. One committing such an offense is liable to indictment, and no action will lie against him by an abutting owner whose property is injured by the flowing of the sewage upon it unless the injury is peculiar to himself, and not of a kind suffered by the public generally.<sup>1</sup> Nor can material be turned into the sewer, of such consistency as to form deposits and obstruct either the sewer or the stream into which it empties.<sup>2</sup> Nor can poisonous or deleterious material be turned into the sewer, which incommodes or injures other persons.<sup>3</sup> A landlord constructing a drain by which the tenants from several of his buildings discharge their sewage is the person causing the nuisance resulting therefrom, under a statute authorizing the local board of authorities to proceed against the person by whose act the nuisance arises.<sup>4</sup> The measure of damages for the overflow of an owner's land, destroying crops and causing permanent damages, caused by the wrongful discharge into a public ditch of water not naturally flowing therein, is the value of the crops destroyed and the difference in value of the land before and after the trespass.<sup>5</sup>

**280. Repair of connections.**—Ordinarily, the burden of keeping the private connections of the sewer in repair is upon the property owner.

<sup>2</sup>*Springmyer v. State*, 1 Ohio C. C. 501.

<sup>1</sup>*Waters v. Newark*, 56 N. J. L. 361, 28 Atl. 717.

<sup>3</sup>*Hudson River R. Co. v. Loeb*, 7 Robt. 418.

<sup>4</sup>*Municipality No. One v. Gaslight Co.* 5 La. Ann. 439.

The maintenance by a cotton-mill company of outlets from closets and cesspools of its large factory into the public gutters of the city, causing offensive matter injurious to the public health to flow through the gutters, is

such a nuisance as may be abated by an injunction issued on the complaint of the city board of health. *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164.

Equity will enjoin the discharging of refuse from a tomato-canning factory into a public sewer, and thence into a small natural stream, whereby a nuisance is created. *Butterfoss v. State*. 40 N. J. Eq. 325.

<sup>5</sup>*Brown v. Bussell*, L. R. 3 Q. B. 251.

<sup>6</sup>*Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.

But the English public health acts, while leaving the owner liable for the repair of a single private drain, have placed the burden of repairing drains, which by reason of their serving as an outlet for several apartments have become more or less public, upon the public authorities. Under these statutes it has been held that a drain constructed on a parcel of property belonging to one owner was a single private drain, although it received the drainage from several houses belonging to different owners.<sup>1</sup> But where the drain runs under three houses and receives the drainage of each, it constitutes a sewer which must be kept in repair by the public authorities, although it is on private property.<sup>2</sup> Where a statute makes a pipe which receives the drainage of two or more houses a sewer, to be maintained and repaired at the public expense, the pipe does not lose its character as such by the owner of one of the two houses subsequently disconnecting his house from it.<sup>3</sup>

#### XV. INJURY TO, AND ABANDONMENT OF, DRAIN.

**281. Injury to drain.**—A drain being established for the good of the public must, in order to accomplish its purpose, be preserved from injury or obstruction by individuals. The statutes, therefore, usually make it an offense to injure or obstruct a public drain.<sup>1</sup> And a

<sup>1</sup>*Seal v. Merthyr Tydfil* [1897] 2 Q. B. 543, 67 L. J. Q. B. N. S. 37, 77 L. T. N. S. 303, 61 J. P. 551.

In *Hill v. Hair* [1895] 1 Q. B. 906, 64 L. J. M. C. N. S. 37, it was held that a single drain on private property draining several houses owned by different persons was not a single private drain within the meaning of the public health act of 1890, because it was constructed prior to the passage of the public health act of 1848, under which it became vested in the local authority and repairable by them; therefore, they were not entitled to compel the owner of the premises drained to repair it, as provided for by the act of 1890. But this decision was disapproved in *Seal v. Merthyr Tydfil* [1897] 2 Q. B. 543, 67 L. J. Q. B. N. S. 37, 77 L. T. N. S. 303, 61 J. P. 551, *Cave, J.*, who rendered the judgment of the court in both cases, saying in the *Seal Case* that he was inclined to think that the drain in the *Hair Case* was a private one, and consequently that that decision was wrong.

A drain used for the purpose of draining two buildings consisting of forty-six apartments each, and separated

by a causeway, is a drain used for the drainage of premises within the same curtilage, within the meaning of the metropolis local management act of 1865, providing that the expense of altering and repairing such a drain is to be paid by the owner or occupier of the premises. *Pilbrow v. St. Leonard* [1895] 1 Q. B. 433, 64 L. J. M. C. N. S. 130, 14 Reports, 181, 72 L. T. N. S. 135, 43 Week. Rep. 342, 59 J. P. 68, Affirming [1895] 1 Q. B. 33, 64 L. J. M. C. N. S. 29.

<sup>2</sup>*Travis v. Uttley* [1894] 1 Q. B. 233, 63 L. J. M. C. N. S. 48.

<sup>3</sup>*St. Leonard v. Phelan* [1896] 1 Q. B. 533, 65 L. J. M. C. N. S. 111, 74 L. T. N. S. 285, 44 Week. Rep. 427, 60 J. P. 244.

<sup>4</sup>*State v. Chesapeake & O. R. Co.* 24 W. Va. 809.

In a general statute relating to highway drains, a penal clause forbidding the obstruction of any drain or ditch draining the water from a highway applies to highway drains crossing the road as well as to those running away from it. *Com. ex rel. Johnson v. Betts*, 76 Pa. 465.

violation of the statute constitutes a public offense.<sup>2</sup> To warrant a conviction, all that is necessary is to show an interference with the ditch. It is not necessary to show malice.<sup>3</sup> But to make the statute operative the ditch must be a lawful one. Therefore, a landowner is not liable for obstructing unlawful efforts to construct a ditch over his property,<sup>4</sup> nor for filling up a drain illegally constructed.<sup>5</sup> But the landowner cannot proceed to destroy the drain if the result would be injury to the public or to his neighbor. His remedy is to take legal steps to have the drain abated.<sup>6</sup> To bring the ditch within the protection of the statute it must be a successful one, and not merely create a nuisance to the abutting property owners.<sup>7</sup> The property owner is not liable for unauthorized acts of his servants.<sup>8</sup> And he is not forbidden to make the ordinary use of his property through which the drain runs,—as, for the pasturage or feeding of stock.<sup>9</sup> To authorize public authorities to object to acts interfering with the drainage improvements, they must have title to them or be authorized by

<sup>2</sup> An averment of unlawfully removing a tile from a public drain, thereby causing the ditch to fill up with mud and diverting the water in the ditch from its proper channel and unlawfully injuring, obstructing, and destroying the ditch, is sufficient in an information to charge a public offense, under a section of the Indiana Criminal Code prohibiting the obstruction of public ditches. *Toops v. State*, 92 Ind. 13.

It is not necessary, in a prosecution for unlawfully obstructing a public ditch, to prove that all the requirements of the statute providing for the construction of ditches have been complied with. It is sufficient if the evidence show that the drain was constructed under the order of the board of county commissioners. *Ibid*.

<sup>3</sup>*Toops v. State*, 92 Ind. 13.

<sup>4</sup>*State v. New*, 130 N. C. 731, 41 S. E. 1033.

<sup>5</sup> The owner of land adjoining a highway may peaceably abate a nuisance caused by highway commissioners turning water from a ditch in a stream upon his land to the injury of his cultivated fields, by closing the sluiceways through which the water comes. *Thompson v. Allen*, 7 Lans. 459.

One who did not consent to the construction of a ditch across his premises, or who, although consenting, claimed and exercised the right of building a fence across it, is not liable for damages resulting from its obstruction, where the natural sinking of the fence has ul-

timately caused a greater obstruction than at first existed. *Freeman v. Weeks*, 48 Mich. 253, 12 N. W. 215.

<sup>6</sup> One cannot unnecessarily obstruct a municipal drain which illegally throws water upon his land, if a third party is injured by the back flow. *Amick v. Sharp*, 13 Gratt. 564, 67 Am. Dec. 787.

It is no defense, in an action to recover the statutory penalty for obstructing a ditch used for the draining of water from the highway, that the ditch was not lawfully laid out and established along the highway. *Hines v. Darling*, 99 Mich. 47, 57 N. W. 1081.

<sup>7</sup> The owner of land is not liable for the penalty prescribed by statute for wilfully filling up a ditch constructed by the overseer of highways for the drainage of the highway, where the ditch did not effect that object or furnish any channel for the passage of water therefrom, but instead created a mud hole in front of the house and store of such owner, which he filled up for the sole purpose of improving the street and restoring the dry condition thereof which had theretofore existed. *State v. Smith*, 52 Wis. 134, 8 N. W. 870.

<sup>8</sup> The obstruction of a sewer by servants who, while engaged in sweeping their master's store, wilfully and intentionally threw the sweepings into the same, does not make the master liable to one whose cellar was flooded by the obstruction. *Douglass v. Stephens*, 18 Mo. 362.

<sup>9</sup>*Chambers v. Kyle*, 87 Ind. 83.

statute to maintain the proceeding.<sup>10</sup> Where the right to have the ditch kept open is conferred by statute, the remedies afforded by it for obstruction of the ditch are exclusive.<sup>11</sup> If the statute provides no remedy the proper authorities may resort to injunction or mandamus to compel the removal of obstructions.<sup>12</sup> A private individual injured by a wrongful obstruction of the ditch may recover damages for his injury from the one responsible for it.<sup>13</sup> So, if a canal company, in constructing or repairing its work, obstructs the sweat and lead ditches which have been in continuous use for a long period of time,

An owner of land through which a drainage ditch passes cannot be enjoined by drainage commissioners from allowing his stock to pasture on his land without inclosing the ditch, under a statute providing that when an owner shall permit animals to pasture in an inclosed field through which runs an open ditch, being part of a combined system of drainage, he shall repair such damage to the ditch as may be done by the animals, or, if he neglects to do so, making him legally liable for the injury done. *Drainage Comrs. v. Sconce*, 18 Ill. App. 120.

A landowner through whose land a ditch for the draining of adjoining lands has been constructed is not liable for injuries to such adjoining land from overflow caused by the filling up of the ditch on his land by the natural washing in of the adjoining banks, although the use and pasturing of the land by such owner in an ordinary, careful, and prudent manner contributed to such filling up. *Ayres v. Laughlin*, 62 Ind. 327.

<sup>10</sup> The commissioners of sewers have no such possessory interest in a wall or dam erected by them across a navigable river as will entitle them to maintain trespass against the commissioners of the harbor for breaking it down. *Newcastle v. Clark*, 2 J. B. Moore, 666, 8 Taunt. 602, 20 Revised Rep. 583.

A police jury cannot, in Louisiana, maintain an action for the removal of obstructions closing a natural drain and obstructing the drainage of plantations under the express power of the regulation of roads, bridges, causeways, dikes, and levees, the adoption of systems of drainage, and the reopening of natural drains or water courses on lands divided among several proprietors. *Concordia v. Natchez, R. R. & T. R. Co.* 44 La. Ann. 613, 10 So. 809.

<sup>11</sup> *Chambers v. Kyle*, 87 Ind. 83.

Obstructing a public highway by filling up a culvert so as to prevent the drainage of the highway and continuing such obstruction after it is created are separate and distinct offenses, under a statute imposing a penalty for causing, creating, or continuing such a nuisance. *Burke v. People*, 23 Ill. App. 36.

In an action for obstructing a legally established ditch the order of the county board for its construction is admissible to prove its legality, but not to show the actual opening of the drain or its capacity or utility as opened. *Chambers v. Kyle*, 87 Ind. 83.

<sup>12</sup> A mandatory writ of injunction may issue *ex parte*, demanding the removal of an obstruction from a drainage canal, where its continuance inflicts an injury forbidden by a writ of prohibition. *New Iberia Rice Mill. Co. v. Romero*, 105 La. 439, 29 So. 876.

Demand is a prerequisite to a mandamus to compel the removal of obstructions from a drainage ditch. *Lake Erie & W. R. Co. v. State*, 139 Ind. 158, 38 N. E. 596.

<sup>13</sup> One obstructing a sewer and thereby flooding plaintiff's cellar is not liable for such damages as plaintiff might have prevented by removing his goods after discovering the condition of the cellar. *Douglass v. Stephens*, 18 Mo. 362.

A landowner having the right by law to enter upon the lands of another to remove obstructions inadvertently or negligently placed in a legally established ditch by such other for temporary purposes, which are easily removed, cannot stand by and await the ruin of his crops and hold the other liable therefor, in the absence of evidence that the obstructions were wilfully placed therein for the purpose of creating obstructions. *Chambers v. Kyle*, 87 Ind. 83.



it will be liable for the injuries thereby caused to the abutting owner.<sup>14</sup> And if a water company constructs its pipe in such a way that it settles and stops the flow of sewage, it will be liable for the injury thereby caused to an abutting property owner.<sup>15</sup> The measure of damages for injury to an owner's land from overflow caused by obstructions by another in a drain constructed under a statute providing that any person obstructing ditches or drains constructed under the provisions of the act shall be liable to the person injured thereby in the sum of \$1 for each day such obstruction shall remain, to be recovered in an action at law by the injured party, is \$1 for each day the obstruction has remained in the drain, whether more or less than the actual injuries sustained.<sup>16</sup>

**282. Abandonment of drain.**— There being no duty on the part of the public or of a municipal corporation to drain in the first instance, there is no duty to continue a drain which has once been established, unless it is imposed by statute, so long as the citizens are left in no worse condition than they were before the drain was established.<sup>1</sup> Under this rule, drainage districts may, with the consent of the legislature, be dissolved, and the drains maintained by them suffered to decay.<sup>2</sup> No lapse of time can invest an artificial channel with the characteristics of a natural water course.<sup>3</sup> But a ditch dug as a neighborhood drain, and which has remained open as a water course for a series of years, ought to be governed by the same rules that apply to other water courses; and one of the neighbors should not be permitted to obstruct or destroy it without the consent of the others.<sup>4</sup> When an artificial drain has become necessary to the drainage of adjoining lands, it is to be considered and treated as a natural water course so

<sup>14</sup>*Williams v. Drummond Water & Canal Co.* 130 N. C. 746, 41 S. E. 1030; *Mullen v. Lake Drummond Canal & Water Co.* 130 N. C. 496, 61 L. R. A. 833, 41 S. E. 1027; *Ferebee v. Lake Drummond Canal & Water Co.* 130 N. C. 745, 41 S. E. 1037. The damages awarded an owner for land taken for such use include, in contemplation of law, all loss or injury resulting to him thereby. *Hollenbeck v. Detrick*, 162 Ill. 388, 44 N. E. 732.

<sup>15</sup>*Kankakee Water Works Co. v. Irwin*, 56 Ill. App. 510.

<sup>16</sup>*Ayres v. Laughlin*, 62 Ind. 327.

<sup>1</sup>*Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Atchison v. Challiss*, 9 Kan. 603; *Estes v. China*, 56 Me. 407.

<sup>2</sup>In the exercise of the right to take land by condemnation to be used for a ditch, there are none of the elements of a contract which would be impaired by a subsequent dissolution of the district.

<sup>3</sup>*Lawton v. South Bound R. Co.* 61 S. C. 548, 39 S. E. 752.

<sup>4</sup>*Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904.

So, after a ditch has been constructed across an abandoned highway the township authorities are not justified, after the lapse of many years and upon changing the highway to its original line, in filling up the ditch, where they awarded the owner but nominal damages for his property and did not condemn the right to maintain the ditch. *Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612.

far as proceedings looking to its abandonment are concerned, and it comprises such a property right as will be protected by injunction.<sup>5</sup> The powers of a drainage district cannot be lost by mere nonuser.<sup>6</sup> But rights may be acquired against a drainage right by prescription, so that a public right of drainage may be lost by nonuser.<sup>7</sup> In discontinuing a drain, care must be taken not to inflict injury on private property.<sup>8</sup>

<sup>5</sup>*Tussing v. King*, 65 Ohio St. 10, 60 N. E. 986; *Freeman v. Weeks*, 48 Mich. 255, 12 N. W. 215.

<sup>6</sup>*Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

<sup>7</sup>*Com. v. Belding*, 13 Met. 10.

<sup>8</sup>Where the city accepted annexed territory and its roads in the condition in which they were at the time of the annexation, including the means provided for carrying off the surface water collecting on the street, which, although not natural water courses, had at least the weight of long-continued sanction of local officials in deciding what was necessary to preserve the highways; and where the city destroys these means, and diverts the natural course of the water

collecting on the street by crossings or ditches, thereby throwing it on the land of a private owner, if, in the opinion of the jury, it was carelessly or negligently done, the city is liable. *Rohrer v. Harrisburg*, 20 Pa. Super. Ct. 543.

And a city, in discontinuing a sewer upon building a new one, is bound to proceed with due regard to the fact that the premises of a person are connected with a drain into the old sewer, and may be liable for the injuries caused by its failure to do so. The city, though under no legal obligation to build or maintain a sewer, has a right to discontinue an old one and build a new one. *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 385.

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## CHAPTER XII

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  - 317e. Remedy; damages.
- 318. Extinguishment of ferry franchise by abandonment.
- 319. Other means of extinguishment.

233. What is a ferry?— A ferry has been said to be a public highway or thoroughfare across a stream of water by boat instead of by bridge;<sup>1</sup> and it has also been said that it is a moving highway upon water.<sup>2</sup> But those definitions are wholly inadequate to express the full idea intended to be conveyed by the word “ferry.” A boat is undoubtedly the easiest and most simple way to span a stream which intersects a highway. Before the age of bridges it was the only way of crossing waters too deep to ford and too wide to swim. It became a matter of public concern, therefore, to have a boat stationed where it could be used when needed. Any person might supply this need through business enterprise for the reward which he might obtain through contracting to serve travelers. But this private enterprise was likely to prove wholly inadequate to satisfy the public needs. The boat owner would be inclined to drive hard bargains for his services, and there was nothing to require the boat to be in readiness at all times, whether to the convenience of the owner or not. It was, therefore, necessary for the public to have some supervision in the matter. The public good demanded that the boat should be at all times in readiness, and that the charges should be reasonable and uniform. But to obtain these advantages it was necessary to secure the boatman from ruinous competition, and to make his income certain. The obvious way to accomplish this was to invest him with a royal prerogative, a franchise to take toll, and to make the right to operate the ferry exclusive. So that the ferry means something more than a continuation of the highway across the water, and includes the idea of public service with its incidents of monopoly and toll.

As said by Cooper, J., the continuity of a highway is not broken by a stream which crosses it. The public, for the purpose of travel, have the same right to go on the water over the highway that they have to pass along any other portion of it; but, as a physical obstruction intervenes, it is necessary that some convenient means of transportation

<sup>1</sup>*Chilvers v. People*, 11 Mich. 43.

<sup>2</sup>*Patterson v. Wollmann*, 5 N. D. 608,

<sup>33</sup> L. R. A. 536, 67 N. W. 1040.

shall be furnished, and the simplest and most economical is in many cases by ferry.<sup>3</sup> The sole and exclusive right to transport over water courses for toll belongs to the sovereign and he may parcel the right out to individuals in such manner as he sees fit.<sup>4</sup> But this right cannot be exercised by an individual without a grant from the sovereign, and when the right has been received it is known as a franchise.<sup>5</sup> A ferry is, therefore, a liberty to have a boat for the carriage of persons and property across a narrow water way for a reasonable toll.<sup>6</sup> A flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank, is a ferry as distinguished from a bridge.<sup>7</sup> But to be a ferry the public must have a right to use the accommodations. A boat for use in furthering private business of the owner is not a ferry.<sup>8</sup> The right of navigation being free to all, the exclusive privilege must be granted with respect to some limits, and the most natural ones are the landing places. So, it was said in an old case that a ferry is in respect of the landing place, and not in respect of the water.<sup>9</sup> But there is a distinction between the ferry franchise being connected with the landing and the

<sup>3</sup>*Sullivan v. Lafayette County*, 58 Miss. 790.

<sup>4</sup>*Pipkin v. Wynns*, 13 N. C. (2 Dev. L.) 402.

<sup>5</sup>*Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589.

<sup>6</sup>*State v. Wilson*, 42 Me. 9; *Broadnaw v. Baker*, 94 N. C. 675, 55 Am. Rep. 633.

<sup>7</sup>*Parrott v. Lawrence*, 2 Dill. 332, Fed. Cas. No. 10,772.

<sup>8</sup>A boat equipped with railroad tracks, and used exclusively for the transportation of railroad cars, and which carries no passengers, baggage, or freight, except as they may be contained in such cars, is not a ferryboat within the meaning of the Montgomerie charter conferring upon the city of New York the sole power to establish ferries; and its operation does not invade such exclusive franchise. *New York v. New England Transfer Co.* 14 Blatchf. 159, Fed. Cas. No. 10,197.

An owner of a small steam yacht, who, mainly on Sundays and holidays, conveys passengers for hire from a village to a wharf upon pleasure grounds not connected with any highway, but maintained by the proprietors for the accommodation of visitors to such grounds at the request of such proprietors, does not maintain a ferry within the meaning of a statute making it a

misdemeanor to maintain a ferry without authority of law. *People v. Mago*, 69 Hun, 559, 23 N. Y. Supp. 938.

One using his own wherry for the purpose of conveying his own laborers to work is not liable under a statute providing that anyone not licensed, who shall navigate a passenger boat for hire or gain, shall be liable to a penalty. *Tadhunter v. Buckley*, 7 L. T. N. S. 273.

So, the penalty is not recoverable against one who runs a free skiff as an inducement to persons to trade at his store, where it appears that those transported in the skiff do not agree to buy anything of the skiff owner, and that he makes no charge in money, or otherwise, for the transportation. *Shinn v. Colton*, 52 Ark. 90, 12 S. W. 157.

<sup>9</sup>*Ipswich v. Browne*, Savile, 11.

A ferry franchise is nothing more or less than a right conferred to land at a particular point and receive toll for the transportation of passengers and property from that point across a stream. *Mills v. St. Clair County*, 7 Ill. 198.

On this principle, it was held that an injunction against the use of a wharf for the purpose of a ferry is violated where the ferryboat lies at the dock each night, and takes in supplies therefrom. *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 300.

title to the soil of the landing, for the owner of a ferry need not have the property in the soil on either side of the ferry; it is sufficient if the landing place is a public way, or, if private property, that he has secured the privilege of using it for a landing place, although the title is in another.<sup>10</sup> The right to one landing is sufficient, for a ferry franchise can be granted giving the right to transport persons and property from one shore of the stream to the other shore only, without the right to bring a return cargo.<sup>11</sup> And the character of a ferry is not destroyed by the fact that the boats make an intermediate stop between its termini.<sup>12</sup> A ferry franchise is entirely distinct from the right to navigate the river, and therefore the grant of such franchise is not within a constitutional provision that rivers within the state shall be common highways and forever free, without any tax, duty, or impost.<sup>13</sup>

**284. Ferry franchise as property.**— A ferry franchise is property,<sup>1</sup> and the character of that property is real estate;<sup>2</sup> and a ferry is an incorporeal hereditament capable of transfer and of descending to the heirs of the licensee.<sup>3</sup> It can, therefore, be transferred only in the manner prescribed by the statutes relative to conveyances of real estate.<sup>4</sup> The statute may give the franchise a different character and make it personal to the licensee, so that it cannot be transferred and will not descend to heirs, but will terminate with the death of the licensee.

**285. A ferry cannot be operated without permission from government.**— A ferry being the continuation of a public highway across a natural barrier, the keeper is in a position to levy toll upon all who seek to use it, and no one is allowed to take toll without governmental supervision. Therefore, in the absence of peculiar or special cir-

<sup>1</sup>*Peter v. Kendal*, 6 Barn. & C. 703; *Day v. Stetson*, 8 Me. 365.

<sup>2</sup>*Power v. Athens*, 26 Hun, 282.

<sup>3</sup>*New York v. New Jersey S. B. Nav. Co.* 106 N. Y. 28, 12 N. E. 435.

<sup>4</sup>*Chapin v. Crusen*, 31 Wis. 209.

<sup>5</sup>*Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191.

Although a ferry franchise is held subject to the right of the county court to regulate the toll, it is property of which the owner cannot be deprived without compensation. *Chadwick v. Haverhill Bridge*, 2 Dane Abr. 686.

<sup>6</sup>*Mabury v. Louisville & J. Ferry Co.* 9 C. C. A. 174, 18 U. S. App. 542, 60 Fed. 645.

A ferry right is a right connected with the soil, and grows out of it. It is an incorporeal hereditament. When

the ownership of it is not connected with the ownership of the soil, no one can have seisin of it as of land; but still it is classed with real estate, and is subject to the laws which govern the realty. It descends to heirs, is subject to dower, and to all the incidents of real property. *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740.

A ferry, being a franchise and therefore a hereditament, constitutes lands within the meaning of a statute entitling to compensation the owner of lands injuriously affected by the construction of a railroad. *Queen v. Cambrian R. Co.* L. R. 6 Q. B. 422, 40 L. J. Q. B. N. S. 169, 25 L. T. N. S. 84, 19 Week. Rep. 1138.

<sup>7</sup>*Lewis v. Gainesville*, 7 Ala. 85.

<sup>8</sup>*Dundy v. Chambers*, 23 Ill. 369.

cumstances, a grant or license from the government is necessary to authorize one to set up a ferry; and this license may contain such conditions as are necessary to give the government supervision of the operations of the ferry, and the opportunity to protect the rights of the public.<sup>1</sup> In *Young v. Harrison*,<sup>2</sup> it is said that the right to receive compensation from travelers and others for their transportation across a river on a public highway is, both at common law and by statute, a public franchise, and from its nature ought so to be; for no greater evil could be imagined than the unrestrained power, on the part of individuals, to exact from the traveler, who cannot brook delay nor stipulate for terms, whatever cupidity might exact. The state may prescribe a penalty for setting up a ferry without permission.<sup>3</sup> The ownership of the soil on both sides of the stream will not confer the right to set up or exercise the franchise of operating a ferry across the stream; it can go no farther than to authorize the proprietor to establish a ferry for his own convenience and that of his family, or, at the farthest, to ferry, not for tolls,—that is, for a fixed price independent of contract,—but upon a contract, express or implied, when not forbidden by statute, and when it does not affect an

<sup>1</sup>*Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040; *Churchman v. Tunstal*, Hardres, 163, Approved in Comyns' Digest, *Piscary*, B.\* 363; Hale, de Jure Maris, chap. 2; *State v. Hudson County*, 23 N. J. L. 206; *North & South Shields Ferry Co. v. Barker*, 2 Exch. 149; *Benson v. New York*, 10 Barb. 224; *Blissett v. Hart*, Willes Rep. 512, note; *Mills v. St. Clair County*, 4 Ill. 53; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *Stark v. M'Gowen*, 1 Nott & M'C. 387, 9 Am. Dec. 712; *Golconda v. Field*, 108 Ill. 419; *McRoberts v. Washburne*, 10 Minn. 23, Gil. 8; 2 Dane Abr. 683; *Day v. Stetson*, 8 Me. 365; *Hanger v. Little Rock Junction R. Co.* 52 Ark. 61, 11 S. W. 965; *Organ v. Memphis & L. R. R. Co.* 61 Ark. 235, 11 S. W. 96; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 492, 9 S. W. 120, 13 S. W. 654; *Wheat v. State*, 6 Mo. 455; *Huzzey v. Field*, 2 Crompt. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855; *Murray v. Menefee*, 20 Ark. 561; *Hudspeth v. Hall*, 111 Ga. 510, 38 S. E. 770; *Prosser v. Wapello County*, 18 Iowa, 327; *New York v. Starin*, 106 N. Y. 1, 12 N. E. 631; *Stark v. Miller*, 3 Mo. 470; *Pennsylvania R. Co. v. National R.*

*Co.* 23 N. J. Eq. 441; *Johnson v. Brakine*, 9 Tex. 1.

The right to maintain and operate a ferry, and collect tolls, is a franchise. It is a sovereign prerogative, and in this country vests in individuals only by legislative grant; and it makes no difference whether the grant is made directly by the legislature or by a subordinate body to whom the power is delegated,—it is still a grant emanating from the authority of the state. *Evans v. Hughes County*, 3 S. D. 580, 54 N. W. 603.

In a Pennsylvania case it was held that in the absence of any legislation on the subject, the right to maintain a public ferry is common to all riparian owners, and restricted only when interfering with special grants. *Braddock Ferry Co.'s Appeal*, 3 Pennyp. 32.

That decision cannot possibly be right, but it illustrates the uncertainty which absence of legislation creates. A ferry right involves a right to take toll, and no individual is accorded that right without a grant from the state. Consequently, in the absence of legislation, there is no ferry right except through tolerance.

<sup>2</sup> 6 Ga. 180.

<sup>3</sup> *Tugwell v. Eagle Pass Ferry Co.* 74

established public ferry.<sup>4</sup> The government cannot, however, interfere with the right of the riparian owner to maintain a boat for his own convenience and that of his family, if he does not attempt to use it as a public conveyance.<sup>5</sup> And if the boat is not in the line of travel, and the riparian owner maintains a boat for his own convenience, he may contract to carry others across the stream for such compensation as he may be able to secure, so long as he does not interfere with exclusive ferry privileges which have been granted others.<sup>6</sup> An unauthorized attempt of a corporation to operate a ferry may be prevented by quo warranto proceedings.<sup>7</sup> When a railroad is limited by the terms of its charter to charge a given rate per mile per passenger and per ton of freight, and required to furnish boats at its termini, it cannot collect an additional charge for transportation on the boats as a common carrier; and when it does so it is liable for the penalty imposed for such an overcharge by a statute passed after the granting of its charter.<sup>8</sup> The operation of a ferry may be authorized by implication.<sup>9</sup> The owner of a perpetual grant of a ferry franchise from the legislature is under no obligation to secure a ferry license from the county court, and is not liable for the penalty prescribed by statute for maintaining the same without such license.<sup>10</sup>

**285a. Prescriptive rights.**—A modification of the doctrine stated in the preceding section, which is not in reality an exception, but which

Tex. 480, 9 S. W. 120, 13 S. W. 654; *Dunlap v. Yoakum*, 18 Tex. 582; *Ladd v. Chotard*, Minor (Ala.) 366; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523.

<sup>4</sup>*Prosser v. Wapello County*, 18 Iowa, 327; *Williams v. Turner*, 7 Ga. 348.

<sup>5</sup>*Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 716; *Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589.

While grants from the state of lands on water courses do not carry with them, as an appurtenance, the privilege of keeping a public ferry, yet the grantee takes a right of private ferry, for interference with which by a bridge constructed under legislative authority compensation must be made. *Harrison v. Young*, 9 Ga. 359; *Greer v. Haugabook*, 47 Ga. 282.

<sup>6</sup>*Tuscaloosa County v. Foster*, 132 Ala. 392, 31 So. 587; *State v. Wise*, 7 Ind. 645; *Averett v. Brady*, 20 Ga. 523; *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770.

<sup>7</sup>A statutory provision authorizing the owner of land on both sides of a stream to establish a bridge or ferry thereon at

his own expense, and charge toll for crossing, must be construed to authorize only the establishment of a private ferry for the use of the owner of the land, and not open to the public at its demand; but for the occasional use of which he may take ferriage, although not as a regular business, in view of a later statutory provision to the effect that the right to construct a bridge or establish a ferry for private use, within or adjoining lands, is appurtenant to the ownership of the land, but the right to establish and keep a public bridge or ferry is a franchise, and must be granted by the state. *Greer v. Haugabook*, 47 Ga. 282.

<sup>8</sup>*Darnell v. State*, 48 Ark. 321, 3 S. W. 365.

<sup>9</sup>*Camden & A. R. & Transp. Co. v. Briggs*, 22 N. J. L. 623.

<sup>10</sup>When the rates for a ferry are settled by the public authority therefor, it recognizes by implication its lawful existence. *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

<sup>11</sup>*Mulinomah County v. Knott*, 6 Or. 279.



appears to be so, is the rule which has recognized the validity of ferries which have been in operation for a long period of years, although the owners could not show a grant or license. Whenever there may be a grant of a franchise, and a person is found in the enjoyment of one and to have continued this enjoyment from a very ancient period without question, it will be presumed that the right was founded on a grant. Before society was as well organized as it is now, and before the records were as well kept, many ferries were in operation which had no definite authority to show for their existence, but which had existed so long that it could not be shown that they were not rightfully established. This raised the question of the effect of long use. It was unanimously conceded that to some extent a right could be established by lapse of time. Thus, in *Hix v. Gardiner*,<sup>1</sup> it was said that it had been adjudged that if a man have a common ferry, and prescribes to have obelum for every footman passing and denarium for every horseman, and that none shall pass but over this ferry, this is a good prescription. And that doctrine has been carried forward into the modern decisions with a modification in favor of the ferry owner, so that the rightfulness of the ferry has been permitted to be established by occupation of it without question for the period necessary to acquire title to real estate by prescription.<sup>2</sup> These decisions are hardly in accord with true principle, at least in states where time does not run against the government. In case of governmental grants there is now no difficulty in showing the grant if it exists; and the doctrine of presumed grant has no application in such cases at the present time, so that, unless the occupant can show a grant, it should be held not to exist. And the better doctrine is that now a prescriptive right to maintain a ferry in this country cannot exist, at

<sup>1</sup> 2 Bulstr. 196.

<sup>2</sup> *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83; *Williams v. Turner*, 7 Ga. 348; *Harrison v. Young*, 9 Ga. 359.

Where it appears that a city has maintained a ferry for a time beyond the memory of living men, it will be held to have obtained a ferry franchise by prescription. *Laredo v. Martin*, 52 Tex. 548.

And the prescriptive right of a city to maintain a ferry was not abrogated or annulled by the Constitution and laws, where its inhabitants came under the government of the state of Texas, although it was the general policy of the state to subject ferries to the control of

county courts. The continued enjoyment of such a franchise by the city, or even by an individual to whom it had been granted by the preceding government, was not so antagonistic to the general policy of the state as to divest the franchise out of the previous grantee, it not appearing plainly that this was the purpose and intent of the state. The franchise would not be divested by implication. *Ibid.*

One who has been in the continuous use, operation, and enjoyment of a ferry privilege for eight or ten years, whether the rightful owner or not, may, on behalf of the interests of the public, and as one in the actual use and enjoyment of the right for the benefit of the public, enjoin those who seek to violate the laws

least unless it has been in use from colonial times.<sup>3</sup> Even where a prescriptive ferry right is recognized, it will not be held to be exclusive when the court by which the right must have been granted had no authority to confer an exclusive right.<sup>4</sup>

**286. Over what waters ferry may be established.**— A ferry performs its office with respect to narrow waters and confined places, and is concerned in transporting travelers from shore to shore and is a matter of local concern; and it is to be distinguished from the carrying of persons or property on long voyages and from navigation in general. The waters on which they are to be established must be of such a character that they may be traversed at regular and brief intervals by boats adapted to the business.<sup>1</sup> The fact that the water is tidal does not alter the power to license ferries upon it.<sup>2</sup> But general authority to a county court to establish ferries does not include the right to establish them over rivers upon the further shore of which lies a foreign nation.<sup>3</sup> A narrow cut-off separating a neck of land from the mainland is not a river or part of it, which sweeps around the neck of land, in the sense that a ferry across it would be illegal because over the river within two miles of another ferry.<sup>4</sup> The general question of the right of independent governments to establish ferries on boundary waters has already been treated,<sup>5</sup> as has also the question arising out of the conflicting authority between the state and Federal governments.<sup>6</sup>

**287. Power of municipal corporation to establish and regulate ferries.**— The rule that a municipal corporation has only such powers as are granted to it applies with full force to its efforts to establish and regulate ferries. Therefore, the question of the power of the municipality depends upon the construction of the statutes under

of Kentucky by erecting another ferry across the line of and within the distance from such established ferry that is prohibited by such laws; at least, such person is entitled to an order continuing the order of injunction, pending an appeal, as provided under a section of the Kentucky Code. *Davis v. Connolly*, 104 Ky. 87, 46 S. W. 679.

*Day v. Stetson*, 8 Me. 365; *Bird v. Smith*, 8 Watts, 434, 34 Am. Dec. 488; *State ex rel. Driver v. Talladega Road & Revenue Comrs.* 3 Port. (Ala.) 412.

The grant of a franchise to keep a ferry cannot be established by prescription, but must be proved by the record of the grant, or, if it is lost, by proof of its contents. *Sullivan v. Lafayette County*, 58 Miss. 790, Overruling *Leake County v. McFadden*, 57 Miss. 618.

*Barrington v. Neuse River Ferry Co.* 69 N. C. 165; *Shorter v. Smith*, 9 Ga. 517; *Harrison v. Young*, 9 Ga. 359; *Parish Treasurer v. Russell*, 3 La. 93.

*New York v. New Jersey S. B. Nav. Co.* 106 N. Y. 28, 12 N. E. 435.

*Fay, Petitioner*, 15 Pick. 243.

*Zane v. Zane*, 2 Va. Cas. 63.

Before the act of January 23, 1850, there was, in Texas, no law which authorized the grant of a license, by the county court, for a ferry across a stream which constituted a national boundary; and that act is operative only so far as it provides a system of reciprocity. *Ogden v. Lund*, 11 Tex. 688.

*Robinson v. Lamb*, 131 N. C. 229, 42 S. E. 701.

<sup>1</sup>See *ante*, § 7b.

<sup>2</sup>See *ante*, § 12a.

which the power is attempted to be exercised. Power conferred upon a municipality to license and regulate ferries enables it to forbid the operation of ferries without license.<sup>1</sup> But the mere grant of power to regulate ferries does not confer power to require a license.<sup>2</sup> Conferring upon the municipality jurisdiction over the river front does not empower it to establish ferries without regard to the general statutes upon that subject.<sup>3</sup> Where a city is authorized to regulate ferries within its corporate limits, it has power to regulate a ferry on a river only one of the banks of which is within its limits; and it also has authority to regulate ferries operated from the opposite bank of the river, as such power is necessary to enable it successfully to exercise the power to regulate ferries within its limits.<sup>4</sup> Legislative authority is necessary to enable a municipality to grant exclusive franchises.<sup>5</sup> And general authority to establish and regulate ferries gives no right to grant any exclusive ferry license.<sup>6</sup> But a municipal charter conferring upon a city the exclusive power to license a ferry, and also authorizing it to grant or refuse the license, permits the granting of an exclusive license because the city may grant or refuse.<sup>7</sup> So, a municipality given the right to exercise all the powers of the government officials in respect of ferries may grant a license of an exclusive ferry across a navigable river, although only one of the termini is within the limits of the town; and a by-law in regard thereto is not necessary;<sup>8</sup> and, although an ordinance is void so far as it grants an exclusive ferry franchise for ten years, it is not necessarily invalid as to a provision which authorizes the issuance of a license every six months to the grantee upon his paying the license tax as provided therein.<sup>9</sup> Ordinances of a municipal corporation governing ferries are not within the constitutional provision forbidding the legislature to pass local or special laws.<sup>10</sup> A municipality is not liable for the acts of its officers in establishing a free ferry so close to an existing one that it draws its custom away from it.<sup>11</sup> Special authority con-

<sup>1</sup>*Chilvers v. People*, 11 Mich. 43.

But a municipal corporation cannot require the owner or keeper of a ferry within its corporate limits to procure a license from the city authorities before operating his ferry, where such action is not authorized by the general law for the incorporation of cities, under which such municipal corporation is organized. *Shallcross v. Jeffersonville*, 26 Ind. 193.

<sup>2</sup>*Duckwall v. New Albany*, 25 Ind. 283.

<sup>3</sup>*Maysville v. Boon*, 2 J. J. Marsh. 224.

<sup>4</sup>*Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 371, 19 S. W. 1053.

<sup>5</sup>*Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884.

<sup>6</sup>*Minturn v. Larue*, 23 How. 435, 16 L. ed. 574, Affirming 1 McAll. 370, Fed. Cas. No. 9,646.

<sup>7</sup>*Burlington & H. County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390.

<sup>8</sup>*Dinner v. Humberstone*, 26 Can. S. C. 254.

<sup>9</sup>*State ex rel. Campbell v. Cramer*, 96 Mo. 75, 8 S. W. 788.

<sup>10</sup>*St. Louis v. Waterloo-Carondelet Turnp. & Ferry Co.* 14 Mo. App. 216.

<sup>11</sup>*Gibbes v. Beaufort*, 20 S. C. 213.

ferred upon the municipality is not repealed by a subsequent general statute committing the regulation of ferries to county courts.<sup>12</sup> Mandamus will not lie to control discretion committed to municipal officers as to the grant of ferry licenses.<sup>13</sup> The state does not deprive itself of the power to regulate ferries by including the power in a municipal charter,<sup>14</sup> and the state, after granting the right to a municipal corporation, may withdraw it again in whole or in part at its pleasure.<sup>15</sup> The provision of the charter of a municipal corporation that "any matter for the doing which a license is required by the laws of the state shall not be done in this corporation unless under authority of a license obtained from the corporation for doing the same, under a penalty of twice the amount which may be demanded by the corporation for the issue of such license," does not apply to a ferry license which the municipal corporation has no power to grant.<sup>16</sup>

**288. Power of municipal corporation to operate ferry.**— A municipal corporation has no power to engage in the business of operating ferries, unless it is expressly conferred upon it by the legislature;<sup>1</sup> and the same principle prevents a county from using the pub-

<sup>12</sup>*Laredo v. Martin*, 52 Tex. 548.

But an ordinance of a municipal corporation requiring ferryboats on ferries across an interstate stream to land at the landing place within the corporate limits every so often, and to remain there at one time only a certain interval, which applies to every day and all hours of the day and night, is void and unenforceable under a statute conferring general power upon municipal corporations to establish and regulate ferries, as prescribing regulations inconsistent with later acts conferring upon county commissioners the power to regulate the hours during which licensed ferrymen across interstate streams are required to keep their ferries open and to run their boats, and requiring such ferrymen to obtain a license from such commissioners, and to enter into a recognizance to the state containing conditions to operate their ferries according to the regulations prescribed by the board, and repealing all laws inconsistent therewith. *Madison v. Abbott*, 118 Ind. 337, 21 N. E. 28.

<sup>13</sup>*State ex rel. Campbell v. Cramer*, 96 Mo. 75, 8 S. W. 788.

<sup>14</sup>*Harrison v. State*, 9 Mo. 526.

<sup>15</sup>The state, after granting to a municipal corporation the exclusive right of establishing ferries within its limits

and of applying the revenues in aid of municipal improvements without any consideration inuring to the state, may grant to a parish on the opposite bank of the river the right to participate in the regulation of the intermediate ferries and to share in the net profits, without violating any contract or vested right within the protection of the United States Constitution. *Police Jury v. Shreveport*, 5 La. Ann. 861.

But in Kentucky it was held that where the legal title to the land bordering on the Mississippi is vested in the trustees of the town, an act of legislature providing that the trustees of such town may fix the rates of ferriage across the Mississippi river, and may also lease out ferries for any term of years not exceeding five, and apply the rents to the improvement of the town, vests in such trustees at least the exclusive beneficial interest in the ferry privileges, absolutely, which right cannot be devested by a subsequent act of legislature establishing a ferry in favor of another. *Walker v. Columbus*, 4 B. Mon. 259.

<sup>16</sup>*Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

<sup>1</sup>Where a municipal corporation has no express grant of authority to expend the corporate funds in establishing and operating a free ferry outside the cor-

lic money for the establishment of a ferry without express legislative authority.<sup>2</sup> So, upon the division of a town no part of its franchise to operate a ferry passes to the new town, except such as the legislature may see fit to grant it.<sup>3</sup> Where a municipal corporation is making an unauthorized appropriation of the corporate funds by establishing and operating a free ferry outside the corporate limits, equity, at the suit of the taxable inhabitants of the corporation, will restrain it and the officers thereof from making the appropriation.<sup>4</sup> The legislature may, however, require a municipal corporation to operate a ferry, and, in the absence of constitutional restrictions, may compel it to incur a debt for that purpose.<sup>5</sup> By the Montgomerie charter, all ferries to be established around Manhattan island were granted to the municipal corporation of New York.<sup>6</sup> A grant to a municipal corporation of power to keep in order and repair streets and roads does not confer on it power to establish and work a ferry across a river which runs through it.<sup>7</sup> A statute permitting a municipal corporation to purchase a ferry, and, upon the completion of said purchase, to determine whether it shall be free of tolls, or free for a time and

porate limits for the purpose of promoting trade and commerce, it has no such power under a statute authorizing a municipal corporation to pass ordinances for the purpose of providing for the safety, preserving the health, promoting the prosperity, comfort, and convenience of such corporation and the inhabitants thereof. *Jacksonport v. Watson*, 33 Ark. 704.

A ferry franchise granted to the trustees of an incorporated town by the county commissioners' court is unauthorized and void, where the statute under which such court derives its power to grant ferry franchises neither expressly, nor by implication, authorizes such privilege to be granted a corporation, and the act of incorporation creating such trustees a corporate body does not confer upon them the power to accept such a grant, or to delegate that right to others. *Betts v. Menard*, Breese (Ill.) 10, Appx.

A town is without authority to lease a ferry from a parish, and is not liable for the amount of its bid therefor. *Millsaps v. Monroe*, 37 La. Ann. 641.

<sup>2</sup>*Leake County v. McFadden*, 57 Miss. 618.

<sup>3</sup>*Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

Where, upon the division of a town, the new town accepts its charter giving

it the privilege of keeping one half of the ferry operated by the old town during the pleasure of the legislature, it cannot afterward claim greater rights than those conferred by such charter. *Ibid.*

<sup>4</sup>*Jacksonport v. Watson*, 33 Ark. 704.

<sup>5</sup>*Simon v. Northup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560.

The trustees of a town on the Ohio river, owning the land on such river, are qualified, under the law regulating the establishment of ferries across the Ohio river, to receive the grant of a ferry franchise across such river for the benefit of such town; and their legal right thereto would be restricted only by questions of public expediency, irrespective of the number of ferries already existing at that point under previous franchises. *Mayeville v. Boon*, 2 J. J. Marsh, 224.

<sup>6</sup>*Re Union Ferry Co.* 98 N. Y. 139; *New York v. Starin*, 106 N. Y. 1, 12 N. E. 631.

Such right is not confined to ferries established at the time of the Montgomerie charter, but extends to, and includes, all other ferries which the corporation might thereafter establish from Manhattan island to any of the opposite shores. *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 232.

<sup>7</sup>*Cooper v. Athens*, 53 Ga. 638.

then for toll, gives the municipal corporation only one choice, so that when it has determined to charge toll it cannot afterwards make the ferry free.<sup>8</sup> It is within the discretion of a city owning a ferry franchise to convert it into a bridge privilege for a term of years in consideration of a specified annual payment to it, and it may lawfully pass an ordinance to that effect.<sup>9</sup>

**239. Sale or lease by municipal corporation of its ferry rights.**—A city owning a ferry landing with boats and appurtenances to operate a ferry, and having a charter power to operate the ferry and to fix the rates, rents, and fees thereof, may do with such property whatever a private person might do if he were the owner, except that, holding it as an agent for the state for a public purpose, it cannot surrender its control and supervision to the unrestricted control and management of another person.<sup>1</sup> It may sell the property connected with the ferry provided the public is not deprived of the improved means of intercommunication,<sup>2</sup> and it may lease the ferry privilege.<sup>3</sup> Although the lease of a ferry by the selectmen of a town may have been without authority, a subsequent vote at town meeting authorizing an action to recover the rent reserved by the lease amounts to a ratification of the same.<sup>4</sup> A lease by the trustees of a town of the ferry privileges of the town, across the Ohio river, by private contract, where the act of legislature authorizing the leasing of such privilege by such town provides that such leasing should be "at public outcry," is, at most, voidable at the election of the lessors or the state, and not void; and its validity cannot be questioned by a stranger who attempts to run an unlicensed rival ferry within the distance therefrom prohibited by statute.<sup>5</sup> Injunction will lie to prevent a municipal corporation from making illegal lease of its ferry franchises.<sup>6</sup> A lease by a municipal corporation of its ferry with covenants for exclusive enjoyment will not prevent the municipality from exercising its statutory power to

<sup>1</sup>*Atty. Gen. v. Boston*, 123 Mass. 460.

<sup>2</sup>*Laredo v. International Bridge & Tramway Co.* 14 C. C. A. 1, 30 U. S. App. 110, 66 Fed. 246.

<sup>3</sup>*Macdonell v. International & G. N. R. Co.* 60 Tex. 590.

<sup>4</sup>*People v. Albany*, 4 Hun. 675.

<sup>5</sup>*Macdonell v. International & G. N. R. Co.* 60 Tex. 590; *Rocky Hill v. Hollister*, 59 Conn. 434, 22 Atl. 290.

It being the duty of the selectmen of a town to maintain its ferry, they have authority, without an express vote of the town, to lease it to one who will maintain it. *Rocky Hill v. Hollister*, 59 Conn. 434, 22 Atl. 290.

In Virginia it is held that, without legislative authorization, a municipal corporation cannot lease a ferry under a power to regulate and manage it, as it is a public highway. *Roper v. McWhorter*, 77 Va. 214.

<sup>6</sup>*Rocky Hill v. Hollister*, 59 Conn. 434, 22 Atl. 290.

<sup>7</sup>*Oicena v. Roberts*, 6 Bush, 608.

<sup>8</sup>*People v. New York*, 32 Barb. 102.

The licensee of a ferry franchise from a municipal corporation is entitled to an injunction to prevent the municipality from alienating the franchise to another during the term of the lease. *Benson v. New York*, 10 Barb. 223.

grant a ferry license over the same water if it is required for public convenience.<sup>7</sup> Property owned by a municipal corporation for the purpose of operating a ferry franchise is, although leased to a private individual who operates the ferry, held for public and governmental purposes so as not to be subject to taxation.<sup>8</sup>

**290. Who may issue ferry licenses.**—The power with reference to the establishment of ferries resides in the legislature,<sup>1</sup> and the right to grant ferry franchises is referable to the police power;<sup>2</sup> but that body may confer the power upon such subordinate municipal subdivisions or governmental boards as it chooses. The power may, as has already been seen, be conferred upon a municipal corporation; and it may also be conferred upon the board of commissioners or supervisors of a county.<sup>3</sup> But the power to establish ferries is political and not judicial, and it cannot, therefore, be conferred upon courts of law.<sup>4</sup> The grant of the right to an inferior tribunal does not deprive the legislature of the right to exercise the authority itself if it wishes to do so.<sup>5</sup> The delegation of power to a subordinate tribunal may be revoked at the pleasure of the legislature.<sup>6</sup> There is no power to grant ferry franchises unless it has been conferred by the legislature.<sup>7</sup> When the opposite sides of the river are within the jurisdiction of different boards, there is usually a concurrent jurisdiction delegated

<sup>1</sup>*Re Fay*, 15 Pick. 243.

<sup>2</sup>*People ex rel. New York v. Brooklyn*, 111 N. Y. 505, 2 L. R. A. 148, 19 N. E. 90, Affirming 47 Hun, 383.

<sup>3</sup>*Bush v. Peru Bridge Co.* 3 Ind. 21.

<sup>4</sup>*Fanning v. Gregoire*, 16 How. 534, 14 L. ed. 1047; *Concay v. Taylor*, 1 Black, 603, 17 L. ed. 191.

<sup>5</sup>*Cross v. Hopkins*, 6 W. Va. 323.

The board of commissioners of a county, in granting a ferry lease under the laws of South Dakota, acts as the agent of the state, and not of the county. *Evans v. Hughes County*, 3 S. D. 580, 54 N. W. 603.

Under the statutes of Texas, which give the commissioners' court authority "to establish public ferries whenever the public interest may require it," such courts have the power to license public ferries in their respective counties in all cases except in those instances where the legislature has especially granted to some person or persons, or some municipal body, the privilege of establishing a ferry. *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

In Louisiana a police jury has power to establish ferries over all water

courses and lakes, whether navigable or not. *Gillespie v. Freeman*, 7 La. Ann. 350; *Plaquemine v. Decaudine*, 16 La. 588; *Hebert v. Maillan*, 16 La. 585.

<sup>6</sup>*Chard v. Harrison*, 7 Cal. 113.

<sup>7</sup>*Blake v. McCarthy*, 56 Miss. 654; *Chapin v. Crusen*, 31 Wis. 209; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921.

<sup>8</sup>In view of the great similarity in the privilege of passing the public over a stream by means of a ferry and pontoon bridge, it seems that an act granting a charter to make and keep a bridge would operate as a *pro tanto* repeal, or limitation, of the general power conferred upon the county courts to establish ferries. *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289.

<sup>9</sup>In New York city the dock department has not been vested by the legislature with power to grant a ferry license. *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 232.

And it has, therefore, no power to grant either ferry franchises or the exclusive use of the bulkhead or pier or any part thereof to persons running a ferry without a ferry franchise. *Cunard S. S. Co. v. Voorhies*, 18 Jones & S. 253.

to them over the matter of ferries.<sup>8</sup> Under the act of 1805, granting to each parish the right to establish within its limits as many ferries as it pleases, the parish of Orleans and the city of New Orleans stand in the same relation as two parishes, and each has the right of establishing a ferry across the Mississippi before the city.<sup>9</sup>

**291. Restrictions on power to issue licenses.**— If the power to regulate and license ferries is committed to a local board, in general terms, its acts are final. The whole matter is entirely within the discretion of the board and subject to revision only by the legislature itself.<sup>1</sup> But if inferior courts of law attempt to exercise a delegated power to establish ferries, their acts are subject to review on appeal.<sup>2</sup> The legislature may prescribe such restrictions upon the exercise of power as it chooses, and a very common one is to ordain that no ferry shall be established within a specified distance of an existing one.<sup>3</sup>

<sup>1</sup>The right of counties separated by a river to establish a ferry thereon under a statute regulating ferries is concurrent, but is exhausted by the exercise of the right by either county. *Jones v. Johnson*, 2 Ala. 746.

The right to establish an additional ferry at or near a town when public interest demands it is not exclusively within the jurisdiction of the authorities of the county in which the town is situated, where the river over which it is to be operated is the boundary between two counties; but the jurisdiction of such counties is concurrent, and the authorities of either may exercise the right if not already exercised by the other. *Ibid.*

<sup>2</sup>*Police Jury v. New Orleans*, 3 Mart. (La.) 711.

<sup>3</sup>*Lawless v. Reese*, 4 Bibb, 309; *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613. 44 Am. Dec. 83; *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

The discretion conferred upon the county courts of Kentucky by statute as to the establishment of ferries is given chiefly for the public good, and, although not unlimited when private rights may be injuriously affected by its exercise, yet it is not subject to the control or revision of courts of appeal, except in cases of clear abuse. *Harvie v. Cammack*, 6 Dana, 243.

<sup>4</sup>*Carter v. Kalfus*, 6 Dana, 43.

Where public convenience does not require the establishment of another ferry across the Ohio river, an order of the county court refusing such grant will

not be reversed on appeal. *Everston v. Sanders*, 6 J. J. Marsh, 142.

<sup>5</sup>Although a county court may have power to establish a free ferry where it will not interfere with a privilege already granted to a private person, such court, being prohibited by statute from establishing a ferry by license granted to a private person within 1 mile of a ferry already established by license, has no power to establish a free ferry within 1 mile of a private ferry. *Re Howell*, 36 Ark. 466.

Under the statute of West Virginia, the board of supervisors is prohibited from granting leave to establish a ferry across a water course within half a mile of another ferry legally established; but this prohibition expressly excepts the grant of a ferry across the Ohio river, and the statute provides that ferries on that river may be established at any place the board may determine. *Cross v. Hopkins*, 6 W. Va. 323.

A provision of a statute permitting the establishment by the court of sessions of ferries nearer together than prescribed thereby, where public convenience requires it, gives the court a discretionary power, the exercise of which will not be disturbed in the absence of anything showing that such power has been exceeded or abused. *Re Hanson*, 2 Cal. 202.

Under the law of Kentucky prohibiting the establishment of ferries across the Ohio river within less than a mile from previously established ferries, an exception providing that such restriction need not be enforced where it be-



The license may also be required to be issued to the owner of the land upon the bank of the stream.<sup>4</sup> The local tribunal should act for the best interest of the public, and not arbitrarily or capriciously.<sup>5</sup> So that, although an owner of land on the Ohio river is alone entitled, under the statutes of Kentucky, to be the grantee of a ferry across it from that point, yet he has no legal right to demand such a grant unless the public convenience shall require the establishment of a ferry from his land, and then he is not entitled to it if his ferry would be within 1½ miles above or below another previously established ferry, unless it be in a town, or necessary in consequence of an impassable stream putting into the Ohio river, or opposite to some established ferry in Ohio.<sup>6</sup> Under this rule, even though there is no restriction in the statute on the location of ferries, the court will not grant a license to operate a ferry at a point but little more than a mile below an existing ferry, and not as much above another, where the existing ferries are in good repair, and are

comes necessary to establish a ferry within less than that distance by reason of an impassable creek emptying into that river, confers upon the county courts the discretionary power to decide when a creek is impassable within the meaning of such exception; and their judgment will not be reversed upon appeal, except in cases where such discretion has been palpably abused. *Sanders v. Craig*, 1 A. K. Marsh, 196.

A small creek impassable at its mouth, but passable at all times a short distance therefrom on the usual road, is not the kind of an intervening impassable stream required by the statute regulating the establishment of ferries across the Ohio river to authorize a grant for a ferry franchise across such river within 1½ miles of a previously established ferry. *Cotton v. Houston*, 4 T. B. Mon. 288.

Under statutes providing for the establishment of ferries at certain distances apart, but without such restriction where there are public roads and the interests of the public demand a ferry at such points, the commissioners' court of a county may establish a ferry at a point where a public road ends, although the road is not continued across the river in the opposite county, and the ferry in the latter county is therefore within the prohibited distance from another ferry. *Alabama Ferry Co. v. Leathers* (Tex. Civ. App.) 69 S. W. 117.

An order of the county court estab-

lishing a ferry across the Ohio river within a mile of another ferry previously established contrary to statute will not be reversed on appeal, unless the record in that court contains conclusive proof of the previous establishment of such ferry within the distance prohibited by such statute. *Givens v. Polard*, 3 A. K. Marsh, 320.

Under the statute of Arkansas, where a license is granted to operate a ferry near a town and near another ferry, whether or not the ferry created by such license is for the public convenience is a question to be determined by the proper county court, and the decision of that court is binding upon everyone, where no exceptions have been taken to the decision, and the judgment has not been set aside. *Haynes v. Wells*, 26 Ark. 464.

\*An order of the county court establishing a ferry will not be reversed on appeal, where it appears from the record that the applicant was the owner of the land on both sides of the stream, and the provisions of the statutes regulating such proceedings were in all respects complied with. *Ackler v. Oldham*, 1 A. K. Marsh, 471.

\*When the legislature has granted the privilege of having a pontoon bridge, it is in the discretion of the county court to determine that the public good does not require a ferry at or near the same place. *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56. 26 Am. Rep. 289.

\**Carter v. Kalfus*, 6 Dana, 43.

properly performing their public duties, and there is no public road leading to the proposed ferry, the only road being a private one, laid out by the petitioner, and no public convenience is to be obtained by granting a license, though there exists a possibility of the new ferry being able to carry at a lower rate by reason of the narrowness of the stream at the point in question.<sup>7</sup> The mere existence, however, of a ferry will not prevent the granting of another franchise if the rights of the first grantee are not exclusive, and public interest demands a second one.<sup>8</sup> The board of supervisors, in granting a ferry privilege or license, cannot bind its successors in office by a stipulation that no rightful ferry shall be established within a certain distance of the one licensed by it, either within a specified period or during all time.<sup>9</sup> Mandamus will not lie to compel the commissioners of revenues and roads to grant a ferry franchise under a statute providing that when the land is owned by the same person on both sides of the river he may have a ferry established thereon, but that no public ferry shall be established within less than 2 miles by water of any ferry already established, where the applicant is not the owner of the land on both sides of the river, and it appears that there is a ferry established within 2 miles of the point at which he desires

<sup>7</sup>*Beard v. Long*, 4 N. C. (2 Car. Law Repos.) 69.

So, the circuit court will, in the exercise of its discretion, refuse a license for a ferry over the east branch of the Potomac river, where the object is by competition to compel bridge companies to take less toll than they are authorized by law to take, whereby they might be unable to keep the bridges in repair, and become liable to prosecution and forfeiture. *Young's Case*, 2 Cranch C. C. 453, Fed. Cas. No. 18,150.

And a person is not entitled to a franchise for a ferry at or near a public bridge, where the only benefit the public would derive from its establishment would be the production of competition which might result in a reduction of the bridge tolls below the amount allowed by law, it being shown that such bridge is sufficient at all times to afford ample accommodations to the traveling public at that point. *Nashville Bridge Co. v. Shelby*, 10 Yerg. 280.

A grant of a ferry franchise to the owner of land on one side of a stream at the same point where another ferry is in operation under a prior grant will be refused, where public needs do not require the establishment of another

ferry at that point. *Clark v. White*, 5 Bush, 353.

So, when there are two ferries within a mile of each other, in the absence of a public need for a third half way between the two, and where it appears that the revenues of one will be injured thereby, it is not error to refuse permission to establish it. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L. R. A. 513, 43 S. E. 107.

<sup>8</sup>*Knott v. Jefferson Street Ferry Co.* 9 Or. 530.

A licensed ferryman is not entitled to damages against the county where the county commissioners' court directly establishes a competing ferry. *Burrows v. Gonzales County*, 5 Tex. Civ. App. 232, 23 S. W. 829.

<sup>9</sup>*Seal v. Donnelly*, 60 Miss. 658.

When a county court, having power to settle and discontinue a ferry, is required to give notice for a new ferry within 2 miles of one already existing, it can make no irrevocable grant of an exclusive franchise. *Barrington v. Neuse River Ferry Co.* 69 N. C. 165.

An attempt to grant an exclusive ferry franchise for ten years, which is void because not authorized by law, may yet create a valid franchise for short periods

to establish his ferry.<sup>10</sup> The acts of local boards must be confined to the territorial limits over which their jurisdiction extends.<sup>11</sup> A proceeding before the commissioners of one county to establish a ferry across a river is not an estoppel to a subsequent proceeding in another county for the same purpose, if any relief can be had in the latter county not obtainable in the first proceeding.<sup>12</sup>

**292. Power of local boards to operate ferry.**— A statute which vests in the commissioners' court the power to establish public ferries whenever the public interest may require, necessarily carries with it the power to construct and operate them; and a statute providing for the granting of ferry licenses does not restrict them to the one means of providing ferries for the public, by granting licenses to individuals or corporations to operate them.<sup>1</sup> And if the board has a right to operate the ferry, it has a right to lease it.<sup>2</sup> If the county authorities have no power to enter into a contract for the operation of a ferry so that the operating expenses will not be a legal charge against the county, the carrying out of the contract may be prevented by injunction.<sup>3</sup>

**293. Method of granting license.**— So far as the procedure for the establishment of ferries is laid down in the statute, it must be followed. The proceedings must be in a court having jurisdiction over them.<sup>1</sup> The route of the ferry should be described with sufficient

for which a license fee is paid. *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

<sup>10</sup>*State ex rel. Driver v. Talladega Road & Revenue Comrs.* 3 Port. (Ala.) 412.

<sup>11</sup>*Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

But the right to establish a ferry at a certain place on a river within the jurisdiction of county commissioners may be granted by them so far as their jurisdiction goes, although the opposite side of the river is within an Indian reservation. *Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

A contract entered into by the supervisors of adjoining counties jointly to construct, equip, and operate a free public ferry across a river between the two counties, is void, no power being given by statute to construct ferries except within the limits of the county, and there being no similar provision relating to ferries such as the one relating to bridges constructed between counties. *Johnston v. Sacramento County*, 137 Cal. 204, 69 Pac. 962.

<sup>12</sup>*Robinson v. Lamb*, 131 N. C. 229, 42 S. E. 701.

<sup>1</sup>*Burrows v. Gonzales County*. 5 Tex. Civ. App. 232, 23 S. W. 829.

<sup>2</sup>*State ex rel. Jackson v. King County* (Wash.) 69 Pac. 1106.

A ferry lease for five years, with a privilege of five or ten more years, at the option of the licensee, is not in excess of the power to grant a lease for a term not exceeding fifteen years. *Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57.

The grant of a ferry lease by a board of county commissioners does not, under the laws of South Dakota, constitute a sale or lease of the property of the county, and does not impose upon the county any liability to refund to the grantee of such lease, money paid by him as rent in case the law under which it is granted shall be held invalid. *Evans v. Hughes County*, 3 S. D. 580, 54 N. W. 603.

<sup>3</sup>*Johnston v. Sacramento County*, 137 Cal. 204, 69 Pac. 962.

<sup>1</sup>*Re Howell*, 36 Ark. 466.

accuracy to protect the rights both of the grantee and of others who may in the future desire to establish a rival ferry.<sup>2</sup> It is not necessary to designate a definite and particular spot on each shore between which the ferry shall be operated.<sup>3</sup> The termini may be rendered definite by the acts of the licensee, and when he has fixed the points he will not be permitted to change them.<sup>4</sup> It is not necessary to the validity of a ferry that the points of departure should always be the same,<sup>5</sup> but the general route must be the same; so that an injunction restraining the operation of a ferry is violated where it covers its former route, although the point of departure is changed to another pier.<sup>6</sup> And in case the applicant is required to be the owner of land on the shore, that fact must appear in the petition.<sup>7</sup> Whether the applicant must prove his title in the first instance or his possession will afford prima facie evidence of title is a question upon which the courts are not in accord. The Kentucky court held that it is not necessary to prove the title in the absence of proof that it is not in

<sup>2</sup>A description is sufficiently accurate in an application to establish a ferry which states that the ferry is to be across a certain river from a point on certain lands to lands of another on the opposite side. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L. R. A. 513, 43 S. E. 107.

<sup>3</sup>It is sufficient, although it permits the ferry to land on the shore of a river between two designated points, one 4 miles above a city, and the other 2 miles below, it being impossible, owing to sand bars, always to land immediately at the city. *Capital City Ferry Co. v. Cole & C. Transp. Co.* 51 Mo. App. 228.

Although the termini of a ferry should be in places where the public have rights, as towns or villages, or highways leading to them, a license from the Crown to a municipality is not rendered invalid by the fact that it authorizes it to establish a ferry between it and a township, as it will be construed as authorizing the municipality to determine the exact point of terminus in the township, to which landing place it will be restricted. *Jellett v. Anderson*, 27 Grant Ch. (U. C.) 411.

A ferry franchise between a municipal corporation and the "opposite" shore refers to that portion of the shore which would be included if the corporation were moved straight across the river. *Snubury Steam Ferry & Towboat Co. v. Grant*, 2 Monaghan (Pa.) 287, 15 Atl. 706.

<sup>4</sup>*Pim v. Curell*, 6 Mees. & W. 234.

There is no presumption that a grant of a ferry privilege extends beyond the place actually occupied in the exercise of the privilege. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>5</sup>*New York v. New Jersey S. B. Nav. Co.* 106 N. Y. 28, 12 N. E. 435.

<sup>6</sup>*New York v. New York & S. I. Ferry Co.* 8 Jones & S. 300.

<sup>7</sup>But it is not necessary in an application by several, as partners, to establish a ferry, to show that the title to the land upon which the ferry is sought to be established is in each and all of the applicants. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L. R. A. 513, 43 S. E. 107.

It is sufficient if an applicant to establish a ferry shows that he owns land on the side of the river in the state, without showing ownership in lands on the opposite side in another state, under W. Va. Code, chap. 44, § 2, providing that any person who owns or has contracted for the use of land at a point where he wishes to establish a ferry may present an application for that purpose. *Ibid.*

Refusal by the court of commissioners of roads and revenues of a ferry franchise, solely on the ground of the illegality of the applicant's certificate of entry embracing land on the river bank at the point where the ferry is to be established, which had been relinquished by another applicant to whom

the applicant who is in possession,<sup>8</sup> while the Indiana court held that proof of possession was not sufficient, but that title must be shown.<sup>9</sup> Possession is, in most of the affairs of life, taken as prima facie evidence of ownership in the absence of evidence to the contrary, and there seems no good reason why the same rule should not apply to this class of cases. A ferry license granted for ten years to the occupant and recognized owner of the adjacent soil is not revoked by a subsequent recovery of the land by the true owner; and the latter is not entitled to the grant of a license during the term of the one granted to the prior occupant.<sup>10</sup> All persons to whom the statute requires notice to be given must receive notice or they will not be bound by the proceedings.<sup>11</sup> A person may estop himself from contesting the regularity of the proceedings by being present and bidding at the sale of the franchise.<sup>12</sup> The riparian owner has, in the absence of statute, no priority of right; and, in case he has no such right, he is not entitled to notice unless the statute gives him the right to it.<sup>13</sup> To make the proceedings valid the record must show

the franchise is granted, without taking into consideration which grant will produce the greatest public benefit and least private injury, is erroneous, where such certificate is good as against everybody except the general government. *Cox v. Easter*, 1 Port. (Ala.) 130.

<sup>8</sup>*Givens v. Pollard*, 3 A. K. Marsh, 320.

<sup>9</sup>*Mullis v. Cavins*, 5 Blackf. 77.

<sup>10</sup>*McCearly v. Swayze*, 65 Miss. 351, 3 So. 657.

<sup>11</sup> Where the owner of a ferry franchise, who had leased it to another for a term of years, requested the county judge not to revoke his license but to compel his lessee to give a bond, but the lessee, in the lessor's absence, obtained an order from the county judge granting him the ferry privilege, and thereupon he operated such ferry and paid the agreed rent during the term of the lease, but after such term expired claimed the ferry privilege as belonging to him under the order of the county court,—such order, if it be construed as granting an original ferry franchise to such lessee, is, nevertheless, void because no notice of the application therefor was given as required by the laws of Kentucky. *Hazelip v. Lindsey*, 93 Ky. 14, 18 S. W. 832.

Under the New York statutes, notice of application for a ferry license need

not be given to all who claim a right to the ferry. All that is required, where the applicant is not the owner of the land through which the highway runs adjoining the ferry, is that the person applying for license shall give notice to the owner of such land. *Wiseall v. Wandell*, 3 Barb. Ch. 312.

But notice to the owner of the land through which a highway runs is necessary, under the New York statutes, before granting a ferry license to a third person to connect with such highway. *Re Talcott*, 31 Hun, 464.

The statutes of Kentucky regulating the establishment of ferries do not require notice of an application by the owner of the land on one side of a stream to establish a ferry across the same to be given the owner of the land on the opposite side lying in another county. *Pentecost v. Miller*, 7 T. B. Mon. 313.

Notice of an application to establish a ferry across the Ohio river in pursuance of the statute regulating their establishment need not be given the owner of another ferry within a mile thereof, unless it appears of record that such other ferry had been duly established prior thereto. *Givens v. Pollard*, 3 A. K. Marsh, 320.

<sup>12</sup>*Chiapella v. Brown*, 14 La. Ann. 185.

<sup>13</sup>*Murray v. Menefee*, 20 Ark. 561.

that the statutory requirements were complied with.<sup>14</sup> Where the applicant need not necessarily be the owner of the land on the side from which the ferry is to run, a grant will not be annulled because the record does not show that the grantee was the owner of that land.<sup>15</sup> Although, under the statutes of Kentucky, a ferry franchise across the Ohio river cannot be granted to other than the owner of the land at the landing on the Kentucky shore, yet, inasmuch as the county court, in granting such franchises, decides upon the title of the applicants, when the record recites that the grantee proved his title to such land, the grant is not void, only erroneous, where it appears from extraneous facts in another case that another was in fact the true owner, and such order will be conclusive as to such other if he was a party to the original proceedings.<sup>16</sup> If the statute requires the taking of a bond, an order granting a franchise is not valid without it;<sup>17</sup> and so with regard to the statute requiring a sale to the highest bidder.<sup>18</sup> The order need not necessarily fix the rates of toll.<sup>19</sup> A refusal of a franchise is conclusive upon all matters decided in it and the matter cannot be reopened by a second decision.<sup>20</sup> On the establishment of a ferry, it is error to give judgment for costs against the party opposing such establishment, where neither the statutes regulating the establishment of ferries, nor the general laws concerning costs,

<sup>14</sup>*Lawless v. Reese*, 4 Bibb, 309; *Lawless v. Rees*, 1 Bibb, 495; *Givens v. Ferguson*, 6 T. B. Mon. 186.

An order granting the right of the applicant to establish a ferry across the Cumberland river from opposite applicant's lots Nos. 11 and 12, to a point opposite to such lots on the other side, is not a sufficient suggestion of ownership in the land on one or both sides of the stream to satisfy the requirements of the statute regulating the establishment of ferries. *Givens v. Ferguson*, 6 T. B. Mon. 186.

<sup>15</sup>*Patrick v. Bush*, Sneed (Ky.) 69.

<sup>16</sup>*Kennedy v. Covington*, 8 Dana, 50.

<sup>17</sup>*Sanders v. Craig*, 1 A. K. Marsh. 196.

<sup>18</sup>The California act of 1893, providing for the sale of franchises in municipalities to the highest bidder, does not include a franchise for a ferry over a river between two counties, but the sale of such a franchise is controlled by Pol. Code, §§ 2843 *et seq.*, which gives discretion to the board of supervisors to grant such a franchise to a suitable person, to subserve a public benefit, sub-

ject to rules and regulations, and that the license required to be paid as fixed by the board is to be full compensation to the counties, and to be divided between them. *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872.

<sup>19</sup>*Pentecost v. Miller*, 7 T. B. Mon. 313.

An omission of the county court to fix the rate of ferriage at the time the order was issued granting the right to establish a ferry, although an omission of duty, will not make such grant void, as the order fixing the rates must necessarily be subsequent to that granting the franchise. *Ackler v. Oldham*, 1 A. K. Marsh. 471.

But the right given the freeholders by statute to fix rates of ferriage is not an unconstitutional delegation of the legislative power, and it applies as well to ferries having but one landing in the state or county as to those with both landings in the same county. In the former case the right is limited to fixing tolls taken at the one end. *Hudson County v. State*, 24 N. J. L. 718.

<sup>20</sup>*Newport v. Taylor*, 11 B. Mon. 361.

authorize it.<sup>21</sup> A ferry is "established" from the date of the lawful order for its location.<sup>22</sup>

**294. Who may contest the grant of a license.**—The interest which will entitle one to be heard on an application by another for a ferry license must be an interest in property relating to him separately as an individual proprietor, and must exist as a private right, which he, as a private individual, may vindicate by suit, and not a mere interest which he holds in common with the rest of the community.<sup>1</sup> If the statute gives priority of right to the riparian owner, he may contest a grant to another person if the priority of right was not offered to him. So, one who has an established ferry with which the one proposed will interfere has such an interest as entitles him to contest the second grant.<sup>2</sup> A person not a party to the proceedings cannot prosecute an appeal or writ of error to reverse an order of court granting a franchise for a ferry across the Ohio river, merely because he thinks himself aggrieved thereby, when the statute under which such franchise was granted does not give that right, and the statute authorizing such action by a person who may think himself aggrieved by an order establishing a ferry does not refer to ferries across the Ohio river.<sup>3</sup> And the contest must be by the complainant in his own right; and he cannot bring forward the rights of other persons as reasons for refusal to grant the franchise.<sup>4</sup>

**295. Method of contesting grant.**—The proper method of contesting a grant of a ferry franchise is to appear before the court having authority to grant it, and urge the objections in that tribunal. If they are ignored in that tribunal, the further steps must be determined by the provisions of the statute. Rights given by the statute cannot be taken from the objector by the action of the local tribunal, although the statute provides no means of protecting them. In such cases the objector may apply to a court of equity to protect his rights.<sup>1</sup> And where statutory rights have been ignored, the action of the local tribunal may be reviewed by certiorari.<sup>2</sup> In case the objector has

<sup>21</sup>*Ackler v. Oldham*, 1 A. K. Marsh. 471.

<sup>22</sup>*Robinson v. Lamb*, 120 N. C. 16, 39 S. E. 579.

<sup>1</sup>*Creswell v. Greene County*, 24 Ala. 282.

<sup>2</sup>*Williamson v. Hays*, 25 W. Va. 609; *Carter v. Kalfus*, 6 Dana, 43; *Givens v. Pollard*, 3 A. K. Marsh. 320.

<sup>3</sup>*Cosby v. Lynn*, 4 Bibb, 249.

<sup>4</sup>A bridge company cannot defeat the operation of a ferry on the ground that the one attempting to do so has not ob-

tained a conveyance from the owner, but it is sufficient if he is operating with the owner's consent. *Johnson's Appeal*, 95 Pa. 78.

<sup>1</sup>The remedy of one who seeks to set up a dormant ferry right based upon a reservation in a deed, and as against an established ferry, is not at law, but by a suit in equity. *Bowman v. Walben*, 2 McLean, 376, Fed. Cas. No. 1,749.

<sup>2</sup>*Murray v. Mariposa County*, 23 Cal. 492.

Where a ferry is established at or

no statutory rights and the statute gives him no remedy to review the decision of the local tribunal, he can proceed no further, but the decision of the local tribunal is final.<sup>3</sup> Conflicting claims to a ferry license cannot be determined by certiorari.<sup>4</sup> The proceeding must in any event be by a direct attack, either by appeal in the proceeding for the establishment of the ferry if that remedy is available, or by an equitable proceeding to annul the grant. The proceeding cannot be ignored and made the subject of collateral attack unless the proceeding is void on its face.<sup>5</sup>

**296. Right of riparian owner to receive grant.**—From his location and the fact that strangers cannot land on his shores without his consent, there are strong reasons why the riparian owner should have the prior right to the ferry franchise.<sup>1</sup> And in view of this natural equity on his part the statutes may give him a prior right. But, in the absence of statute, the riparian owner has not the prior right. The right of ferry is not a natural riparian right. It arises out of a duty resting on the government to provide highways for the accommodation of the citizens, and should be delegated to the one who will best serve the public interests. In most instances the riparian owner, because of his natural facilities, most nearly meets the requirements, and so is usually accorded the first opportunity. But this is not always so.<sup>2</sup> *Peter v. Kendal*.<sup>3</sup> in holding that the owner of

near a town under the statute of Arkansas, which provides that the county court "shall not permit any ferry to be established within 1 mile above or below any ferry previously established, except at or near cities or towns where the public convenience may require it and satisfactory proof of the same shall be adduced," the county court, in granting the right to establish the ferry, passes upon and determines the question of public necessity or convenience; and where the proprietor of an established ferry voluntarily appears before the county court, and resists the establishment of the ferry, his only remedy is to invoke the appellate jurisdiction of the circuit court by writ of certiorari to quash the proceedings; otherwise the judgment of the county court is conclusive as to the question of public convenience, and the owner of the rival ferry will not be heard to attack it in a court of chancery. And this is the case although the county court has renewed the license annually under the statute, and the owner of the rival ferry did not appear at the time of the renewal, as the question of public con-

venience is not subject to review at the time of each yearly renewal of the license. *Lindsay v. Lindley*, 20 Ark. 573.

"An injunction should not be issued upon the application of one operating a ferry, against another to prevent him from applying for a license, also, to operate a ferry near the same point, when the statute does not make ferry licenses exclusive; but whether there shall be one or more ferries at or near a particular locality should be left to the judgment and discretion of the officials whose duty it is to issue licenses therefor. *Green v. Ivey* (Fla.) 33 So. 711.

*Re Fay*, 15 Pick. 243.

*Everston v. Sanders*, 6 J. J. Marsh. 142; *New-Port v. Taylor*, 6 J. J. Marsh. 134; *Churchill v. Grundy*, 5 Dana, 90.

<sup>1</sup>In *Nashville Bridge Co. v. Shelby*, 10 Yerg. 280, it is said that it is deemed matter of common right when a grant of a ferry franchise is made to a subject, that it should be made to the owner of the soil where the ferry is kept.

<sup>2</sup>*Mills v. St. Clair County*, 4 Ill. 53; *Young v. Harrison*, 6 Ga. 130; *Stark*



a ferry need not have the property in the soil on either side, expressly disapproves of the law as laid down in *Savile*, wherein it is stated "that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he cannot land on the other side." The grant by a county court of a ferry franchise across a private stream, whereby other individual proprietors of the bed of the stream are prevented from establishing ferries, is not a private appropriation of private property to public uses, but is a mere inhibition upon the use of the property of one person in such a manner as to interfere with the vested rights of another.<sup>4</sup> The inherent difficulties which would arise from granting the franchise to one who does not own a landing place are so great and the equities of the riparian owner so strong that the courts have been inclined to uphold the rights of the riparian owner when it was possible to do so.<sup>5</sup> The North Carolina court, after much vacillation, reached the conclusion that the franchise of keeping a public ferry, and demanding toll for transportation, resides in the state, and is so incident to riparian ownership that it can be granted to none others than those who own the land at one or the other of its terminal connections, unless such proprietor refuse to exercise it, when it may be conferred upon another, who can only obtain the right to use the soil for the purpose by making compensation; and this, even when those termini are public roads.<sup>6</sup> That doctrine can hardly be supported on prin-

v. *Miller*, 3 Mo. 470; *Trustees of Schools v. Tatman*, 13 Ill. 27; *Gant v. Drew*, 1 Or. 35; *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289; *McRoberts v. Washburne*, 10 Minn. 23, Gil. 8; *Bell v. Clegg*, 25 Ark. 26.

Under the Kentucky statutes, it is not necessary that the grantee of a ferry franchise should own the land on any stream except the Ohio. *Brown v. Given*, 4 J. J. Marsh. 28; *Harvie v. Cammack*, 6 Dana, 243.

The statute merely makes such owner a preferred applicant: and therefore such franchise, except on the Ohio river, is not a right incident to, and growing out of, the title to such land. *Richmond & L. Turnp. Road Co. v. Rogers*, 1 Duv. 135.

<sup>4</sup>6 Barn. & C. 703.

<sup>5</sup>*Murray v. Menefee*, 20 Ark. 561; *Harvie v. Cammack*, 6 Dana, 242.

<sup>6</sup>In an early Pennsylvania case it is said, the late proprietors claimed a right, by way of prerogative, to grant patents for ferries, but they never pretended this claim where the patentee

was not possessed of lands on both sides of the water, or at least had not the permission of the owners of the landings. *Chambers v. Furry*, 1 Yeates, 167.

So, the Kentucky court held that the power of granting ferry franchises to persons other than the owners of the soil is an extraordinary power which ought not to be favored, and, when it exists, must be conferred by the legislature. *Jefferson Seminary v. Wagnon*, 2 A. K. Marsh. 379.

<sup>7</sup>*Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633.

The earliest cases in that state held that a person may be granted the privilege of erecting and operating a ferry, although he is not the owner of the land on either side of the stream. *Raynor v. Dowdy*, 5 N. C. (1 Murph.) 279; *Stark v. M'Gowen*, 1 Nott & M'C. 387, 9 Am. Dec. 712.

But in *Pipkin v. Wynns*, 13 N. C. (2 Dev. L.) 402, it is said that a riparian owner has "the preferable right" to call for the ferry franchise across a public river bordering his land, and it cannot

ciple. A ferry franchise is not a right belonging to the riparian owner, but to the state; and for the public good the state may permit its grantee to acquire a landing by right of eminent domain, so that the riparian owner cannot be said to possess a right, but merely an equity which the state may recognize or ignore at its pleasure. The usual rule, however, does not apply to private ferries. The riparian owner has a right to maintain them for his own use, with which the state cannot interfere.<sup>7</sup>

**296a. Effect of statutes.**—As stated in the preceding section, the statute may confer a prior right to receive the ferry franchise upon the owner of the shore, and, in case it does so, he must be accorded the first refusal of the privilege of operating the ferry.<sup>1</sup> A franchise to establish a ferry will not be granted a person not the owner of the land under the provisions of a statute that the ferry must be from the lands of the applicant, although the act in other respects contains neither express nor implied obligations on the part of the applicant as to the ownership or nonownership of such lands.<sup>2</sup> It has been suggested that, under a statute which provides that any person wishing to establish a ferry shall apply to the commissioners' court, and shall show that he is the owner of the land on which the ferry is sought to be established, the right of preference in favor of the landowner does not exist at points where public roads have been established across the streams of the state.<sup>3</sup> Where the applicant must be the owner of the land, alienation of the land pending the application will defeat the right.<sup>4</sup> Even in case the statutes recognize the right of the riparian owner to priority of right, such right is not an absolute one unless made so by the statute.<sup>5</sup> Under the law authorizing ferries to be granted to the owners of the land, it is not material whether the title thereto be joint or several, or whether it be held in trust or in one's own right.<sup>6</sup> The dedication or taking of land for a

arbitrarily and capriciously be granted to another, at least until the owners be in default.

This rule was followed in *Biggs v. Ferrell*, 34 N. C. (12 Ired. L.), 1, which was an action for injuries caused by negligence in running a ferry.

In *Barrington v. Neuse River Ferry Co.* 69 N. C. 165, the court returned to its original doctrine that there is no obligation on the legislature,—at least, none which the courts can enforce,—to offer a ferry franchise first to the riparian proprietor, and held that the legislature may grant a ferry franchise to anyone, and empower him to condemn riparian land for a landing.

<sup>7</sup>See *ante*, § 285.

<sup>1</sup>*Kennedy v. Covington*, 8 Dana, 50; *Somerville v. Wimbish*, 7 Gratt. 205; *Mills v. St. Clair County*, 4 Ill. 53; *Hazelton v. DePriest*, 143 Ind. 368, 42 N. E. 751; *Nashville Bridge Co. v. Shelby*, 10 Yerg. 280.

<sup>2</sup>*Jefferson Seminary v. Wagnon*, 2 A. K. Marsh. 379.

<sup>3</sup>*Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

<sup>4</sup>*Churchill v. Grundy*, 5 Dana, 99.

<sup>5</sup>*Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202; *Tuscaloosa County v. Foster*, 132 Ala. 392, 31 So. 587.

<sup>6</sup>*Maysville v. Boon*, 2 J. J. Marsh. 224.

public highway does not, in cases where the owner retains the fee, and the public have only an easement, deprive such owner of his preferable statutory right to a ferry if one is established.<sup>7</sup>

**297. Priority among applicants.**— If the statute gives the riparian owner a prior right to receive the franchise as between him and a nonriparian applicant, he is entitled to the preference, and the grant cannot be made to a nonriparian applicant until the riparian owner has been given the refusal of it.<sup>1</sup> And even in the absence of a statutory requirement to that effect, unless there is some strong reason to the contrary, he should be given the preference. Where a preference for a ferry franchise is given by law to the owner of the land on a river, or, in case different persons own land on opposite sides, a franchise therefor may be granted both, a person owning land on both sides of a river at the landing places of such ferry is entitled to a preference for an exclusive franchise, as against the owner of land on one side only, above and below, but not at the landing place of such ferry.<sup>2</sup> The circumstances may be such that both applications should be granted, and there will be no necessity of choosing between them.<sup>3</sup> If the riparian owner makes no application, the franchise may be granted to a nonriparian owner, and the grantee will be entitled to all

<sup>7</sup>*Prosser v. Wapello County*, 18 Iowa, 327.

The title to the center of a street extending to a river does not inure to purchasers of land alongside thereof by the subsequent dedication of such street, which at the time of their purchase could not have been in the contemplation of the parties, so as to make them adjoining owners, entitled to a preference to keep a ferry to be established at such street, under statutes giving such a preference to the owner of the land embracing or adjoining the stream where the proposed ferry is to be established. *Knott v. Jefferson Street Ferry Co.* 9 Or. 530.

So, the easement which a turnpike company acquires by condemnation proceedings to the land comprising its roadway does not vest it with the exclusive ferry privilege across a stream to the edge of which such roadway extends, although its charter authorizes it to receive a franchise therefor from the county court of that county; but in such case the company has such an interest in the establishment of a ferry at that point as to entitle it to notice of an application for a ferry franchise by another, even if that other be the

owner of the fee, notwithstanding the general statutes regulating the establishment of ferries in Kentucky do not require notice of an application for a ferry franchise to be given, except where the applicant is not the owner of the land. *Lexington, H. & P. Turnp. Road Co. v. McMurtry*, 3 B. Mon. 516.

<sup>1</sup>*Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289.

<sup>2</sup>*Allen v. Farnsworth*, 5 Yerg. 189.

<sup>3</sup>Where two applicants for ferry franchises across a stream file their applications therefor at the same time, the one for a ferry from his land on one side of a stream across the same just below the mouth of a fork thereof, and the other from his land between the fork and main stream across such main stream to a public highway on the land of the other applicant, both have equal rights to such franchises, and both will be granted, such fork constituting an impassable stream between the two landings on the one side, within the exception to a statutory prohibition against granting a franchise for a ferry within a mile of another ferry on the same stream, except in a town or city, or where an impassable stream intervenes. *Bullow v. Pettus*, 3 Bush, 603.

the benefit accruing from the grant and cannot be compelled to account to the riparian owner for any of the profits.<sup>4</sup> The question of priority may depend upon the terms of a grant or dedication of the land if it is not fixed by statute. A grantor, upon granting land upon the bank, may reserve the right to the ferry.<sup>5</sup> In the absence of an express reservation, a grant of land bounded by a river will reserve nothing to which a ferry franchise can attach, where it must be granted to a riparian owner.<sup>6</sup> Such reservation, however, is not binding on the authority granting the franchise. That authority is bound to recognize only the riparian owner, and he may be compelled under the covenants of his grant to account to the vendor for his profits.<sup>7</sup> The owner in fee of a landing dedicated to public use may reserve the ferry right.<sup>8</sup> Grantees of the exclusive right to the use of the river front of a riparian owner for ferry landing purposes, but in connection only with a particular ferry, cannot be deemed adjoining owners within statutes giving the owner of land embracing or adjoining the stream where the proposed ferry is to be established the preference to keep the same on proper and reasonable application therefor.<sup>9</sup> A riparian owner loses his preferential right to a ferry franchise only during the term of a license granted another, under a statute limiting such franchise, and at the expiration of such license he may assert his preference to the exclusion of the former licensee

<sup>4</sup>*Sparks v. White*, 7 Humph. 86.

<sup>5</sup>*Bowman v. Wathen*, 2 McClean, 376, Fed. Cas. No. 1,740.

A court of equity will enjoin the establishment of a ferry landing on land, where the same was originally sold to the grantor of the present owner by one owning other land on both sides of a river across which he was operating a ferry, and, for the purpose of protecting the same from opposition, he provided in the deed of conveyance of such land that neither the purchaser nor his heirs or assigns should establish or authorize the establishment of a common ferryboat landing on the land conveyed without the permission of such grantor. *Frye v. Partridge*, 82 Ill. 267.

<sup>6</sup>*Churchill v. Grundy*, 5 Dana, 100.

<sup>7</sup>*Brown v. Given*, 4 J. J. Marsh. 28;

*Lytle v. Breckenridge*, 3 J. J. Marsh. 663.

A reservation, by the original proprietors in the grant of a town site situated on the Ohio river, of the exclusive right to the benefits of the entire ferry franchise incident to the land within the town limits, indorsed on the plat thereof, and not denied in the act of the legislature incorporating such

town, vests in the trustees thereof the legal title to such land, and consequently the exclusive right to be the grantees of a ferry franchise across the Ohio river; but, by virtue of such reservation, the beneficial interest in such ferry remains in the original proprietors, their heirs or assigns, which may be enforced as an available trust. *Kennedy v. Covington*, 8 Dana, 50.

<sup>8</sup>*Memphis v. Overton*, 3 Yerg. 387; *New-Port v. Taylor*, 6 J. J. Marsh. 134.

The dedication of land to the water's edge for the public use and benefit of a town, without reservation, renders the town the virtual owner thereof, and the trustees of such town are entitled to a grant of a franchise for a ferry across the Ohio river, although the naked legal title still remains in the original proprietor of such town, and the statutes of Kentucky provide that no franchise for a ferry across the Ohio river shall be granted to one not the owner of the land on the Kentucky shore at the point of embarkation. *Dover v. Fox*, 9 B. Mon. 200.

<sup>9</sup>*Knott v. Jefferson Street Ferry Co.* 9 Or. 530.

who seeks a renewal.<sup>10</sup> Peremptory mandamus will not issue to compel the granting of a ferry license to one whose application was denied, although filed prior to the application of one to whom the license was granted on the consideration of both applications at the same time, where but one ferry is needed to supply the needs of the public, and it is not shown that the board acted capriciously, corruptly, arbitrarily, or oppressively,—the best interests of the public, and not priority of filing, controlling in case of a conflict of applications.<sup>11</sup>

**298. Acceptance of franchise.**— No rights can be claimed under a ferry franchise before the conditions precedent contained therein have been complied with by the grantee.<sup>1</sup> The right does not vest until the grantee commences to operate the ferry, and an unreasonable delay may be ground for forfeiting the franchise.<sup>2</sup> An act which shows an intention to comply with the conditions is, however, sufficient to work an acceptance of the grant.<sup>3</sup> A ferry franchise granted to two persons cannot be made operative by the acceptance of only one of the two, but must be accepted by both.<sup>4</sup>

**299. Public revenue from ferry.**— The facts that a ferry cannot be operated without the consent of the government, and that the legislature may confer the right to regulate the ferry upon local subdivisions of the state, place it in the power of such subdivisions to secure a revenue for the privilege of operating them. The statute may itself provide for granting the right to the one who will offer to pay the greatest amount into the public treasury for the privilege.<sup>1</sup> In the absence of statutory provisions the steps which should be taken to secure the revenue are within the discretion of the officials having special supervision of the granting of the franchise.<sup>2</sup> The mere fact

<sup>10</sup>*Beckley v. Learn*, 3 Or. 470.

<sup>11</sup>*Oxford Ferry Co. v. Sumner County*, 19 Kan. 293.

<sup>1</sup>*Day v. Stetson*, 8 Me. 365.

<sup>2</sup>*Clarke v. Calloway*, Sneed (Ky.) 46, 2 Am. Dec. 706.

<sup>3</sup>Stretching a cable across a river twice, and taking the boat to the place where the franchise designated the ferry should be operated and for the purpose of so operating, are a sufficient acceptance of the franchise. *Chapin v. Crusen*, 31 Wis. 209.

<sup>4</sup>*Ferrel v. Woodward*, 20 Wis. 458.

<sup>1</sup>*Wilson v. Gabler*, 11 S. D. 206, 76 N. W. 924.

<sup>2</sup>In the absence of bad faith, the sale of ferry franchises by the sinking-fund

commissioners will not be restrained at the suit of a taxpayer to prevent illegal conduct and waste, on the ground that, unless a minimum rate of ferriage is prescribed, railroad corporations may acquire the franchise, and, by prorating a joint charge for ferriage and railway fare, so depress the ferriage receipts that, notwithstanding the company's covenant to pay a greater percentage of the gross receipts than any other competitor, they may never become obligated to pay more than the fixed minimum annual rental; but it is sufficient where the commissioners, in the exercise of a sound administrative discretion, have fixed the minimum annual rental at an amount which is in excess

that the public are to receive a percentage of the receipts does not prevent the grantee from changing conditions so as to reduce the receipts.<sup>3</sup> The revenue to be derived from the ferry is to be treated as other public funds and cannot be squandered or applied recklessly in the making of contracts.<sup>4</sup>

*License fees*.—The municipal corporation may be authorized to exact a license fee for the privilege of operating a ferry within its limits.<sup>5</sup> Unless the ferry privilege is conferred upon the municipality so that it has a right to dispose of it according to its pleasure, it cannot exact license fees for the purpose of increasing its revenues.<sup>6</sup> But if the matter is committed to the discretion of the municipality, with full authority over it, it may fix the fee at such sum as will produce a revenue.<sup>7</sup> The fact that a fee is exacted greater than the amount allowed by statute does not render the grant of the license void.<sup>8</sup>

of the percentage upon the estimated gross receipts for ferriage which have accrued to railway companies during any one year in the past. *Robinson v. Gilroy*, 10 Misc. 205, 30 N. Y. Supp. 411.

<sup>1</sup>A company which has procured from the city a lease of a ferry franchise in consideration of the payment of 5 per cent of the gross receipts which are derived from a 10-cent fare may subsequently construct a railroad stopping at some of the points theretofore covered by the ferry, which thereafter stops at but one point, and reduce the ferry fare to 5 cents, where there is nothing in the lease to the contrary. *Staten Island Rapid Transit Co. v. New York*, 2 N. Y. Supp. 680.

<sup>2</sup>Where a city owning a ferry franchise contracts with an attorney to give him, as compensation for services, for a period of twenty years, one third of the rents of the ferry privileges and the receipts of the ferry when not rented; and where the contract by its terms is made irrevocable, and it mutually binds the contracting parties to do no act and to enter into no contract which will interfere with its terms,—such contract is void as against public policy, for the city thereby places it beyond its power to establish a free ferry, or to charge such tolls, only, as will defray the expenses of operating the ferry. The ownership by a city of such a franchise involves a public trust, and it must be administered by the city for the benefit

of the public. *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81, Modifying 60 Tex. 519.

<sup>3</sup>A license fee charged for the privilege of operating a ferry is not a tax within the meaning of the term as used in the Constitution of the state of Michigan or the charter of the city of Detroit. It is a price paid for a franchise or a public right vested in an individual. *Chilvers v. People*, 11 Mich. 43; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560.

<sup>4</sup>Although a municipal corporation which is given the power to regulate ferries by license has no right to use the power to license as a means of increasing its revenue, a license fee of \$25 for the privilege of keeping a ferry within the city will be held a reasonable regulation, and not a tax, where it appears that the city may incur expenses in the enforcement of its police regulations as to ferries. *Arkadelphia Lumbar Co. v. Arkadelphia*, 56 Ark. 371, 19 S. W. 1053.

Statutory authority conferred upon a municipal corporation to levy a specific tax on "vehicles used and run for passengers for hire" does not authorize the imposition of a license fee, for revenue purposes, upon ferryboats running to and from any point within the corporate limits. *Buckwall v. New Albany*, 25 Ind. 283.

<sup>5</sup>*Chilvers v. People*, 11 Mich. 43.

<sup>6</sup>*Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

**Taxation:**—The property of a ferry company is the subject of taxation the same as that of other corporations within the state. But the franchise can be taxed only by the state which granted it, so that a Kentucky corporation operating a ferry across the Ohio river is deprived of its property without due process of law by the action of that state in including, for the purpose of taxation, the value of an Indiana franchise acquired for the purpose of enabling it to operate the ferry from the Indiana shore.<sup>9</sup>

**300. Construction of charter.**—Like all public grants, a charter granting the right to operate a ferry will be strictly construed. Therefore, a grant from the Crown of "all our ferriages and passages" over certain rivers conveys only ferries existing at the date of the grant, and does not confer on the grantees the right to create new ferries over those rivers.<sup>1</sup> A grant of a franchise to maintain a ferry "between the town of A to B" refers to a ferry from shore to shore, both ways.<sup>2</sup> A grant of a corporate charter containing authority to operate a ferry does not include the right of a ferry privilege. That is a separate franchise which must be acquired in the regular way in order to enable the corporation to enjoy it.<sup>3</sup> But a grant of a ferry

<sup>9</sup>*Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

<sup>1</sup>*Londonderry Bridge v. M'Keever*, Ir. L. R. 27 Eq. 464.

Where a statute granting a ferry franchise authorized the grantee to purchase an ancient ferry operated within the limits of the grant, the grantee, on purchasing the same, cannot continue to operate it after the completion of the new ferry, but must discontinue and abandon it. *North & South Shields Ferry Co. v. Barker*, 2 Exch. 136.

Authority to the owner of a ferry to remove it to lands that may belong to him will be limited to such as belong to him at the time of the passage of the act. *Mills v. St. Clair County*, 8 How. 581, 12 L. ed. 1206.

<sup>2</sup>*Jelleit v. Anderson*, 7 Ont. App. Rep. 341, Affirming 27 Grant Ch. (U. C.) 411.

<sup>3</sup>*Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

A railroad company authorized to construct its road along a specified route over and across a designated ferry is not entitled, under such charter, to maintain a ferry at that point. *The Maverick*, 1 Sprague, 23, Fed. Cas. No. 9,316.

And a charter authorizing a railroad

company to establish a ferry from a termination of its railroad across a harbor as a part of its railroad route, to connect the same with its railroad on the other side of the harbor, grants a limited ferry only, and the company cannot use it for purposes other than the transportation of passengers and freight of the railroad. *Fitch v. New Haven, N. L. & S. R. Co.* 30 Conn. 38.

A grant to a railroad company of the right to connect its terminus on one side of a river with its depot on the other side, though giving, by implication, the right to operate a ferry, does not constitute such ferry a part of the railroad, so as to permit the railroad to carry persons across the river only as passengers carried under the railroad franchise. *Aikin v. Western R. Corp.* 20 N. Y. 370, Reversing 30 Barb. 305.

Under the general incorporation law of Arkansas, the charter to a turnpike company cannot legally authorize the maintenance of a ferry separate from the turnpike and as an independent privilege, since the ferry franchise as an independent privilege can be granted only by the county court. *Darnell v. State*, 48 Ark. 321, 3 S. W. 365.

A special act of the legislature authorizing the county court to grant to a

franchise by special act limiting and determining the powers, rights, and duties, independent of the general statute relating to ferries, is a license, and consequently dispenses with the general statutory requirements for obtaining a license.<sup>4</sup> A ferry license to operate ferries on Sunday, issued under an act of Parliament, is not in the nature of an ancient ferry, so as to entitle the licensee to maintain an action for infringement, where none of the ordinary obligations and burdens of a ferryman are imposed on the licensee, although the license is called in the act of Parliament a ferry license.<sup>5</sup> A statute providing that the ferry formerly known by the name of Compt's ferry be re-established in the name of Henry M'Gowen, his heirs and assigns, for a specified term, is sufficient to vest the ferry in the person so named.<sup>6</sup>

**301. Renewal.**— The question of the right of a licensee to a renewal of his license depends upon the terms of the statute and upon his contract. If, under the statute, he is the only one to whom the franchise can be given, and the public good requires a continuance of the ferry, he is entitled to a renewal of the license. But the question of renewal is within the discretion of the public authorities and the ferryman has no right of action against them for refusal to renew the license.<sup>1</sup> And in no event can damages be recovered against the public authorities for their action in granting a franchise to a rival, when complainant contends that it should have been granted to him.<sup>2</sup> To be

certain person a franchise for a ferry across the Ohio river from a point on his land about  $\frac{1}{4}$  mile from another ferry does not dispense with the requisition of the general law requiring an applicant for such franchise to be the owner of the land at the point from which such ferry is proposed to be established: and a failure on his part to prove title to the land in question will defeat his right to such franchise. *Henry v. Underwood*, 1 Dana, 245.

<sup>1</sup>*Roy v. Henderson*, 132 Ala. 175, 31 So. 457.

<sup>2</sup>*Letton v. Goodden*, 14 L. T. N. S. 298, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 Week. Rep. 554.

<sup>3</sup>*Stark v. M'Gowen*, 1 Nott & M'C. 387, 9 Am. Dec. 712.

But a statute providing "that a ferry formerly known by the name of Compt's ferry be re-established in the name" of another does not impose on the grantee the same conditions that were named in the statute establishing Compt's ferry. *Ibid.*

<sup>4</sup>*Burrows v. Gonzales County*, 5 Tex. Civ. App. 232, 23 S. W. 829.

The provision of the Arkansas statute in relation to ferries, that when a ferry license has been granted by the county court, and the ferry once established, it shall be the duty of the county court to levy a tax on the privilege annually thereafter, whether application for a renewal of the license be made or not; and that it shall be the duty of the clerk to issue, annually, a license, and deliver it to the sheriff, for the person to whom the privilege was granted, who, on presentation of the license, is bound to pay for it,—relates more especially to the mode of taxing the privilege, and does not deny to the county court the power to discontinue the franchise when the public interest demands it, and such court has the power to discontinue the franchise by refusing the annual license for its further exercise. *Bell v. Clegg*, 25 Ark. 26.

<sup>5</sup>*Burrows v. Gonzales County*, 5 Tex. Civ. App. 232, 23 S. W. 829.



entitled to a renewal, all requirements of the statute must be complied with.<sup>3</sup> The owner of a ferry franchise, who, on application for a renewal of his license, makes proof of having kept and run the same according to law, which, under the statute, entitles him to a renewal, is entitled to a writ of mandamus, which is the proper remedy to compel the issuance thereof, where the renewal is refused on the ground that his franchise has been sold under execution, to which it is not subject.<sup>4</sup> Where, upon the division of a town, the new town is granted, during the pleasure of the legislature, the privilege of using one half the ferry formerly operated by the old town, and such ferry is, later, discontinued by legislative enactment, its subsequent revival gives the new town no greater rights than it possessed before, and it holds its franchise subject to the pleasure of the legislature.<sup>5</sup> In granting a franchise for a ferry, the county commissioners have no right to grant such franchise to the person who would pay the largest amount of money therefor in addition to the tax which they might legally impose, where such condition is not imposed by the ferry laws, and no such power is conferred thereby upon such commissioners; and money so paid by an applicant for a renewal of his franchise, although called a donation to the county, may be recovered back, together with interest thereon from the date of payment.<sup>6</sup> In case the license is not renewed, but is granted to another, he may be required to indemnify the former licensee for the improvements made by him.<sup>7</sup>

**302. Right to land on shore.**—The government may grant a right to carry persons and property across a river to whom it pleases, but it cannot grant a right to make a landing on banks belonging to a private individual without his consent, or without acquiring the right to do so under the power of eminent domain.<sup>1</sup> There seems to be some conflict in the decisions upon the question whether or not the

<sup>3</sup>The burden is on one applying for a renewal of a ferry license affirmatively to show that he has kept the same in accordance with law, to entitle him to a preference in respect thereto under a statute giving him such preferential right if he has kept the same in accordance with law. *Finch v. Tehama County*, 29 Cal. 453.

<sup>4</sup>*Thomas v. Armstrong*, 7 Cal. 286.

<sup>5</sup>*East Hartford v. Hartford Bridge Co.* 17 Conn. 79.

<sup>6</sup>*La Salle County v. Simmons*, 10 Ill. 513.

<sup>7</sup>The sinking-fund commissioners will not be enjoined, upon the sale of a ferry franchise and lease of the wharf, from

requiring the purchaser to indemnify the retiring lessee for permanent improvements made by it under an agreement with the city that it should be compensated therefor on the termination of the lease, although such agreement is *ultra vires*, since, under the circumstances, such a plea would not be received. *Wilkins v. New York*, 9 Misc. 610, 30 N. Y. Supp. 424.

<sup>1</sup>*Root v. Com.* 98 Pa. 170, 42 Am. Rep. 614; *Averett v. Brady*, 20 Ga. 523; *Prosser v. Wapello County*, 18 Iowa, 327; *Murray v. Sharp*, 1 Bosw. 539; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658.

rule which prevents a ferryman from landing on private property applies to landings at the termini of streets, the fee of which is in the abutting owner. If nothing more was needed for a ferry landing than simply to come to the shore and discharge passengers and freight, there could be no objection on the part of the owner of the fee, because such use would be strictly within the purposes for which the highway was laid out. Therefore, it has been held that no additional servitude is placed upon land used as a highway, by the necessary use of it as a ferry terminus.<sup>2</sup> As stated in *Mills v. Learn*,<sup>3</sup> one through whose land a highway runs, intersected by a stream, is not entitled to compensation for the use of the bank within the limits of the highway as a landing for a public ferry, as, when a public highway crosses a stream of water it is not interrupted, but the water and the soil beneath it within its limits are a continuous part of the road, compensation for the taking of his land for which includes compensation for all incidents connected therewith. But a ferry landing usually includes something more than a mere landing and discharge of passengers. There must be accommodations for the discharging of the cargo, which necessitates, in most instances, the building of a wharf. There must be accommodations for waiting passengers and for property which is to be transported across the ferry. There must be offices for the necessary employees. All of these matters are entirely different from the ordinary use of a highway, and, to a large extent, constitute an actual appropriation of the common property to the separate use of the owner of the ferry. To such use the owner of the fee has a right to object,<sup>4</sup> and he may maintain ejectment to

<sup>1</sup>*Patrick v. Ruffner*, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

The grant of a ferry right carries with it whatever right the public then has, or may thereafter acquire, to use the landing place as a highway; and, if the grantee claims anything more, he must show title thereto by private contract. *Somerville v. Wimbish*, 7 Gratt. 205.

Under the statutes of Kentucky, the owner of land on one side of a stream, being the grantee of a ferry privilege across such stream, is entitled to use a public highway on the opposite side for a landing place, without instituting condemnation proceedings for that privilege. *Clark v. White*, 5 Bush, 353; *State v. Wilson*, 42 Me. 9.

Where a ferry franchise has been granted by the county court, the grantee has the right to land on a public street

of a town in accordance with the express provisions of the grant without obtaining the consent of the counsel of the town, where there is nothing in the town charter prohibiting such a landing. *Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223.

This doctrine was carried in one case to the extent of holding that the owner of a ferry franchise has such right to the use of a highway at a terminus of his ferry, and of which his ferry is a link, that he may maintain suit for damages resulting from injury to such right. *Patrick v. Ruffner*, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

<sup>2</sup> 2 Or. 215.

<sup>3</sup>*Pipkin v. Wynns*, 13 N. C. (2 Dev. L.) 402; *Douglass's Appeal*, 118 Pa. 65, 12 Atl. 834; *Prosser v. Wapello County*, 18 Iowa, 327; *Prosser v. Davis*, 18 Iowa, 367.

compel a removal of permanent structures from the highway,<sup>5</sup> and enjoin interference with his property for the accommodation of the landing.<sup>6</sup> It would seem that the true rule should be that, so far as the ferry can land and discharge its passengers without doing more than merely bringing the boat to shore and permitting the passengers to disembark upon the highway, the owner of the fee has no cause of complaint;<sup>7</sup> but that, so far as it is necessary to place permanent structures upon the highway and make an exclusive occupation of the land belonging to the abutting owner, he has a right to object. It is sufficient for the owner of land, in an action for mesne profits, to show title to the premises on which there is a ferry landing; and he need not show authority for a ferry, as against a trespasser who shows no title to the landing.<sup>8</sup> A riparian owner on one bank is under no equitable obligation to continue a license for a ferry landing originally founded on mutual advantage.<sup>9</sup> One licensed to maintain a ferry while a bridge is being repaired need not, under a statute requiring all ferries to be located on land over which a public road is kept up, operate it precisely at the bridge; since, if a public way is impassable, the public have a right to pass over adjacent lands as long as the necessity therefor continues.<sup>10</sup> The owner of a mere ferry license making use of a city wharf as a landing place is liable for wharfage in the absence of proof that he owns any part of the wharf or has any interest therein.<sup>11</sup>

A legislative grant of an exclusive ferry privilege across a river between the termini of two streets confers no special right to the streets occupied as a landing, as the grantee obtains only the right to navigate the river there with a public ferry without competition. *Pittsburgh & L. E. R. Co. v. Jones*, 111 Pa. 204, 56 Am. Rep. 260, 2 Atl. 410.

<sup>5</sup>*Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658.

<sup>6</sup>The changing of the grade of a street by ferry owners to render it suitable for landing purposes, without authority for the establishment of a landing at the foot of such street, will be enjoined at the suit of the owners of adjoining premises, whose wharves, constructed at the foot thereof by authority of the municipality, or access thereto, will be injured and destroyed thereby. *Price v. Knott*, 8 Or. 438.

<sup>7</sup>In one case, however, it was held that passengers of a private ferry cannot be landed upon the terminus of a highway on the river without the consent of the owner of the soil. *Chess v. Manoun*, 3 Watts, 219.

<sup>8</sup>*Averett v. Brady*, 20 Ga. 523.

In estimating the rent of a landing used by a trespasser in connection with a ferry run by him, the jury may take into account the proceeds of the ferry after deducting the expenses of fitting up and carrying on the same, and making due allowance for all risks and expense. *Ibid.*

<sup>9</sup>*Chambers v. Furry*, 1 Yeates, 167.

<sup>10</sup>*McInnis v. Pace*, 78 Miss. 550, 29 So. 835.

<sup>11</sup>*Jeffersonville v. The John Shallcross*, 35 Ind. 19, *Modifying Jeffersonville v. Louisville & J. Steam Ferry Co.* 27 Ind. 100, 89 Am. Dec. 495.

Under the New York statutes, the proper authorities of New York city may lease with its ferry franchises the wharves or piers required for the use of the ferry as part of the franchise, and may include in one leasing two franchises. *Starin v. Edson*, 112 N. Y. 206, 19 N. E. 670, *Reversing 42 Hun*, 549.

**303. Right to use opposite shore.**—The rule which prevents the owner of a ferry franchise from landing on the shore without the consent of the owner applies in case the franchise is granted to the owner of one shore who does not own the opposite one. The fact that he has a right on one side gives him no right to the other. And his rights will be only such as can be granted by the public authorities having jurisdiction on one side of the river, where their authority does not extend to both sides. Therefore, a grant of an exclusive privilege by public authorities having jurisdiction only on one shore will not prevent the establishment of other ferries from the opposite shore.<sup>1</sup> But it is not necessary to specify that the ferry is to be both ways if the authority granting the franchise has jurisdiction to make such grant. And, therefore, a grant of a ferry franchise "between the town of Belleville to Ameliasburg" contemplates the establishment of the ferry between those towns, running each way.<sup>2</sup> A ferry franchise may be granted the owner of land on one side of a stream upon condition that he procure from the owner of the land on the other side a right of way for such ferry, under the provisions of the Kentucky statutes, requiring the issuing of a writ of *ad quod damnum* to ascertain the damages the owner of land on the opposite side will sustain; for, if the owner is compensated, or waives his right, the law is satisfied, and no condemnation proceedings are necessary.<sup>3</sup> In case rival ferries are organized under the regulations enforced on the opposite sides of a stream, the rights of each may be recognized by the authorities on the opposite side of the river to prevent the exclusion of their own licensees from similar rights on the opposite banks, in retaliation for their refusal to recognize the rights of the licensee of the officials in the other jurisdiction.<sup>4</sup> The consent of the

<sup>1</sup>*Murphy v. Police Jury*, 9 La. Ann. 434; *Cloyes v. Keatts*, 18 Ark. 19; *Levisay v. Delp*, 9 Baxt. 415.

The reservation of the rights of the Wyandotte Indians in an existing ferry, and the sale thereof by and under the provisions of the treaty of 1855 between such Indians and the United States, give no rights to the purchaser thereof as against and within the limits of an exclusive ferry franchise subsequently granted by the legislature, where, at the time of the reservation and sale, the only right the Indians had was the ownership of the ferry and fixtures and of a landing on one side of the river, having on the other side of the river only a right of landing in common with the public in general at a point

within the limits of the subsequent grant; since the latter right would continue only until the grant by the legislature of an exclusive franchise at that point, and the perfection of the right by the grantee. *Walker v. Armstrong*, 2 Kan. 198.

<sup>2</sup>*Anderson v. Jellet*, 9 Can. S. C. 1.

<sup>3</sup>*Combs v. Hogg*, 101 Ky. 178, 40 S. W. 453.

<sup>4</sup>*Bell v. Olegg*, 25 Ark. 26.

Where, upon a petition for a franchise to operate a ferry from a town to a township, a license is granted to establish a ferry from the town to the township, it will be construed as granting a ferry both ways, when considered in connection with the ferry act providing that when one of the termini is in

owner of land on one side of a stream at and above its confluence with a fork thereof and bordering on such fork, to its use by the owner of the land on the opposite side of such main stream for a ferry landing, although sufficient to authorize the grant to such owner for a ferry from his own land across such main stream below the mouth of the fork to the land of such consenting owner, is not sufficient as the basis of a grant to him of another franchise for a ferry from the land of such consenting owner as its site to the opposite side of such fork on the land of another, who not only does not consent to such use, but is himself a rival applicant for such franchise, where the statutes regulating that subject require an applicant for a ferry franchise either to be the owner of the land, or to have the privilege of its use for ferry purposes from such owner; and if such ownership or privilege to use as the site of such ferry is confined to one side only, the right to land on the opposite side must be acquired by condemnation proceedings.<sup>3</sup>

**304. Acquisition of right to landing.**— The right to a landing may be acquired in the same manner as real estate in general is acquired. It may be acquired by grant, prescription, or by the right of eminent domain. Continued use of the land for a landing for the prescriptive period will give a right to a continued enjoyment of the privilege.<sup>1</sup> But a prescriptive right to use the lands of another for a ferry landing is not established by a series of trespasses committed without his consent or knowledge.<sup>2</sup> And the fact that land is used at such points on the banks of a river as convenience or the condition of the river might make most suitable for ferry landings, where no improvements of any character to facilitate the landing of boats have ever been made, cannot be regarded as such evidence of possession of the lands as would, if held for the requisite period, ripen into a title adverse to the true owner, in the absence of a paper title thereto.<sup>3</sup> Actual occupation of the banks for ferry purposes raises a presumption of a right to make such use of them.<sup>4</sup> A ferry landing is of such importance to public interests that its acquisition may be secured by an exercise of the power of eminent domain.<sup>5</sup> Equity,

a town and the other in a township the license shall be issued to the town. *Jellett v. Anderson*, 27 Grant Ch. (U. C.) 411.

<sup>1</sup>*Ballow v. Pettus*, 3 Bush, 608.

<sup>2</sup>*Clark v. White*, 5 Bush, 353; *Bird v. Smith*, 8 Watts, 434, 34 Am. Dec. 488.

<sup>3</sup>*Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658.

<sup>4</sup>*Mississippi River Bridge Co. v. Longan*, 91 Ill. 508.

<sup>5</sup>*Sleight v. Kingston*, 11 Hun, 594. Appeal dismissed in 73 N. Y. 592.

<sup>6</sup>Permitting the lessee of a ferry belonging to a municipal corporation to acquire terminal facilities by eminent domain is not prohibited by a constitutional provision against local bills granting exclusive privileges or franchises to corporations, since the grant is not to a private corporation, but for the benefit of a public ferry. *Re Union*

therefore, will not interfere with an attempt to acquire the right in that manner.<sup>6</sup> But compensation must be made to perfect the title.<sup>7</sup> The right to acquire the land for that purpose must, however, be given by statute, since the power of eminent domain resides exclusively in the legislature.<sup>8</sup> Access to a landing from the land side may also be acquired by an exercise of the right of eminent domain.<sup>9</sup> In assessing the damages for land taken for a ferry landing, the value of a ferry operated by the owner without right will not be taken into consideration.<sup>10</sup> But the peculiar advantages of the property as a site for a ferry landing may be taken into consideration.<sup>11</sup>

**305. The franchise may be made exclusive.**— One of the elements originally belonging to a ferry, in the popular understanding, was exclusiveness. It certainly is exclusive as against an unlicensed person, and in most cases the public interest requires that the licensee shall not be subjected to competition. The duty to furnish adequate service, and the limitation of toll, being enforceable by the public, there is no reason for competition, and more faithful service will be secured if the licensee is secure from rivalry. Therefore, the idea of exclusiveness is intimately connected with ferries. So long as most of the ferries were ancient, so that the grant did not distinctly appear, there seems to have been no inclination to establish rivals.<sup>1</sup> But under the more rapid growth, and therefore more urgent need, of modern times, and with the title more directly in evidence, there has been a tendency to depart from the ancient ideas, and to hold that the franchise is not exclusive unless it is expressly made so. And this ruling is sanctioned by true principle. The ferry franchise, being a part of the royal prerogative held for the public good, may be

*Ferry Co.* 98 N. Y. 139, Reversing 32 Hun, 82.

*Barrington v. Neuse River Ferry Co.* 69 N. C. 165.

Testimony offered to show that a ferry is not a public use, and also as to its proper location, may properly be excluded in an action to condemn land for a ferry landing, when those questions were contested before the board of supervisors who granted the franchise, and there determined. *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872.

*Pipkin v. Wynns*, 13 N. C. (2 Dev. L.) 402; *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289.

<sup>6</sup>An act giving the right of eminent domain to appropriate lands for right of way for railroads, canals, turnpikes, roads, and bridges as works of public utility does not give the right to appro-

priate lands for a ferry landing. *Sandford v. Martin*, 31 Iowa, 67.

<sup>7</sup>*Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

A highway, strictly speaking, connects with a ferry only at the water's edge, and an open space between the termination of the highway and the water cannot be presumed to go by the name of Bristol ferry, in the absence of positive proof. *State v. Peckham*, 9 R. I. 1.

<sup>10</sup>*Mills v. St. Clair County*, 4 Ill. 53.

<sup>11</sup>*Payne v. Kansas & A. Valley R. Co.* 46 Fed. 546.

<sup>1</sup>Justice Baldwin says the rule that a ferry cannot be set up to the detriment of an ancient ferry applies only to ancient ferries by prescription, and those in a ville. *Charles River Bridge v. Warren Bridge*, 9 L. ed. 948.

bestowed in the manner which is best calculated to secure the greatest good to the public, and the legislature is the exclusive judge of what that will be. Constitutional provisions against the granting of monopolies do not apply to the granting of such franchises, and the grant may be exclusive at the pleasure of the legislature.<sup>2</sup> As said in *Forlain v. Smith*,<sup>3</sup> the enjoyment, by the grantee of such right, of the limited immunity from the encroachment of others which is contemplated under the statute does not in any respect lend to the privilege granted the semblance of monopoly. The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government by encouraging enterprise. And the legislature may also make the grant irrevocable.<sup>4</sup> The county court, under the Oregon statutes which give a person licensed to keep a ferry an exclusive privilege therefor "where such ferry is established," exhausts its jurisdiction by the granting of such a franchise, and is precluded from establishing another ferry substantially at the same place, although not at the particular point where the other ferry lands, the object of which is to serve the same custom and form a part of the same highway which the prior franchise covers.<sup>5</sup> The franchise is exclusive if the establishment of rival ferries within a

<sup>2</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040; *Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Costar v. Brush*, 25 Wend. 628; *Burlington & H. County Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

An exclusive ferry franchise granted to the owner of land on one side of a stream by an order of the county commissioners, and afterwards confirmed by statute, continuously operated by such owner for more than thirty-one years until his death, and by his heirs thereafter for more than twenty-three years, is a property right which they have a right to enjoy and use, and which a court of equity will protect by enjoining an interference therewith by the establishment of a rival ferry, and which right they have not lost by accepting the provisions of an act of the legislature conferring upon them a fran-

chise for twenty years, and under which they held in connection with the original grant; nor are they thereby estopped from claiming under the original grant after the twenty years have expired. *Golconda v. Field*, 108 Ill. 419.

<sup>3</sup>114 Cal. 494, 46 Pac. 381.

<sup>4</sup>*New York v. Starin*, 106 N. Y. 1, 12 N. E. 631.

A grant unrestricted as to time, of the right to keep a ferry, made by a Spanish governor and thereafter unrestricted by the legislature, will be considered as unlimited. *Davis v. Police Jury*, 1 La. Ann. 288.

A ferry franchise granted for a single year is invalid where the statute authorizing the commissioners to grant such franchise contemplates only the establishment of a permanent ferry, and the owner of such franchise is therefore not entitled to an injunction restraining the operation of another ferry near by. *Cason v. Stone*, 1 Or. 39; *Gant v. Drew*, 1 Or. 35.

<sup>5</sup>*Montgomery v. Multnomah R. Co.*, 11 Or. 344, 3 Pac. 435; *Hackett v. Wilson*, 12 Or. 25, 6 Pac. 652.

certain distance from it under the franchise granted is prohibited.<sup>6</sup> But, in order to secure the licensee from interference by the legislature, its exclusive right must be made so by its charter, for a mere law prohibiting the establishment of ferries within a certain distance of others is not a contract which cannot be repealed to the injury of existing ferries.<sup>7</sup> Consequently, although the legislature has prohibited the county court from authorizing a competing ferry within  $\frac{1}{2}$  mile of another, the legislature itself may authorize it.<sup>8</sup> A contract, to be exclusive, must be made so in terms,<sup>9</sup> and must be made by officials having authority to make such a contract.<sup>10</sup> In case the franchise of the first grantee is not exclusive, a similar franchise may be granted to a rival company to operate, even between the same termini;<sup>11</sup> and if, at the time of the granting of the first franchise, the

<sup>6</sup>*Viron v. Reid*, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57; *Casey v. Jones*, 2 Litt. (Ky.) 301.

Under a statute providing that no ferry shall be granted within a city or town unless those established therein cannot properly do all the business, or unless public convenience greatly requires a new ferry at a site not within 400 yards of that of any other, one ferry is entitled to the exclusive ferry privileges at a town where neither of these conditions exist. *Combs v. Hogg*, 101 Ky. 178, 40 S. W. 453.

Under the statute of Arkansas, which provides that a ferry privilege shall not be granted in case a ferry has been established within a mile above or below the proposed ferry, except in case it is to be established near a city or "town," the term "town" does not include a place which has a store doing business to the amount of \$4,000 per year, a dwelling house for two families consisting of six persons, and a warehouse from which produce is shipped varying in value from \$200 to \$1,500 per year. *Murray v. Menefee*, 20 Ark. 561.

<sup>7</sup>*Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Williams v. Wingo*, 177 U. S. 601, 44 L. ed. 906, 20 Sup. Ct. Rep. 793.

So, where, some time after a license was issued to operate a ferry, a general law was passed, gratuitously and without further consideration from established ferries, providing that county courts should not license a ferry within  $\frac{1}{2}$  mile of one already established, such law does not create a perpetual monopoly, but is repealable at the will of the legislature. *Wheeling Bridge Co. v.*

*Wheeling & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009.

<sup>8</sup>*Somerville v. Wimbish*, 7 Gratt. 205.

<sup>9</sup>A proposition made to the inferior court and the public by ferry owners, to construct and maintain a ferry at a designated point and transport a certain class of inhabitants free of toll, in consideration of the removal there of the county seat, and the removal of the county seat to such place, do not constitute a contract between the inferior court and such ferry owners preventing the construction, under authority of such court, of other ferries at such new county seat. *Shorter v. Smith*, 9 Ga. 517.

<sup>10</sup>*De Russey v. Davis*, 13 La. Ann. 468.

<sup>11</sup>*Collins v. Sherman*, 31 Miss. 679; *Gillespie v. Freeman*, 7 La. Ann. 350; *Shorter v. Smith*, 9 Ga. 517; *Maysville v. Boon*, 2 J. J. Marsh. 224; *Brown v. Given*, 4 J. J. Marsh. 28; *Montjoy v. Pillow*, 64 Miss. 705, 2 So. 108.

The owner of a ferry franchise cannot enjoin the grant of a like franchise for another ferry so near his own as to enter into direct competition therewith, on the ground that his ferry is the older, and is well established, and that, by reason of its location on the river, it will be of more public benefit than the one proposed to be established; where, by legislative acts, the county court has full power and authority to appoint and settle ferries when necessary, and to grant two or more ferry keepers the privilege of using the same landing place, and there is nothing to show that such county court has unreasonably abused or exercised such discretionary power. *Blair v. Carmichael*, 2 Yerg. 306.



statutes provide for the establishment of rivals, there is no restriction whatever upon the right to authorize such establishment.<sup>12</sup> The duty imposed upon a ferry company by its act of incorporation to keep its works in constant repair does not confer upon it an exclusive privilege, or debar the state from granting a similar franchise to other persons.<sup>13</sup>

**306. Grants will be strictly construed.**—A ferry franchise, being a portion of the royal prerogative, and it being necessary to acquire a grant from the sovereign to obtain the right to operate it, is within the rule that royal grants are to be strictly construed. And the rule bears with much greater force upon this class of cases than upon grants of real estate or property generally. In the former cases the sovereign is parting with his prerogatives and can be held to have done so only to the extent of his expressed words. Nothing can be left to implication. The prerogative powers are held by the sovereign strictly for the public good, and if he deems it to be for public good to confer a portion of them upon an individual, all considerations require that he define the limits of his grant. Therefore, unless the right to operate a ferry is stated to be exclusive, it cannot be held to be so.<sup>1</sup> Under this rule the grant of a franchise to maintain a ferry

<sup>12</sup>*Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146.

<sup>13</sup>*Collins v. Sherman*, 31 Miss. 679.

<sup>1</sup>A provision in a grant of a ferry license to a man and his heirs for a period of twenty years, that no county or board of county commissioners shall authorize a person to keep a ferry within the limits of the franchise, will not prevent a grant of a license by the city council when that is substituted by the legislature for the county commissioners for the purpose of licensing ferries. The exclusive right must be clearly expressed or necessarily implied. *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043.

A Spanish grant of the right to maintain a ferry "con exclusion" is not a renunciation on the part of the sovereign power of the right to establish another ferry, but only prohibits the transportation of persons or property by others across the river for hire within a reasonable distance above or below the ferry established. *Davis v. Police Jury*, 1 La. Ann. 288.

When a legislative grant, for good consideration, of a perpetual ferry franchise is made exclusive and protected by penalty without further consideration, the state cannot be held to be pre-

vented by contract from subsequently granting another franchise, although the first be impaired thereby. *Johnson v. Crou*, 87 Pa. 184.

The owner of a ferry across the Mississippi river cannot enjoin the establishment of another ferry at that point and the condemnation of his land as a landing therefor upon the ground that the act of legislature under which the right to establish such ferry was acquired is unconstitutional and void as an impairment of the obligations of the contract existing between the state and such owner by virtue of an act granting him the exclusive ferry privileges at that point, under which he established and has since operated his ferry in strict compliance with the terms of such act, where that act provided that the ferry should be established from lands at that place belonging to such grantee, and should be in operation within eighteen months thereafter, and it does not appear with certainty that he owned any land on the Mississippi river at that place at the date such act was passed, or within eighteen months thereafter, upon which such grant could operate, or that he owned any land upon which the same could be removed at the date of a subsequent act authorizing such re-

between two places does not exclude from the state the right to grant a similar franchise at or near the same place.<sup>2</sup> The old idea that a ferry franchise includes the principle of exclusiveness has influenced a few courts to hold that a grant of such a franchise, although not made exclusive in terms, would prevent the establishment of a rival so near as to cause injurious competition.<sup>3</sup> But that doctrine cannot be maintained in view of the rule by which such grants should be construed. A privilege of establishing a ferry between two designated points does not preclude the power to grant similar privileges beyond the limits of the landings fixed by the first grant.<sup>4</sup> If the termini are not fixed by the grant they will be regarded as fixed when they are designated or located by the acts of the grantee, and they cannot be subsequently changed; nor can the grantee interfere with a grant to a rival of the right to operate between other termini.<sup>5</sup>

**307. Supervision and regulation of ferry.**—The same principle which gives the government the right to control and supervise the maintenance and operation of highways gives it a right to supervise

moval. *Mills v. Brown*, 3 Ill. 548; 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83. *Mills v. St. Clair County*, 7 Ill. 197.

The statutory prohibition of the establishment of a private ferry within 3 miles of any public bridge does not prohibit the establishment of a private ferry within 3 miles of a public ferry. *Greer v. Haugabook*, 47 Ga. 282.

One granted by a city a ferry privilege within its limits cannot complain because the parish authorities have established another ferry across the river outside of the corporation, in the absence of any restriction as to the proximity of ferries, and where the operation of the new ferry is advantageous and convenient for the public. *O'Neill v. Police Jury*, 21 La. Ann. 586.

*Power v. Athens*, 99 N. Y. 592, 2 N. E. 609, Affirming 26 Hun, 282; *Meads v. Wandell*, 4 Ch. Sent. 14; *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770; *Carrou v. Washington Toll Bridge Co.* 61 N. C. (Phill. L.) 118.

A license to receive, for a period not fixed or limited, a compensation supposed to be a fair equivalent for services rendered as ferryman, cannot be regarded as a vested interest beyond public control, and does not preclude the granting of other licenses for the same place. *Day v. Stetson*, 8 Me. 365.

*Charles River Bridge v. Warren Bridge*, 7 Pick, 344; Affirmed in 11 Pet. 420, 9 L. ed. 773; *Mills v. St. Clair County*, 7 Ill. 197; *Smith v. Harkins*, *Knott*, 8 Or. 438.

But *Carrou v. Washington Toll Bridge Co.* 61 N. C. (Phill. L.) 118, does not take the same view of the question.

When a franchise has been granted for a ferry between two municipalities, it is exclusive as to ferrying from any point in one municipality to any point in the other. *Jellett v. Anderson*, 7 Ont. App. Rep. 341, Affirming 27 Grant Ch. (U. C.) 411.

A grant by a municipal corporation of ferry franchises under the authority of the legislature, giving the municipality the exclusive control over ferry rights at the *locus in quo*, confers a right which cannot be impaired by subsequent legislation. *Aikin v. Western R. Corp.* 20 N. Y. 370. But see *Power v. Athens*, 99 N. Y. 592, 2 N. E. 609.

*Gales v. Anderson*, 13 Ill. 413.

*Mills v. St. Clair County*, 7 Ill. 198; *Gales v. Anderson*, 13 Ill. 413; *Anderson v. Jellett*, 9 Can. S. C. 1.

Owners of a ferry, whose exclusive franchise has ceased to exist by the expiration of the term thereof, have but one ferry right which is confined to the established landings, and cannot change their landings from one street to another, or establish new ones at other streets, to the injury of the wharves of adjoining land owners, without authority from the county court. *Prior v.*

ferries for the purpose of insuring to travelers a safe and convenient method of crossing water which may obstruct their journey.<sup>1</sup> The legislature may place such restrictions upon the grant of the franchise as it wishes to make.<sup>2</sup> And it will not be presumed to have intended to deprive itself of the power of promoting the public good by the necessary regulation of the operation of the ferry.<sup>3</sup> The control and management of the ferry may be delegated to any governmental agency.<sup>4</sup> The legislature retains its right to control, even though the ferry belongs to a municipal corporation.<sup>5</sup> Whether the state will itself operate the public ferries within its borders, or whether it will confer this right on others, and the terms on which it will give others this special privilege, and whether an exclusive franchise shall be granted,—these, and all other questions connected with the subject, are absolutely within the control of the legislature.<sup>6</sup> The regulation of the ferry is, however, a public matter, and a private citizen has no right to maintain an action to compel the maintenance of the ferry.<sup>7</sup> Where a person is enjoined from operating an illegal ferry at a specified point on a river, and the county court afterwards establishes a ferry at that point, and licenses such person to maintain and operate it, the injunction is properly dissolved.<sup>8</sup> The legislature may require the ferryman to give a bond for the faithful performance of his duties.<sup>9</sup> And the wrongful operation of a ferry for toll may be prevented by an information in the nature of a quo warranto.<sup>10</sup>

<sup>1</sup>*Kerby v. Lewis*, 6 U. C. Q. B. O. S. 207; *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289; *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83; *McRoberts v. Washburne*, 10 Minn. 23, Gil. 8; *Cross v. Hopkins*, 6 W. Va. 323.

<sup>2</sup>*Power v. Athens*, 99 N. Y. 592, 2 N. E. 609.

<sup>3</sup>*Pintt v. Covington & C. Bridge Co.* 8 Bush, 31.

<sup>4</sup>*Simon v. Northup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560.

<sup>5</sup>*People v. New York*, 32 Barb. 102; *Simon v. Northup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560.

<sup>6</sup>*Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

<sup>7</sup>*Pain v. Patrick*, 3 Mod. 289, 1 Salk. 12.

But if toll had been extorted from such a person, then he would have been specially damaged and entitled to his action. *Ibid.*

Those who show no right to set up a ferry have no standing to allege that the occupant of an exclusive ferry franchise

has not complied with the law. His right can only be questioned by the state. *Douglass's Appeal*, 118 Pa. 65, 12 Atl. 834.

The municipal authorities of a village cannot institute a suit to contest an owner's right to a ferry. *Conner v. Paxson*, 1 Blackf. 207.

<sup>9</sup>*Hostler v. Marlowe*, 44 W. Va. 707, 30 S. E. 146.

<sup>10</sup>A bond for a ferry license, when required by statute, cannot be regarded as a voluntary bond on the ground that, independently of statutory enactments, a person was under no moral obligation to give a bond before he could exercise the privilege of keeping a ferryboat upon his own land and demand compensation from those who received his services. *Johnson v. Erskine*, 9 Tex. 1.

<sup>11</sup>Such an information was discharged in *Rex v. Reynell*, 2 Strange, 1161, "because it only appeared he took money of passengers, which is not setting up an exclusive right," although it is held that such an information would lie for claiming an exclusive ferry.

**307a. Rates of toll.**—The taking of toll being the one element of a ferry franchise which is a part of the public prerogative, that is the thing which, above all others, the public has a right to regulate and control. Unless the rate of toll is fixed in the contract of the licensee, the state may at any time fix rates which will be reasonable for the service performed;<sup>1</sup> and the rates fixed by the authorities must conform to the directions of the statute.<sup>2</sup> The taking of excessive toll is a public offense.<sup>3</sup> A variation in the rate of toll exacted by a ferry keeper will not affect his franchise so as to deprive him of a right of action against another for disturbing it.<sup>4</sup> The rates cannot be fixed so low that the cost of operation will exceed the income,<sup>5</sup> or so as to be unreasonable under all the circumstances of the case.<sup>6</sup> A ferry company whose charter is subject to alteration at the pleasure of the legislature may be required to take lower rates of tolls from passengers on street cars which cross on its boats.<sup>7</sup> The corporation may be required to post the rates which it is authorized to exact.<sup>8</sup> Where a ferry license fixed the rate of ferriage, such rate will continue on

<sup>1</sup>*People v. New York*, 32 Barb. 102; fixed are fair and reasonable. *Rohn v. State v. Hudson County*, 23 N. J. L. 206, Affirmed in 24 N. J. L. 718. *Beardstown*, 32 Ill. App. 407.

No vested right is acquired by the owner of a ferry franchise in the rate of tolls fixed by county commissioners, where the charter provides that such ferry shall be subject to the same regulations as other ferries are, "or may hereafter be," by the laws of the territory; but such rates are subject to change under a subsequent law giving county commissioners authority to alter rates of ferriage. *Stephens v. Powell*, 1 Or. 283.

<sup>2</sup>*Bedinger v. Drake, Sneed* (Ky.) 97; *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084.

<sup>3</sup>Where the owner of a ferry extorts excessive toll of divers persons, each act constitutes a separate offense. *King v. Roberts*, 1 Shower, 389.

<sup>4</sup>*Trotter v. Harris*, 2 Younge & J. 285.

<sup>5</sup>*Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042; *Rohn v. Beardstown*, 32 Ill. App. 407.

The burden is on the owner of a ferry seeking an increase, to show that ferry rates established by an ordinance of a municipal corporation are unreasonably low; and, in the absence of definite proof as to fixed charges and receipts, it will be presumed that the rates so

<sup>6</sup>Upon appeal from an order of a county court of Kentucky reducing the ferry rate to be charged by a certain ferry for foot passengers, the court of appeals will reverse such order where such reduction appears unreasonable, when the net profits derived therefrom and the risk from accidents assumed are taken into consideration. *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084.

<sup>7</sup>*Parker v. Metropolitan R. Co.* 100 Mass. 506.

<sup>8</sup>Where, as provided by statute, the rate of ferriage for wagons has been fixed by the county court and posted, the ferryman cannot charge as a common carrier for the contents of a wagon separately from the wagon itself. *Kelly v. Altemus*, 34 Ark. 184, 36 Am. Rep. 6. A statute requiring ferry companies to post conspicuously schedules of the rates of ferriage charged thereon by them and authorized by law to be charged, and making a violation of its provisions a misdemeanor, is not applicable to a foreign corporation, since it could not be punished within the state for a misdemeanor; nor does it require rates to be posted except in cases where they are restricted by law. *Blanchard v. Hoboken Land & Improv. Co.* 25 N. Y. S. R. 566, 6 N. Y. Supp. 279.

the subsequent renewals of the license, although the renewals are silent on that question.<sup>9</sup>

**308. Right to transfer franchise.**— As has been seen,<sup>1</sup> the character in which a ferry franchise was first known to the law was that of an incorporeal hereditament. There is no doubt that so long as it retained that character it was transferable.<sup>2</sup> Under this view of the character of the property the legal title can only be transferred by deed; but one who buys and pays for a ferryboat and appurtenances, and is placed in full possession of the ferry by the owner under such purchase, has the equitable title thereto, though no deed has ever passed, and can maintain an action for damages for injury to such franchise caused by the unauthorized act of another.<sup>3</sup> But the grants under the modern statutes assume more nearly the character of mere licenses, and as such the question whether or not they can be transferred will depend upon the wording of the statute and the general policy of the state.<sup>4</sup> The state may consent to the assignment of the license, and in analogy to its original character it will be regarded as transferable unless the right to transfer it is prohibited by the state.<sup>5</sup> The state alone can question the right to assign the franchise.<sup>6</sup> Where the right to the franchise is made to depend on riparian ownership, the franchise will pass with the riparian land.<sup>7</sup>

<sup>9</sup>*State v. Sickmann*, 65 Mo. App. 490.

<sup>1</sup> See ante, § 283.

<sup>2</sup>*Evans v. Hughes County*, 3 S. D. 580, 54 N. W. 603; *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202; *Greer v. Haugabook*, 47 Ga. 282; *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722.

Absence from the state of the original grantee of a ferry license without giving a new bond as required by law is no sufficient reason for revoking the ferry franchise, as such grant is an incorporeal hereditament, which is a subject of sale, and would descend to the heirs, and such bond might be given by the heir, alienee, or lessee. *Garrett v. Ricketts*, 9 Ala. 529.

Likewise, a ferry franchise is not lost by the death of the party to whom it was granted, but passes to his representatives. *Lippencott v. Allander*, 27 Iowa, 460, 1 Am. Rep. 299.

The widow and children of a ferry owner who died without disposing of his real estate, and who, since his death, have maintained the ferry and are in possession, have such a joint interest in an award of damages against a toll-bridge company that they are proper parties to the proceedings to procure it,

and a satisfaction will protect the company paying against all further claims: and with the method of apportionment the company has no concern. *Columbia & D. Bridge Co. v. Geise*, 34 N. J. L. 268.

<sup>3</sup>*Mississippi River Bridge Co. v. Longman*, 91 Ill. 508; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

<sup>4</sup>The Indiana statute recognizing ferry rights in riparian proprietors does not limit the right to the grantee of the soil, but he may convey it and still retain the fee in the land; and the grantee of such right acquires the use of the soil for a ferry landing as fully as though he were the grantee of the soil. *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740.

<sup>5</sup>*Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 315, 67 N. W. 57; *Montgomery v. Multnomah R. Co.* 11 Or. 344, 3 Pac. 435.

<sup>6</sup>*Evans v. Kroutinger* (Idaho) 72 Pac. 882.

<sup>7</sup>*Maysville v. Boon*, 2 J. J. Marsh. 224; *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

Under the Kentucky laws, a franchise for a ferry across the Ohio river is a property right incident to the title to

Therefore, where one of two tenants in common to land and a ferry which was appurtenant to the land purchased the other's interest in the land, such other's interest in the ferry franchise passed as an incident of the grant of the land, and the grantee as such proprietor is liable to indictment for failure to keep it in repair.<sup>8</sup> And a ferry franchise may be partitioned, in connection with the land on each side of the stream forming the landings, in the same manner as real estate.<sup>9</sup> And where the right to the franchise depends upon ownership of the land, the landowner cannot confer the right separate from the land.<sup>10</sup> If the franchise is not annexed to the land, title to it may be transferred independently of the land.<sup>11</sup> A grant of riparian lands on one side of a stream "with all the appurtenances" confers no right or interest in a ferry franchise belonging *en gros* to a plankroad company, but which, since its nonuser, had been occupied and claimed by the grantor who owned the fee to the land at both termini.<sup>12</sup> A prohibition against transfer of a ferry franchise does not apply to a transfer of his interest by one person to another.<sup>13</sup> When bridge and ferry franchises, purporting on the face of the grant to be exclusive, are conveyed by deed in fee simple with warranty of title against the vendor and his heirs only, the purchaser, in the absence of any fraud on the part of the vendor, takes the risk of the grant proving exclusive or not exclusive in its legal operation.<sup>14</sup> If the franchise is transferred, it is subject to the same control by the franchise-granting power in the hands of the assignee that it was in the hands of the original grantee.<sup>15</sup>

land on that side, alienable and descendible, of which the legislature has no power to divest the owner by a retroactive statute. A statute, therefore, giving the county courts the power to revoke the franchise of a nonresident who has not sold such ferry to a resident citizen within one year after his removal from that state or the accrual of his right, if he was already a nonresident, is unconstitutional and void as to the vendee of one who acquired his franchise prior to the enactment of such statute. *Dufour v. Stacey*, 90 Ky. 288, 29 Am. St. Rep. 374, 14 S. W. 48.

So, a lessee of land and ferry annexed becomes the owner during the term. *Biggs v. Ferrell*, 34 N. C. (12 Ired. L.) 1.

<sup>8</sup>*State v. Willis*, 44 N. C. (Busbee L.) 223.

<sup>9</sup>*Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587.

An act of the general assembly con-

firmed the transfer of a ferry property to an individual, and declaring his title thereto to be absolute and perfect, with full power to sell and convey the same, merely confirms in such grantee such rights as he acquired under his purchase, and does not divest the title of remaindermen in an undivided one half thereof. *Ibid*.

<sup>10</sup>*Haynes v. Wells*, 26 Ark. 464, Modified in *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202.

<sup>11</sup>*Kennedy v. Covington*, 8 Dana, 50.

A ferry operated under a license from the state does not pass to the grantee under a conveyance of the adjoining land. *Gourdine v. Davis*, 1 Bail. L. 469.

<sup>12</sup>*Haithcock v. Swift Island Mfg. Co.* 72 N. C. 410.

<sup>13</sup>*Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809.

<sup>14</sup>*Wright v. Shorter*, 56 Ga. 72.

<sup>15</sup>*Evans v. Krouting* (Idaho) 72 Pac. 382.

**308a. How far a personal trust.**—Where, under the policy of the state, a ferry franchise is a mere license conferred upon the licensee as a personal trust, it cannot be transferred without the consent of the state, and any attempt to make such transfer will render the license subject to forfeiture; and it has been held that this character is given to the ferry franchise by a statutory provision that no one shall operate a ferry without obtaining a special license therefor.<sup>1</sup> This ruling, however, loses sight of the fact that the license is not required because of the personality of the licensee, but because no one has a right to operate a ferry and exercise the prerogative right of taking toll unless he is authorized to do so by the state. Therefore, the license is for the protection of the public, and is not personal to the licensee. Under a statute authorizing a board of supervisors to grant a license to keep a ferry to a suitable person owning the land through which the highway adjoining the ferry shall run, and requiring the execution of a bond that he will faithfully keep and attend such ferry, a license to keep a ferry is not assignable.<sup>2</sup> But when the license is held to be a personal trust, it cannot be transferred without the consent of the state; nor will it descend to the heirs or personal representatives of the licensee;<sup>3</sup> nor is it the subject of levy, sale, or delivery under execution.<sup>4</sup> The state may, however, give its assent to a transfer.<sup>5</sup> It will be presumed that a ferry is kept by and for the person who has a license to keep it, and who is responsible to the public and to individuals for its safe and commodious condition.<sup>6</sup>

**309. Contracts affecting ferry.**—The right to operate a ferry is the subject of lease unless such course is forbidden by the statute, and the rights of the persons under the lease will be determined by the construction of the instrument in the same manner as similar rights are determined under other contracts between landlord and tenant.<sup>1</sup>

<sup>1</sup>*The Maverick*, 1 Sprague, 23, Fed. Cas. No. 9,316.

<sup>2</sup>*Willard v. Forsythe*, 2 Mich. N. P. 190.

<sup>3</sup>An injunction will be granted at the suit of the owner of a ferry franchise to restrain the operation of another ferry between the same points by the administratrix of one not the riparian owner, who carried on such ferry under a license from the county court, as, under the Oregon statutes, such a ferry license is a mere personal trust which expires with the death of the grantee. *Knott v. Prush*, 2 Or. 237.

<sup>4</sup>*Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286; *Fisher v. Higgins*, 5 T. B. Mon. 140.

<sup>5</sup>*Hackett v. Multnomah R. Co.* 12 Or. 124, 53 Am. Rep. 327, 6 Pac. 659.

<sup>6</sup>*Brearily v. Norris*, 23 Ark. 514.

<sup>1</sup>A lease of a ferry, requiring the lessee to keep a good and sufficient steam ferryboat for the safe conveyance of passengers at all usual and reasonable times without delay, is broken by frequent failure of the lessee to answer applications of persons for passage over the river and for refusing for hours to notice such applications; and the facts that the lessee's wood was green, and his boat moored on the opposite shore from where the persons desire to embark, are immaterial. *Phillips v. Bloomington*, 1 G. Greene, 498.

The lessee of a ferry and a tract of

Where a proprietor of one bank of a river, who has a license to keep a ferry at a place where a public highway crosses the river, executes a written obligation for a lease of the ferry rights of the proprietor of the opposite side of the river, who has obtained from the county court an order for a ferry from his shore, such obligation is founded upon a valid consideration, where it appears that the obligor, by leasing the ferry, avoided competition, and could thereby avail himself of the entire profits from carrying freight and passengers from both shores of the river.<sup>2</sup> Where one operates a ferry under a license, from the bank of a river owned by him to the opposite bank owned by one who subsequently obtains a license to operate a ferry from his bank, and the prior licensee rents the rival privilege, and, after the expiration of the lease, the county court refuses to renew the license of the rival ferry, but does renew the license upon a subsequent application, the prior licensee, who operated the ferry at the same place between the time that the court refused to renew the license and the time when it was granted, is not liable to account for half of the profits to the rival ferry owner, since, when the county court refused to renew the license, the right of the licensee ceased, and he had no foundation for his claim against the defendant.<sup>3</sup> Failure to operate a ferry between designated points for twenty-nine days while in the custody of a marshal under a libel and seizure for money due employees, except that a schooner owned and operated by others than the lessees of the ferry was run between such points as the wind and weather permitted, the ferry being subsequently continuously operated by purchasers at the sale to whom the lease was assigned, does not work a forfeiture of the lease by virtue of a covenant therein that the premises shall be used in good faith continuously during the existence of the lease for the usual and ordinary business of a ferry, and a pro-

land on one side of a stream, being the only ferry at that point, is not evicted therefrom, so as to justify an abandonment and release him from the payment of further rent, by the passage of an act of legislature giving a land owner on the opposite side of the stream the right to a license for a ferry on his side, and to have all the privileges of a ferry keeper from that side with mutual privileges of landing, under which act the licensee, having purchased the opposite shore, acquired a license, and thereafter operated such ferry therefrom, and abandoned his rights under the lease. *Huff v. Walker*, 1 Ind. 193.

The lessee of a ferry, who continues

to operate the same after his lease expires, claiming exclusive privilege under an act of legislature passed just prior to such expiration, nevertheless, would be deemed to hold and operate under the title of his lessor also holding under a legislative grant, where he never surrendered his possession obtained under the lease, and had obtained the consent of a subsequent lessee to allow him to operate the same until the respective rights of the parties were determined by a subsequent legislature. *Walker v. Tipton*, 3 Dana, 3.

<sup>2</sup>*Clegg v. Roane*, 21 Ark. 361.

<sup>3</sup>*Bell v. Clegg*, 25 Ark. 26.



vision that the lease shall be forfeited for default in any covenants.<sup>4</sup> A contract between a railroad company and a ferry company by which the former binds itself to employ the latter to transport for it across the Mississippi river at St. Louis all persons and property which shall be taken across the river either way "to or from Bloody island" and "to or from St. Louis," being a contract in restraint of competition in trade, will not be construed as implying a prohibition on the part of the railroad company to extend its tracks to some other point and there employ another ferry to transport its passengers and freight from and to St. Louis.<sup>5</sup> An executed agreement to advance purchase money of land in consideration that the purchaser shall secure the ferry right in the land for the use of the lender, and the taking of the title in the name of the purchaser, create, as to the ferry right, an implied trust in favor of the lender.<sup>6</sup> Permission to operate a ferry across a bayou under the control of a canal company, given on condition that it shall not impede navigation, may be recalled when ascertained to be inconvenient and a hindrance to vessels.<sup>7</sup>

**310. Public duties of ferryman.**—The holder of a ferry franchise owes certain duties to the public because of the privileges given him, and he has certain rights in return, which are accorded him as compensation for the duties performed. Among his duties are to provide adequate means for accommodating the traffic, and to have the ferry in readiness for use at all times when it could reasonably be demanded under all the circumstances of the case. Furthermore, he must refrain from interference with traffic on the river more than is reasonably necessary. Failure of the licensee to perform his duties may be ground for forfeiture of his license.<sup>1</sup> The law establishes ferries for the public good and convenience, and not for the individual profit of the keeper; and he who accepts this trust must provide himself with proper boats to accommodate the public at all stages of water, either high or low, or suffer the consequence of his neglect.<sup>2</sup> One who accepts a ferry franchise is bound to furnish reasonable accommodations to the public, to submit to the general ferry regulations throughout the state, and to take just and reasonable toll as from time to time the legislature shall establish.<sup>3</sup> Where a railroad corporation, whose charter is subject to alteration by the legislature.

<sup>4</sup>*Heywood v. Berkeley Land & Town*  
*Improv. Asso.* 71 Cal. 349, 12 Pac. 232.

<sup>5</sup>*Wiggins Ferry Co. v. Ohio & M. R.*  
*Co.* 72 Ill. 360.

<sup>6</sup>*Williams v. Turner*, 7 Ga. 348.

<sup>7</sup>*Singer v. Carondelet Canal & Nav.*  
*Co.* 39 La. Ann. 478, 2 So. 102.

<sup>1</sup>*New York v. Starin*, 106 N. Y. 1, 12  
N. E. 631.

<sup>2</sup>*Jabine v. Midgett*, 25 Ark. 474.

<sup>3</sup>*Charles River Bridge v. Warren*  
*Bridge*, 7 Pick. 344.

has, under legislative sanction, acquired an existing ferry franchise as an extension and part of its railroad line, the legislature may require such corporation and its successors to operate the ferry.<sup>4</sup>

**311. Right of ferryman to tolls.**—A ferry franchise includes the right to take tolls, and, in the absence of any particular act on the part of the licensee which will prevent his insisting upon his rights, there is no question of his right to enforce payment of them from persons attempting to use the facilities furnished by him. The right to take toll may be released by custom<sup>1</sup> or by contract,<sup>2</sup> and a contract giving a right to ferriage free of charge will be given a reasonable construction.<sup>3</sup> The owner of a ferry franchise cannot encumber it with perpetual burdens the tendency of which would be to destroy its public usefulness. A contract, therefore, made by a ferry owner with the owner of land adjoining his landing on one side, granting free ferriage to such owner and family in consideration of the privilege of tying his ferryboat to a tree on such land, and of using a portion thereof for ferry purposes, is a mere personal contract, binding upon such ferry owner and his successors so long as they voluntarily continue to use the property of such landowner, but cannot be enforced against remote successors after the original franchise has expired, and they have ceased to make use of the privileges granted by the contract.<sup>4</sup> One continuously using a ferry without objecting to the failure of the proprietor to comply with a statute providing for the forfeiture of tolls by owners of ferries neglecting to keep fixed up in a conspicuous place the rate of toll will be presumed to have used such

<sup>1</sup>*Brownell v. Old Colony R. Co.* 164 Mass. 29, 29 L. R. A. 169, 49 Am. St. Rep. 442, 41 N. E. 107.

But a railroad company is not authorized to become the owner of, or operate, a ferry, unless such power is expressly or by necessary implication given to it by statute; and hence, a railroad company operating a ferry without such statutory authority is not liable to indictment for failure to keep it in repair. *State v. Wilmington & M. R. Co.* 44 N. C. (Busbee L.) 234.

<sup>2</sup>A custom by which all inhabitants of a certain village dwelling in ancient houses had passage on a ferry free of toll is good if founded upon a lawful beginning. *Pain v. Patrick*, 3 Mod. 289, 1 Salk. 12.

And the keeper of a ferry is not discharged from his duty to carry certain persons free of toll by his constructing a bridge over which they can find passage. *Ibid.*

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<sup>3</sup>An agreement to carry a person on a ferry free of toll is not a covenant real, so as to bind a subsequent purchaser of the ferry, although it was made on a partition of a tract of land including the ferry landing and as part consideration for the transfer of the ferry landing to the covenantor. *Morse v. Garner*, 1 Strobb. L. 514, 47 Am. Dec. 565.

<sup>4</sup>A reservation in a sale of a ferry franchise of ferriage for the grantor and his family free from all charges or demands forever, without any specified limitation, entitles such grantor to the free transportation of lumber, which, under a contract for the running of his mill by another, it is his duty to haul to a point requiring the crossing of the river. *Stephens v. Knott*, 2 Or. 304.

<sup>5</sup>*Potts v. Park*, 106 Ky. 202, 49 S. W. 1058.

ferry under a contract to pay the tolls, and cannot, in an action to recover them, set up such forfeiture as a defense.<sup>5</sup>

**312. What competition interferes with ferry license.**—As we have seen,<sup>1</sup> a ferry franchise may be made exclusive so as to entitle the licensee to freedom from competition. But even in cases where the attempt has been made to make an exclusive grant, there is still room for construction as to what will be an interference with such right. The charter may fix the limits of the exclusive right so definitely as to preclude further controversy as to its meaning. In such cases the only question is whether or not the person complained of has carried on a ferry within the prohibited boundaries. And even when it is found that some acts have been done within those boundaries, the further question arises as to whether or not the acts done interfere with the ferry rights of the licensee. It is not the mere diminution of profits occasioned by a new ferry which constitutes it a nuisance to an old one, but to produce this effect the new one must be established within the range of the exclusive right of the old one, which is to be settled on proof of use in case of a prescriptive right, or by the grant where one exists.<sup>2</sup> In *Newton v. Cubitt*,<sup>3</sup> which was an action for infringing a ferry franchise, the court said: The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that, if the franchise of a ferry be established for facility of passage, and if the monopoly be given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water way; and it is obvious that the single landing place which sufficed for the uninhabited marsh would be utterly inadequate for several towns thronged with industrious mechanics.<sup>4</sup> A ferry franchise is infringed by the operation of a ferry

<sup>5</sup>*Addison v. Hard*, 1 Bail. L. 431.

<sup>1</sup> See *ante*, §§ 306, 307.

<sup>2</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

<sup>3</sup>12 C. B. N. S. 58.

<sup>4</sup>In *Churchman v. Tunstal*, Hardr. 162, it was held that the owner of a ferry is not entitled to restrain the owner of land  $\frac{1}{2}$  of a mile off from operating a ferry at such point, as to grant such relief would tend to create a monopoly. This case was, however, expressly overruled in *Atty. Gen. v. Richards*, 2 Anstr. 603, and in *Huzzey v. Field*, 4 L. J. Exch. N. S. 239, 2 Crompt. M. & R. 432, 5 Tyrw. 855, 1 Gale, 166. In the latter case Lord Abinger says that, upon an-

other bill filed by Churchman in 1663, after the Restoration, a decree was made by Lord Hale on the 18th of June, 14 Car. II., in favor of the same plaintiff, that the new ferry should be put down.

In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, Taney, Ch. J., in referring to the *Churchman Case*, stated that it was repugnant to all former cases, as well as later cases.

In *Pim v. Curell*, 6 Mees. & W. 260, an action for infringing a ferry, Parke, B., stated that the report of *Churchman v. Tunstal*, in Hardr. 160, is incomplete, and that the statement of it in *Huzzey v. Field*, 2 Crompt. M. & R. 436 4 L. J. Exch. N. S. 239, 5 Tyrw. 855, 1

within a short distance of its termini, and which carries people whose immediate destination is one of the termini of the licensed ferry.<sup>5</sup> A ferry franchise is not infringed by one carrying people to a town near the terminus of the ferry, but at a sufficient distance from it to be of substantial importance to those having to pass to such town.<sup>6</sup> Where a ferryman is possessed of an exclusive ferry between certain points he cannot maintain an action against another for carrying persons across to a place near one of his termini, where it is not done fraudulently and for the purpose of avoiding the regular ferry, and the persons carried have no intention of going to the place situated at the terminus of the plaintiff's ferry.<sup>7</sup> To be an infringement, the rival transportation must be across the stream in the regular way in which ferries operate.<sup>8</sup> Rights of commerce give no authority to their possessor to infringe the ferry franchise of another.<sup>9</sup> A ferry

Gale, 166, is correct; that the decision ultimately was for the plaintiff.

<sup>5</sup>*Jellett v. Anderson*, 27 Grant Ch. (U. C.) 411.

A ferry right is infringed by the act of taking across a single person who would otherwise have gone by way of the ferry. *North & South Shields Ferry Co. v. Barker*, 2 Exch. 136.

<sup>6</sup>In *Newton v. Cubitt*, 12 C. B. N. S. 32, the distance was 1,280 yards, and it was held that to carry persons to that point, who actually desired to go there and not to the terminus of the ferry, was not an infringement.

The court said the owner of a ferry has a cause of action against one carrying passengers in the line of the ferry, whether it is done directly or indirectly. He has a right to the transportation of passengers using the way. And, if the alleged wrongdoer makes a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to travelers, such wrongdoer will be liable. But where the alleged infringing ferry lands people at such a distance from the old ferry as to be of substantial importance to the passengers, it is not an infringement.

In *Anonymous*, 1 Ves. Sr. 476, the court, in determining a motion to restrain before answer the operation of an infringing ferry that was of great importance to a large city, said this is like the ferry on the Thames and the passage of boats to Gravesend, which have a sole right of carrying, yet other ferries do carry every day, and it is not held as infringement of their right.

<sup>7</sup>*Tripp v. Frank*, 4 T. R. 666; *Huzzey v. Field*, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855.

He is not a "customer" of the established ferry who, wishing to go to a point half a mile from the terminus of the ferry, would have to get there through the marsh or hire a boat to take him there if he patronized the ferry; and the ferry franchise is not violated by one who sets him over at the desired place, although the law forbids the establishment of a competing ferry within that distance. *Taylor v. Wilmington & M. R. Co.* 49 N. C. (4 Jones L.) 277.

<sup>8</sup>Therefore, a ferry franchise is not invaded by one maintaining a line of steamers for the transportation of freight along a river, having a landing at a place 2 miles from, but within the exclusive franchise of, the ferry, no persons being carried over the river for fee or reward. *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633; *Huzzey v. Field*, 2 Cromp. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855; *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191.

<sup>9</sup>*Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191.

Therefore, equity will restrain the infringement of a ferry franchise by a vessel owner having a United States harbor license making regular, hourly "excursions" between the same places, and soliciting persons to take his boat instead of the ferry. *Midland Terminal & Ferry Co. v. Wilson*, 28 N. J. Eq. 537.

See also, § 12a, ante.

right is not limited to boats exceeding a certain size or burden, so as to permit others to operate a ferry of smaller burden, by a statute declaring that if any person should use any boat exceeding a specified burden in ferrying for hire across a river, he should be subjected to a penalty, as such statute merely added accumulative remedy by way of penalty.<sup>10</sup> In *Norwood v. Norwood*,<sup>11</sup> Hanson, Chancellor, in refusing to determine the right to an injunction to restrain the operation of a rival ferry by one tenant in common of an existing ferry, because of insufficiency of the evidence before him, considered that if two persons agree to set up at their joint expense a ferry for the accommodation of travelers on a certain road, and the ferry is accordingly set up, the setting up of another ferry by one of such persons for his own emolument within a short distance of the first ferry to accommodate the same set of travelers would be a violation of the right and interests of his partner; but if the ferry, although near by, is only for the accommodation of the travelers on another road who would not otherwise cross at the old ferry, the other owner would not be entitled to have it suppressed. A person operating a ferry is liable for the act of his servant in landing a person at a point which infringes another ferry franchise.<sup>12</sup>

**312a. Carriage without compensation.**—Under the rule that the owner of land on a stream may maintain a boat for the use of himself and family without the necessity of obtaining a ferry license, he cannot be regarded as infringing the rights of an exclusive licensee if he merely uses his boat for the accommodation of his family or business. The question then arises, How far can he make use of his skiff for the accommodation of others without infringing the ferry right? It has been held that there is no infringement of such right unless the owner of the private boat takes a fee or reward for his services.<sup>1</sup> In *Hunter v. Moore*<sup>2</sup> it was held that a ferry licensee has no right to prevent citizens from using their own boats upon the stream for a mile above or below, carrying themselves, their families,

<sup>10</sup>*North & South Shields Ferry Co. v. Barker*, 2 Exch. 136.

<sup>11</sup>4 Harr. & J. 112.

<sup>12</sup>*Huzzey v. Field*, 2 Crompt. M. & R. 432, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855.

<sup>1</sup>*Hanson v. Webb*, 3 Cal. 237; *Chapelle v. Wells*, 4 Mart. N. S. 427.

<sup>2</sup>44 Ark. 184, 51 Am. Rep. 589.

On similar grounds, it is held that an individual has the right to transport himself over a river in his own boat, although there may be a licensed ferry at the same place; but he may not make

this individual right the medium or cover of conveying travelers whose carriage legally belongs to the licensed ferryman. *Weld v. Chapman*, 2 Iowa, 524.

So, one crossing a river at a point where there is a ferry, in a canoe not belonging to the owner of the ferry, but landing on the other side by getting from the canoe into one of the ferry-boats and from thence to the bank, is not liable for the rate of ferriage allowed by law. *Henry v. Turner*, 2 Port (Ala.) 23.

employees, guests, or occasionally a friend, or occasionally lending their boats to each other; but such persons, in using the banks of the licensee for landings except at a public highway, and in crossing his lands to reach their boats, are liable as trespassers. But the rule as stated in those cases is not quite broad enough. It leaves too much room for invasion of the ferry right. The licensee cannot complain if the neighbor uses his boat to carry himself, his family, or his property over the river, or if he occasionally carries a guest with him.<sup>3</sup> But when the private boat is made a convenience by ferry patrons to such an extent as seriously to interfere with the revenue of the ferry or to deprive it of custom which belongs to it, then the licensee has a right to complain. Thus, the purchase by a number of persons, of a ferryboat and landing places on each side of a river, and their exclusive use for the ferrying of such owners and their families across such river by a ferryman employed by them at a yearly salary, without carrying any other persons either for toll or free, are unlawful as against the owner of a regularly licensed ferry established within the distance from such other prohibited by law, as a combination formed manifestly for the purpose of evading the payment of tolls; and he may enjoin its use.<sup>4</sup> The owner of an exclusive ferry privilege has a right of action against a person establishing a free ferry which takes away part of his custom, although the person establishing the free ferry receives no benefit from it, as the ground of the action is the injury which the owner of the privilege sustains, he having assumed the burdens attached to the privilege.<sup>5</sup>

**312b. Bridges.**—The rule that the grant of a ferry franchise should be strictly construed prevents the erection and maintenance of a bridge from being a violation of a ferry franchise, although it is so

<sup>3</sup>It is not an infringement of an exclusive ferry privilege for a person operating a manufacturing establishment regularly to carry his property across the river on a flat boat at such times as may be convenient. *Alexandria, W. & K. Ferry Co. v. Wisch*, 73 Mo. 655, 39 Am. Rep. 535.

<sup>4</sup>*Warren v. Tanner*, 21 Ky. L. Rep. 1678, 56 S. W. 167.

A club ferry, of which anyone might become a member by taking shares, each one of which entitled the owner to a certain number of tickets for passage on the ferry, established within the limits of an exclusive licensed ferry, is an infringement upon the latter for which the licensee may recover damages. *Dinner v. Humberstone*, 26 Can. S. C. 254.

across a river gratuitously persons who stop at his hotel is liable in damages to the lessee of the exclusive right to keep a ferry at that point. *Fenner v. Watkins*, 16 La. 204.

So, an unlicensed person who, while a bridge is being repaired, operates a ferry for the accommodation of himself and others from whom he receives pay, and thereby infringes the right of one licensed to maintain a ferry until the bridge is completed, cannot urge that he keeps only a private ferry, if it was established in consequence of the bridge being broken, and would not have been used if the bridge had been passable. *McInnis v. Pace*, 78 Miss. 550, 29 So. 835.

<sup>5</sup>*Long v. Beard*, 7 N. C. (3 Murph.)

And a tavern keeper who transports 57.

located as to destroy the benefits of the ferry.<sup>1</sup> Therefore, extending the approaches to a bridge so as to intersect the highway beyond the toll gate of a ferry across a river, thereby diverting travel from the ferry and seriously reducing its revenues, where such extensions are reasonably essential to the public convenience, and are built to subserve that end, does not constitute a shun-pike, and is not an impairment or violation of a contract within the constitutional prohibition.<sup>2</sup> Depreciation of the profits of a ferry franchise, caused by the opening of a bridge, erected at that point by the proper public authorities, will not be allowed as part of the incidental damages in estimating the compensation to be allowed such ferry owner for a strip of land condemned for the erection of one of the bridge piers, where the franchise itself, and its exercise, are not impaired by the existence of such pier.<sup>3</sup> If the ferry franchise is exclusive, a construction permitting the establishment of other means of transportation across the river should not be so strict as to result in a confiscation of property without compensation, contrary to the constitutional inhibition, for there can be no question that a destruction of the value of the ferry is a destruction of property. As said by the West Virginia court, an exclusive ferry franchise is private property within the meaning of a constitutional provision which declares that private property shall not be taken or damaged for public use without just compensation.<sup>4</sup> Under such constitutional provision it is held that a grant prohibiting the establishment of rival ferries within a certain distance of the former one will preclude the construction of a bridge. When, however, the Constitution merely prohibits the taking of property, it does not prevent the construction of a bridge which destroys the value of the ferry franchise. As said in *Hydes Ferry Turnp. Co. v. Davidson County*,<sup>5</sup> the impairment or total destruction of the value of a ferry franchise, by the erection of a bridge nearby,

<sup>1</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Dyer v. Tuscaloosa Bridge Co.* 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Piatt v. Covington & C. Bridge Co.* 8 Bush, 31; *Bush v. Peru Bridge Co.* 3 Ind. 21; *Jones v. Keith*, 37 Tex. 394, 14 Am. Rep. 382.

Where a law passed after the establishment of a ferry, which provides that no ferry shall be established within ½ mile of a ferry already established, and which is construed as prohibiting the establishment of a toll bridge within that distance, is validly repealed as against the owner of such ferry, the purchase of such ferry by a bridge com-

pany under an enabling act authorizing it to make the purchase does not create in any way a perpetual monopoly, but such law is subject to repeal as against the bridge company, and a new bridge may be erected within the restricted territory without any violation of vested rights. *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009.

<sup>2</sup>*Hydes Ferry Turnp. Co. v. Davidson County*, 91 Tenn. 291, 18 S. W. 626.

<sup>3</sup>*Moses v. Sanford*, 11 Lea, 731.

<sup>4</sup>*Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396.

<sup>5</sup>91 Tenn. 291, 18 S. W. 626.

is not a taking of the former's franchise which will entitle its owner to compensation, where the public convenience demanded the building of the bridge, and the same was built to subserve that end, and the grant of franchise for the ferry was not by its terms exclusive.<sup>6</sup> Since the grant of an exclusive ferry franchise does not exclude the construction of a bridge in the vicinity,<sup>7</sup> the ferryman cannot complain of the construction of such bridge unless by the terms of his charter he has a right to be free from competition from bridges.<sup>8</sup> His rights are not infringed by the construction near him of a railroad bridge.<sup>9</sup> But the owner of the ferry has a strong equitable claim to be protected against destruction of his business by the construction of a bridge. This consideration has led one court to hold that the construction of a bridge is a violation of the spirit of the statute giving the exclusive franchise.<sup>10</sup> There is no room for such construction, however, in grants of portions of the royal prerogative, and such

<sup>6</sup>*Dyer v. Tuskaloosa Bridge Co.* 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>7</sup>See ante, § 306a.

<sup>8</sup>*Piatt v. Corington & C. Bridge Co.* Bush, 31.

One who claims the right to operate a ferry, and who institutes an action against the owners of a toll bridge for diverting traffic from it, cannot recover, unless it appears that the defendants collected tolls without lawful authority, from persons using the toll bridge. *Hanger v. Little Rock Junction R. Co.* 52 Ark. 61, 11 S. W. 965.

A ferry company is not entitled to recover damages for the diversion of travel by the construction of a bridge upon its line, although it is entitled to damages for injuries to it by the placing of piers in such a way as to interfere with the passage of its boats. *Riverton Ferry Co. v. McKeesport & D. Bridge Co.* 1 Pa. Super. Ct. 587.

<sup>9</sup>*Hopkins v. Great Northern R. Co.* L. R. 2 Q. B. Div. 224, 46 L. J. Q. B. N. S. 265, 36 L. T. N. S. 898.

And a railroad bridge is not rendered an infringement of a ferry franchise by the fact that it is provided with a foot bridge for the use of which no toll is charged, and which is used to enable passengers to go to and from the railroad station, although it may be used by trespassers who are not going to the railroad station. *Ibid.*

The owner of a ferry is not entitled to compensation for injuries resulting

from the construction of a railroad bridge under a statute providing for compensation for injuries caused by such construction, as the injury to the ferry, if any, results, not from the construction, but from the user, of the bridge. *Ibid.* In so holding the court overruled *Queen v. Cambrian R. Co.* L. R. 6 Q. B. 422, 40 L. J. Q. B. N. S. 160, 25 L. T. N. S. 84, 19 Week. Rep. 1138, which held that the fact that a ferry is not actually injured by the construction of a railway toll bridge and foot way, which divert traffic from the ferry, until such traffic is actually diverted, does not prevent the injury from arising from the construction of the bridge, within the meaning of the statute entitling to compensation the owner of property injuriously affected by the construction of the railway.

But where a ferry is attached to the adjoining land, an injury to it by the construction of a railway bridge entitles the owner to compensation as for an injury to the land. *Re Cooling*, 19 L. J. Q. B. N. S. 25, 14 Q. B. 25, 14 Jur. 128.

Although, in Pennsylvania, it has been held that the lawful construction of a railroad bridge over a river in such a way as to interfere with a ferry landing is not an injury to private property in the ferry franchise, for which compensation must be made. *Pittsburgh & L. E. R. Co. v. Jones*, 111 Pa. 204, 56 Am. Rep. 260, 2 Atl. 410.

<sup>10</sup>*Gates v. M'Daniel*, 2 Stew. (Ala.) 211, 19 Am. Dec. 49.



decisions cannot be upheld on sound principle. The statute may provide compensation for injury done to the ferry by construction of the bridge.<sup>11</sup>

**313. Right to sue for violation of ferry rights.**—A ferry right is property which entitles the owner to protection against those who attempt to infringe it without right,<sup>1</sup> and, if his right is exclusive, he is entitled to protection even against an attempt by the state to establish a rival ferry. But to entitle him to maintain the action, he must show that he has a right to maintain a ferry;<sup>2</sup> and, in case his rival is operating under authority from the state, he must further show that his ferry privilege is exclusive.<sup>3</sup> He may estop himself from recovering damages

<sup>11</sup> The injury to a ferry for which a bridge company would be liable under its charter on building its bridge, is such as it would be liable for at common law, if it invaded the ferry right without statutory authority. *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558, Affirming 34 N. J. L. 268.

Whether or not a ferry is property, if the legislature considers it to be property when granting a bridge charter which was accepted by the incorporators, the bridge corporation cannot escape any of its conditions by questioning the precise nature of the ferry right, as it cannot question the propriety or expediency of a franchise. *Buckwalter v. Black Rock Bridge Co.* 38 Pa. 281.

<sup>1</sup> *Taylor v. Wilmington & M. R. Co.* 49 N. C. (4 Jones L.) 277.

The construction of a ferry without public authority, so near to a licensed one as to draw away its custom, is a nuisance for which the owner of the licensed ferry may maintain an action. *Stark v. M'Gozen*, 1 Nott & M'C. 387, 9 Am. Dec. 712.

The grantee of a ferry privilege is entitled to an injunction against one who, having no license, undertakes to operate another ferry in competition with that which is licensed; and it is not necessary that the grant of the ferry privilege should exclude the power to grant a license for another ferry; but it is sufficient that no such second license has in fact been granted. *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

<sup>2</sup> *Hanger v. Little Rock Junction R. Co.* 52 Ark. 61, 11 S. W. 965; *Organ v. Memphis & L. R. R. Co.* 51 Ark. 235, 11 S. W. 96; *Londonderry Bridge v.*

*M'Keever*, Ir. L. R. 27 Eq. 464; *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809.

The purchaser of a ferry franchise cannot maintain an action enjoining the establishment of another ferry at the same point, where he is operating his ferry without having obtained leave of court to make the purchase, or having filed his bond with surety in lieu of that of the former owner, as is required under the ferry laws of Kentucky. *Davis v. Connolly*, 21 Ky. L. Rep. 1459, 55 S. W. 691; *Walker v. Armstrong*, 2 Kan. 198.

<sup>3</sup> *Owens Bros. v. Lockwood*, 83 Ky. 266; *Butt v. Colbert*, 24 Tex. 355.

The owner of a ferry may not maintain an action for damages against the county or the owner of a subsequently established ferry, for loss of profits and patronage resulting from the establishment of the latter ferry. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L. R. A. 513, 43 S. E. 107.

Where one operating a ferry on Sundays only, under a license authorizing him so to do, is under no obligation to keep up the ferry, being free to abandon it at any time, his right does not stand upon the same footing as an ancient ferry, and he cannot maintain an action for infringing his right, although the effect of the infringing ferry is to divert traffic. *Letton v. Goodden*, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 L. T. N. S. 296, 14 Week. Rep. 554.

A bill in equity cannot be maintained by one tenant in common against a purchaser from the administrator of the other cotenant of his interest in the land, for an accounting for a share of the proceeds of a disused ferry of the deceased cotenant which the purchaser

by consenting to the operation of the rival,<sup>4</sup> or by unfair treatment of the one against whom relief is asked.<sup>5</sup> The only one who has a right of action is he in whom a grant lies.<sup>6</sup> But plaintiff need not produce a grant from the Crown, where he proves that he has been in possession of and used the ferry for such a time as will raise a presumption of its having been originally founded on a grant. In one case he had been in possession for thirty-five years, which the court held was sufficient to raise such a presumption.<sup>7</sup> One tenant in common of a ferry franchise, in sole possession thereof, may maintain an action to protect it from injury or destruction by the opera-

had re-established in opposition to a ferry which had been run by such cotenants as partners, where the surviving cotenant declined to recognize the purchaser's title to a moiety of the land, and refused to take him into partnership, as he had the right to enter upon the land and enjoy the same as his predecessor had done. *Spann v. Nance*, 32 Ala. 527.

'No, consent by the owner of a ferry to the erection of a bridge within the limits of his exclusive privilege will prevent his recovering damages for injuries to his ferry right, caused by the erection of the bridge. *Morey v. Orford Bridge*, Smith (N. H.) 91.

The owner of a ferry, who has resorted to unfair means to divert travel from the ferry and tollgate of another on one side of a river, will not be granted an injunction to restrain interference by such tollgate owner with a private way from his ferry to a public road on the other side of the river on which the tollgate is located, by the straightening of the public road adopted by the overseer of the road and the building of a fence on the land of the tollgate owner so as to cut off the private way, which had not been established under the statutory provisions regulating such ways. *Hill v. Averett*, 27 Ala. 484.

*Higgins v. Hogan*, 7 U. C. Q. B. 401.

*Trotter v. Harris*, 2 Younge & J. 285.

In *Blissett v. Hart*, Willes Rep. 508, it was held that, in an action by the owner of a ferry against a person erecting an infringing ferry, the plaintiff need not allege that he was seised in fee, his possession being sufficient to entitle him to maintain the action, and that he need not set forth in his declaration that he keeps boats and ferrymen sufficient to carry passengers. The reason given by the court for its opinion did

not appear in the report of the case, but in a note appended to it the reporter gave the following extract from Mr. Justice Abney's note book: "By the court, a ferry is *publici juris*. It is a franchise that no one can erect without a license from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license the Crown has a remedy by quo warranto, and the former grantee has a remedy by action. But what profits it yielded, and what repair it was in, were proper for the consideration of the jury to found their damages upon."

An owner of a ferry is in possession of it, so as to entitle him to maintain an action against a person infringing his right, where, after having demised it to another by parol at a certain annual rental, he, finding it unprofitable, proposes to become the servant of the owner and to account to him for all money received from passengers upon being allowed fixed daily wages, which is done. *Peter v. Kendal*, 6 Barn. & C. 703, 5 L. J. K. B. 282, 30 Revised Rep. 504.

Thus, it seems that one who is in the actual occupation of a ferry, though without license, can sustain an action against another who dispossesses him without authority. *Ogden v. Lund*, 11 Tex. 688.

But the lessee of a ferry franchise is not entitled to relief by injunction against the operation of another ferry within a short distance thereof, in the absence of any proof of his lease, or of the corporate character and right of his lessors, who described themselves as certain commissioners to whom the grant of the franchise appears, by the record of the court of roads and revenues, to have been made. *Carter v. Garrett*, 13 Ala. 728.

tion of another ferry within 1 mile thereof contrary to statute.<sup>8</sup> And he may maintain an action against his cotenant for an accounting, in case the latter takes exclusive possession and receives the profits.<sup>9</sup> The widow and children, who have continued in possession and the operation of a ferry since the death of its owner, have such a joint interest as entitles them to maintain proceedings for an award against a bridge company required, on constructing its bridge, to pay damages to all ferry owners injured thereby.<sup>10</sup> If the franchises for the opposite ends of the ferry are held by different persons, who, under compact, operate the ferry as one plant, neither need join the other in a suit to recover for the infringement of his franchise.<sup>11</sup> A corporation empowered by statute to establish and work a steam ferry cannot restrain a person who, without any title, has established a ferry which interferes with the profits of its ferry, unless it, like the proprietors of ancient ferries, is under obligation to maintain the ferry.<sup>12</sup>

**314. Remedy for infringing ferry rights.**—Nothing is better established than that the owner of the ferry franchise is entitled to legal protection against those infringing his rights. As long ago as the time of the Year Books, it was held that an action lies against one who sets up a ferry to the injury of an existing one.<sup>1</sup> The statute may

<sup>8</sup>*Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381.

<sup>9</sup>*Puckett v. Smith*, 5 Strobb. L. 26, 53 Am. Dec. 686.

But where one of two tenants in common of land on which a ferry may be kept obtains a license and keeps a ferry, without interfering with the rights of his cotenants to do the same thing, he is not bound to account to them for the profits received. *Ragan v. McCoy*, 29 Mo. 367.

<sup>10</sup>*Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558.

<sup>11</sup>*Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39, Affirmed in 38 N. J. L. 580.

<sup>12</sup>*Londonderry Bridge v. M'Keevor, Ir.* L. R. 27 Eq. 464.

<sup>1</sup>22 Hen. VI. 14, pl. 23.

In *Huzzey v. Field*, 2 Crompt. M. & R. 439, 4 L. J. Exch. N. S. 239, 1 Gale, 166, 5 Tyrw. 855, Newton, J., says the case of a ferry differs from that of a mill. We are bound to sustain a ferry, and to serve and repair it in ease of the common people, and that the proposition in the Year Book is quoted in 2 Rolle. Abr. 140 (G), pl. 4, Comyns' Digest, *Piscary, B.*, and *Action on the*

*Case for a Nuisance*, and in most of the cases in which the rights of a ferry have come in question. He further states that the authorities appear to be clear, that, if a new ferry be set up without the King's license, to the prejudice of the old one, an action will lie, and there is no case which has the appearance of being to the contrary except that of *Tripp v. Frank*, 4 T. R. 666; these old authorities proceeding upon the grounds (1) that the grant of a franchise is good in law, being for a sufficient consideration to the subject, who, as he receives compensation, may have by the grant of the Crown a corresponding obligation imposed upon him in return for the benefit received; and (2) that, if another, without legal authority, interrupts the grantee in the exercise of his franchise by withdrawing the profit of passengers which he would otherwise have had, and which he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury.

And this rule is still in force. *Owens v. Roberts*, 6 Bush, 608.

give a remedy, such as authorizing the ferryman to take possession of boats which are used in violation of his rights,<sup>2</sup> or the infliction of a penalty for the violation of ferry rights. The question of the effect of the infliction of the penalty upon the right of the licensee to maintain an action has given the courts some trouble. One court has held that the penalty was to be enforced by the public authorities, and not by the licensee.<sup>3</sup> While in *Almy v. Harris*<sup>4</sup> it was held that a person having a right of ferry granted under the statute for the regulation of ferries cannot maintain an action on the case for disturbance of his right, but his remedy is limited to suit for the penalty given by statute. The question is primarily one of the intention of the legislature, to be determined by the language of the statute. The licensee has a right to protection, of which he cannot be deprived. The legislature may limit him to a suit for the penalty or leave him to his remedy at law at its pleasure. But the statute should not be construed so as to deprive him of his common-law right unless such intent is plainly expressed.<sup>5</sup> If the licensee attempts to pursue the statutory

<sup>2</sup> But a person operating a ferry under a grant conferred by a special act of legislature, which confers no exclusive franchise or power to declare a forfeiture of the boat of another who runs a ferry without authority within the distance from his ferry prohibited under the general ferry laws, cannot avail himself of the provisions of the general ferry laws authorizing a forfeiture in such case. *Gear v. Buller-dick*, 34 Ill. 74.

By the provision of the ferry laws of Illinois declaring that a person running a ferry within 3 miles of an established ferry, without authority, is liable to forfeit his boat to the owner of such established ferry, the legislature did not intend the forfeiture should be declared by the party injured; that must be done by some judicial proceeding, and, when done, the proprietor of the established ferry may take possession of the boat, without which the taking of such boat is wrongful and tortious. *Ibid.*

It is not the mere license to keep a ferry which invests the person licensed with the right to seize the boats of another run at or near such ferry, as provided by the ferry laws of Illinois, but such right matures only upon his exercising his privilege conferred by the license, by establishing a ferry and putting it into operation for such purpose, doing every act required by law. *Lombard v. Cheever*, 8 Ill. 469.

<sup>3</sup> *Miles v. Craig*, 3 La. Ann. 635.

<sup>4</sup> 5 Johns. 175.

<sup>5</sup> An act prescribing penalties for carrying for hire persons or goods across a river where an established ferry is kept, and which only purports to give additional remedies to the common-law remedy for the infringement of a ferry, is not exclusive, and the common-law remedy may be enforced. *Gibbes v. Beaufort*, 20 S. C. 213.

That the running of a ferry without license is made a misdemeanor does not prevent a suit for the damages thereby inflicted by a violation of an exclusive ferry franchise. *Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809.

But a limited right which may be protected by indictment, and not an exclusive franchise for interference with which a civil action may be maintained, is created by a statute making the running of a ferry for compensation without a license a misdemeanor punishable by fine, and providing that no ferry or toll bridge shall be established within 1 mile, either above or below a regularly established ferry or toll bridge, unless it be required by public convenience. The court says further, however, that the party aggrieved may resort to a court of chancery for relief. *Ward v. Severance*, 7 Cal. 126.

remedy, he must bring himself within the terms of the statute.<sup>6</sup> A writ of forcible entry and detainer will not lie for forcibly taking possession of a ferry and the banks and shores of the river, where the party so taking possession has a right of ferry established.<sup>7</sup> A county cannot be held liable for interference with a ferry franchise unless it authorizes the acts done.<sup>8</sup>

**314a. Injunction.**— When the rights of the owner of a ferry franchise are infringed his first thought is to obtain some means of stopping the operation of the rival ferry. The remedy at law is not as prompt and effective as an equitable remedy would be, and suitors, therefore, are prone to bring their suits in equity if that court will take jurisdiction. There has been some disinclination on the part of equity courts to entertain jurisdiction, but there can be no question that the case is within such jurisdiction if it presents any of the well-recognized grounds therefor. If the complainant has established his right at law, and the defendant continues repeatedly to disregard the rights of the complainant, equity will grant relief.<sup>1</sup> When the right of the licensee is exclusive and there is no adequate remedy at law, equity will grant an injunction,<sup>2</sup> and, if the defendant is acting without right and there is no other way to compel him to desist, the injunction may be granted although complainant's rights are not ex-

\*Although a licensed owner of a ferry in Kentucky may bring an action for damages against any person encroaching upon his rights, he cannot maintain such an action under the general ferry statutes of that state, unless such encroacher is also a licensed ferry owner, as such statutes are intended only to protect the licensed owner of one ferry against the encroachments of a licensed rival in his business. *Lowry v. Dixon*, 12 Ky. L. Rep. 466.

*Rees v. Lawless*, Litt. Sel. Cas. 184, 12 Am. Dec. 295.

<sup>6</sup>So, a county is not liable for injuries to the landings and ferry right of an owner by the construction of a bridge over a stream, where the building of the bridge by the county commissioners was unauthorized and wholly outside the powers conferred on the board, because the stream formed a boundary line between that and another county, and they failed to obtain the concurrence of the commissioners of the latter county to its building as required by law. *Browning v. Owen County*, 44 Ind. 11.

<sup>7</sup>*Hazelip v. Lindsay*, 93 Ky. 14, 18 S. W. 832; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, Affirmed in 110 Mo. 557, 19 S. W. 809.

The right to enjoy a ferry franchise is property, the full use of which the courts will protect by injunction where a direct pecuniary loss ensues to complainant by the unauthorized and continuous operation of a rival ferry. *Caulle v. Craig*, 94 Mo. App. 675, 69 S. W. 49.

Where the erection of a bridge will damage a ferry, a court of equity has jurisdiction to restrain the injury to the ferry as taking private property for public use without just compensation, even though an action at law will lie for the recovery of damages after the property has been taken or damaged. *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396.

<sup>2</sup>*McInnis v. Pace*, 78 Miss. 550, 29 So. 835; *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040; *Drew v. Gant*, 1 Or. 197.

The owner of an exclusive ferry is entitled to an injunction restraining the operation of an interfering ferry, where he is unable to obtain proofs showing the extent of his loss of profits. *Long v. Beard*, 4 N. C. (Term Rep.) 256, 6 N. C. (2 Murph.) 337.

clusive.<sup>8</sup> Equity will not, however, take jurisdiction of an action for damages.<sup>4</sup> If the ferry constitutes an obstruction to navigation, complainant must establish his right to maintain it at law before equity will interfere.<sup>5</sup> But where, in an action to restrain the operation of an infringing ferry, it becomes necessary to determine the legal rights of the parties, the court will not restrict the plaintiff to his action at law where it is inadequate; but where, by affidavits, the legal issue has been plainly presented to the court, it will direct that issue to be tried, although the answer has not been served.<sup>6</sup> In order to be entitled to an injunction, complainant must show that his rights have been infringed,<sup>7</sup> and if, in any case, there is an adequate remedy at law, it must be resorted to.<sup>8</sup> Injunction cannot be resorted to for the purpose of making a collateral attack upon an order granting a ferry license.<sup>9</sup> Where different persons, not in combination, land their boats upon a ferry landing, and are liable in trespass, equity will not interfere by injunction to prevent a multiplicity of suits, where it appears that the damage by the trespass is not real, and the landing of the boats does not amount to a nuisance.<sup>10</sup> In an action by the owner of an exclusive ferry franchise against a bridge company incorporated under a general law, to restrain the corporation from erecting a bridge to the injury of the plaintiff, it appeared that no legislation had prescribed the manner in which the bridge company could acquire the legal right to damage the franchise of the plaintiff; and it was held that, although the plaintiff had the right to restrain the defendant from constructing and operating its bridge until compensation should

<sup>4</sup>*Green v. Ivey* (Fla.) 33 So. 711; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884.

<sup>5</sup>*Rhee v. Hooper*, 5 Lea, 390.

<sup>6</sup>*Hilton v. Scarborough*, 4 Vin. Abr. 425.

<sup>7</sup>*Cory v. Yarmouth & N. R. Co.* 3 Hare, 593.

<sup>8</sup>*McEwen v. Taylor*, 4 G. Greene, 532; *Wintura v. Larue*, McAll. 370, Fed. Cas. No. 9,646.

A court will not enjoin the construction of a ferry for which a franchise has been taken out, because it is to be placed so near the ferry of another that it will render his unprofitable, or because there is no public necessity for it. *Hudspeth v. Hall*, 113 Ga. 4, 84 Am. St. Rep. 200, 39 S. E. 358.

<sup>9</sup>*Long v. Merrill*, 4 N. C. (Term Rep.) 112. (Later the injunction was granted, the plaintiff being unable to prove the extent of his lost profits. See 4 N. C. [Term Rep.] 256.)

The court will not grant an injunction restraining the operation of an infringing ferry, pending the trial of the legal right to operate it, where accounts can be kept of the number of people carried and the measure of damage approximately estimated, so that no irreparable mischief can be done by a continuance of the operation of the ferry. *Cory v. Yarmouth & N. R. Co.* 3 Hare, 593.

An injunction will not be granted to restrain a ferryman from interfering with the operation of ferryboats maintained by a railroad company authorized to operate them, but which had contracted to use only the public ferry of the defendant; but the parties will be left to their remedy at law. *Texas & P. R. Co. v. Baton Rouge*, 36 Fed. 845. <sup>10</sup>*Stahl v. Brown*, 84 Ky. 325, 1 S. W. 540.

<sup>11</sup>*Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589.

be paid or secured to the plaintiff, as it appeared that the bridge company had expended much money, equity would award an issue *quantum damnificatus* to assess the damage to the plaintiff's ferry franchise by the erection and use for public travel of the toll bridge of the defendant and would decree that, after the damage is ascertained, the injunction shall continue in force until the damage is paid, but when paid the injunction shall be wholly dissolved.<sup>11</sup> The operation of a ferry will not be enjoined at the suit of a competitor on the ground that persons crossing at such ferry might commit a trespass on complainant's property by making use of a toll road therein without paying toll.<sup>12</sup>

**315. What will defeat action.**—The defenses available to one who is accused of infringing an existing ferry right must go to the overthrowing of the right or to showing that the acts of defendant do not conflict with plaintiff's rights. It is not open to defendant to show that complainant was not serving the public properly, as that is a matter which must be corrected by the public officials.<sup>1</sup> So, the question of the validity of plaintiff's license cannot be raised by one charged with violating the rights secured by it.<sup>2</sup> But complainant may deprive himself of the right to equitable relief by the failure to perform his obligations, so that the public interests require accommodations additional to those furnished by him;<sup>3</sup> and the public needs may be such as to override the technical rights of the first licensee and prevent his obtaining relief if he is incapable of satisfying such needs.<sup>4</sup> Mere nonrenewal of the license, due to the fault of the public officials, will not deprive the licensee of his right to relief.<sup>5</sup> A bridge company required by its charter to pay damages to a ferry owner injured by the construction of its bridge is not relieved from

<sup>11</sup>*Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396.

<sup>12</sup>*Collins v. Sherman*, 31 Miss. 679.

<sup>1</sup>*Hickley v. Gildersleeve*, 10 U. C. C. P. 460; *Peter v. Kendal*, 6 Barn. & C. 703, 5 L. J. K. B. 282, 30 Revised Reps. 504.

<sup>2</sup>*Collins v. Ewing*, 51 Ala. 102; *Conner v. Paxson*, 1 Blackf. 168; *New Albany & S. R. Co. v. Huff*, 19 Ind. 15.

The defense that a ferry company is operating under a franchise that is not to take effect until another still in force has expired, or that the franchise has been forfeited, cannot be set up in an action against another company for infringing such franchise, as these are questions that can only be raised by the grantor of the franchise. *Capital City Ferry Co. v. Cole & O. Transp. Co.* 51 Mo. App. 228.

<sup>3</sup>*Willard v. Forsythe*, 2 Mich. N. P. 190; *Ferrel v. Woodward*, 20 Wis. 459.

<sup>4</sup>*Newton v. Cubitt*, 12 C. B. N. S. 58; *Anonymous*, 1 Ves. Sr. 476.

The ground upon which the owner of an ancient ferry can claim protection against an infringing ferry is the obligation he is under to keep the ferry always in a fit state for the use of the public; hence, it was held that one operating a ferry on Sundays only, under a special license for that purpose, and being under no obligation to keep up the ferry, but being free to abandon it at any time, could not maintain an action against an infringing ferry in the absence of fraud. *Letton v. Goodden*, L. R. 2 Eq. 123, 35 L. J. Ch. N. S. 427, 14 L. T. N. S. 296, 14 Week. Rep. 554.

<sup>5</sup>*Chard v. Stone*, 7 Cal. 117.

such payment because the act establishing the ferry was not passed until after its charter, although the ferry had existed long prior thereto.<sup>6</sup> In an action against a railroad company for injury to the land and a ferry right appurtenant thereto, the fact that the company had employed skilful engineers, and had done no wilful or unnecessary damage, does not relieve it from liability for the damages actually done.<sup>7</sup>

**316. Damages.**—One infringing a ferry license is liable for all the damages inflicted on the licensee by his act.<sup>1</sup> In determining the amount of damages, the probable amount of tolls of which complainant is deprived may be shown.<sup>2</sup> When the act of defendant will result in the destruction of the ferry right, the full value of the right must be paid for.<sup>3</sup> But when land is taken for a bridge terminus, no part of which has been used as a ferry landing, the damage which will thereby be caused to the ferry cannot be recovered as part of the amount to be awarded for the land taken.<sup>4</sup> If, however, in the construction of a bridge, the use by the ferryman of his landing is obstructed, the bridge company is liable for the loss caused thereby.<sup>5</sup> In fixing the damages the franchise should be regarded as permanent, if the statute made it so, and the possibility of a repeal of the statute should not be taken into consideration.<sup>6</sup> The expense necessary to put the plant in good condition should be taken into consideration in estimating the damages.<sup>7</sup> The rules governing the admission of evidence in courts do not apply to a proceeding before the freeholders to appraise damages to a ferry caused by the erection of a bridge; they

<sup>1</sup>*Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558.

<sup>2</sup>*New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

<sup>3</sup>*New York v. Starin*, 106 N. Y. 1, 12 N. E. 631.

<sup>4</sup>*Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39; *Blackwood v. Tanner*, 23 Ky. L. Rep. 1919, 66 S. W. 500.

Upon the trial of an issue *quantum damnicatus* to ascertain the damage to a ferry franchise by the construction and operation of a bridge, the jury may consider, for the purpose of ascertaining the damage, the amount of travel and the revenues derived from the exercise of the ferry franchise while the ferry proprietor was landing his boat on the land of another, as the trespass in such a case is a matter between the land owner and the ferryman; but the jury should also consider, in estimating the damage, the fact that

there might not have been so much travel attracted to the ferry if the ferryman had not used the land of another as a landing. *Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223.

<sup>5</sup>*Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 474.

<sup>6</sup>*Richmond & L. Turnp. Road Co. v. Rogers*, 1 Duv. 135.

<sup>7</sup>*Riverton Ferry Co. v. McKeesport & D. Bridge Co.* 179 Pa. 466, 36 Atl. 186; *Riverton Ferry Co. v. McKeesport & D. Bridge Co.* 20 Pa. Co. Ct. 604.

A railroad company is liable for consequential damages sustained by a ferry owner by the erection of the embankments, bridges, etc., of the railroad beyond the line of his land. *New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

<sup>1</sup>*Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223.

<sup>2</sup>*Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223.



have a right, not only to view the premises and property, but to determine what information they need, and also how and where to obtain it as a basis for award.<sup>8</sup>

**317. How far does ferryman assume liability of a common carrier.—**

The duties of the owner of a ferry relate primarily only to travelers, with their conveyances and the articles which they have with them on their journeys. With respect to these they are bound to carry all who wish to use the ferry, at all reasonable times, either day or night. The ferry is established for the benefit of the traveling public, and the licensee assumes the duty of meeting the public demand. In addition to the common-law liability in this regard, the statutes usually enforce the duty by the imposition of a penalty. This penalty is cumulative merely, and does not prevent the maintenance of a common-law action for the loss sustained by the delay.<sup>1</sup> The penalty is incurred by refusal to transport a passenger after dark, in the absence of anything to justify the refusal.<sup>2</sup> But to render the ferry owner liable, the duties demanded of him must be of a kind which he was bound to perform. The swimming of cattle across a stream is no part of his duty as the keeper of a ferry.<sup>3</sup> The ferry keeper is a common carrier with respect to the transportation of persons and animals over the stream, and the measure of his care and duty must be determined by those of common carriers generally;<sup>4</sup> and, in addition

<sup>1</sup>*Columbia Delaware Bridge Co. v. Geisse*, 36 N. J. L. 537, Affirming 35 N. J. L. 474.

<sup>2</sup>*Wallen v. McHenry*, 3 Humph. 245.

The right of action given any person detained at a public ferry, by a statute prescribing a penalty for the failure of the keeper of a public ferry to do his duty, need not be brought upon his bond, given as security for the performance of his duty as such keeper. *Pate v. Henry*, 5 Stew. & P. (Ala.) 101.

<sup>3</sup>*Pate v. Henry*, 5 Stew. & P. (Ala.) 101; *Koretke v. Irwin*, 100 Ala. 323, 21 L. R. A. 727, 13 So. 943.

In an action for the penalty prescribed by statute for unreasonably detaining a person at a public ferry because of refusal to transport travelers after dark, it is no defense that it would be dangerous to cross then on account of the character of the construction of the ferryboat or appliances, in view of the requirements of the statute that the owners and keepers shall keep safe and convenient boats. *Koretke v. Irwin*, 100 Ala. 323, 21 L. R. A. 727, 13 So. 943.

<sup>4</sup>The act of one of the copartners of a ferry in attempting to swim cattle across the stream while the water was so low that the boat could not cross is not within the scope of his duties in operating the ferry, so as to render his partner liable for the drowning of a part of the cattle, where the articles of copartnership only authorize the former to bind the latter for such acts as come within the scope of his duties in operating the ferry. *Einstman v. Black*, 14 Ill. App. 381.

<sup>5</sup>*Fisher v. Clisbee*, 12 Ill. 344; *Henry v. Voltz*, 1 Tex. App. Civ. Cas. (White & W.) § 775, p. 426; *Pomeroy v. Donaldson*, 5 Mo. 36; *Cohen v. Hume*, 1 M'Cord L. 439; *Smith v. Seward*, 3 Pa. St. 343; *Wilson v. Hamilton*, 4 Ohio St. 722; *Hall v. Renfro*, 3 Met. (Ky.) 51.

The facts that by statute public ferry-men are required to give bond with surety and that the rate of toll is regulated by statute do not affect their common-law liability as such. *Babcock v. Herbert*, 3 Ala. 392, 37 Am. Dec. 695.

The doctrine that the liability of a

to his duty with respect to the passengers and their vehicles, he may assume the duty of a common carrier with respect to merchandise delivered to him for transportation.<sup>5</sup> This liability does not rest upon the keeper of a private ferry,<sup>6</sup> but may do so if he holds himself out as ready to transport all who desire his services for hire.<sup>7</sup> They are not bound to insure that by no possibility can a passenger meet with a casualty, but they are bound to take the highest degree of care to protect him from injury; that is, such degree as the sacredness of human life demands.<sup>8</sup> But the personal element and the equal responsibility on the part of the passenger to avoid injury enter into, and modify, the duty of the carrier with respect to him, and he is not bound to do more than to exercise the highest degree of care. But with respect to property committed to his care, he is an insurer. As said in *Albright v. Penn.*,<sup>9</sup> a ferryman is a common carrier, and as such is liable for all losses not occasioned by the act of God or the public enemy, or not originating in the fraud of the plaintiff himself in relation to the goods, or not arising from the negligence of the plaintiff in marking or delivering or from internal defect, without fault of the carrier.<sup>10</sup> Since much of the property which comes into the possession of the ferry keeper is accompanied by the owner, the question arises as to whether or not the property has been delivered to the carrier or is retained in the possession of the owner. The solution of this question is for the jury.<sup>11</sup> If it is found that the property has been committed to the care of the ferryman, he will be liable for injury,<sup>12</sup> and the fact that the owner or driver accompanies the property

ferryman is that of a common carrier is denied in *Wyckoff v. Queens County Ferry Co.* 52 N. Y. 32, 11 Am. Rep. 650.

<sup>6</sup>*New York v. Starin*, 106 N. Y. 1, 12 N. E. 631.

<sup>7</sup>One who keeps a private ferry for the convenience of customers of his mill, and charges no ferriage, is not a common carrier but a mandatary and liable only for gross negligence. *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544.

<sup>8</sup>*Littlejohn v. Jones*, 2 McMull. L. 365, 39 Am. Dec. 132.

<sup>9</sup>*Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533, Affirming 22 Hun, 33.

<sup>10</sup>14 Tex. 290.

<sup>11</sup>*Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595; *Evans v. Rudy*, 34 Ark. 383.

The rule absolving a ferryman from liability for an accident which happens in consequence of a natural, inherent infirmity in the property itself, after all reasonable care has been taken by

him to prevent it, does not apply to chattels not in their nature subjects of decay or depreciation, such as stage coaches, drygoods, or horses. *Powell v. Mills*, 37 Miss. 691.

<sup>12</sup>*Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595.

<sup>13</sup>*Wells v. Steele*, 31 Ark. 219; *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

To place a team on board a ferry with no assistance provided in case of their taking fright, the ends of the boat being entirely open and with a projecting apron insufficient to hold them, is not an exercise of that scrupulous care which the owner of a ferry is bound to exercise; and it is immaterial that that ferry may have carried horses safely without those precautions, as losses from want of them, even though seldom occurring, are, nevertheless, such as might be readily anticipated and easily provided against. *Wilson v. Hamilton*, 4 Ohio St. 722.

is immaterial.<sup>13</sup> When the property has been received on board the boat, it will be presumed to have been in the custody of the carrier, and to relieve himself from liability he must show that it was not in fact in his custody.<sup>14</sup> But if the custody of the property is in fact retained by the owner, the ferry keeper is relieved from his strict liability as a carrier.<sup>15</sup>

**317a. Duty to have safe boat.**—A ferry keeper is bound to have a boat which is reasonably safe for the purpose to which it is to be put, and this liability extends to the tackle, chain, and other appliances used in the transaction of the business.<sup>1</sup> And the boat must be op-

<sup>13</sup>*Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595.

A ferryman who undertakes to transport a stage coach and horses across a stream is responsible as a common carrier to the owner for damages sustained, where the horses became restive and ran out of the boat before it reached the landing, when the driver did not take upon himself to keep the horses safely. *Powell v. Mills*, 37 Miss. 691.

A ferryman is liable for the damages sustained by the owner of a horse and carriage for the drowning of the one and the injury to the other, caused by both falling from the boat into the water while the horse was backing, although such owner accompanied them, and, at the direction of such ferryman, held the horse's head, whose action in backing was not caused by the owner's negligence; and the fact that he did not unhitch the horse when told to do so does not relieve the ferryman from liability, as in such case the owner was acting merely as a voluntary servant of the ferryman, and the management of the property while on the boat was entirely outside his control. *Fisher v. Clisbee*, 12 Ill. 344.

<sup>14</sup>*Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595.

For the purpose of fixing the liability of a ferryman, a horse and carriage are considered delivered to him at the time he directs the driver to drive onto the flat, and the driver, in so doing, acts as his agent. *Cohen v. Hume*, 1 McCord L. 439.

<sup>15</sup>*Wyckoff v. Queens County Ferry Co.* 52 N. Y. 32, 11 Am. Rep. 650.

When the care and control of the property have not been intrusted to a ferryman, but retained by the owner, he is not, if a loss occurs, chargeable as a common carrier or an insurer, but is

only answerable for actual negligence; and if, in such case, the owner, by his own negligence or wilful wrong, contributed to the loss, so that, but for it, the loss would not have happened, he will not be entitled to recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence. *Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595; *Evans v. Rudy*, 34 Ark. 383.

One who retains possession of his horse on a ferryboat is bound to exercise ordinary care to prevent injury by its becoming frightened or restless. *White v. Winnisimmet Co.* 7 Cush. 155.

<sup>1</sup>*Rutherford v. McGowan*, 1 Nott & McC. 17; *Clark v. Union Ferry Co.* 35 N. Y. 485, 91 Am. Dec. 66.

A ferryman is responsible for his gross negligence in having an iron spike 5 inches long, so located in his boat, in which horses and mules were to be transported, that there was a reasonable probability that one or more of the animals would be injured by it. *Wilson v. Shulkin*, 51 N. C. (6 Jones L.) 375.

A ferryman cannot defeat his liability for loss of a horse by failure to keep up a chain by showing a custom of other ferrymen to put up the chain only at request of the passenger. *Miller v. Pendleton*, 8 Gray, 547.

While a recovery was not allowed, because of the plaintiff's contributory negligence, it was asserted to be the duty of a ferryman to use a better barrier against startled horses plunging into the water than a chain hanging at its center but a few inches above the deck, and to be gross negligence not to do so. *Dudley v. Camden & P. Ferry Co.* 45 N. J. L. 368, 46 Am. Rep. 781, Affirming 42 N. J. L. 25, 36 Am. Rep. 501.

rated in a skilful manner.<sup>2</sup> The manner of the equipment of the boat may be committed to the ferry commissioners, so that their failure to require a given kind of apparatus will absolve the keeper from liability for failure to provide it.<sup>3</sup> An order of the county court, pursuant to a statute, excusing a public ferryman from having "hand-rails" fixed upon his ferryboat for the greater security of "stock," does not diminish or affect his duties or liabilities as a ferry keeper under the general principles of the common law, to have a boat safe and sufficient for all the uses and purposes incident to his employment, and to operate the same by a force of skilful ferrymen sufficient to manage the boat and take proper care of persons and all kinds of property received for transportation.<sup>4</sup> The proprietor of a ferry is not bound to maintain guards or railings at the end of his boat when not in actual use, so as to prevent runaway teams from entering from the highway and passing over the boat into the river.<sup>5</sup>

**317b. Duty as to operation and terminals.**— The duty of the ferryman extends to the exercise of due care in the operation of the boat and in caring for property which is upon it.<sup>1</sup> His liability extends to the terminals which are necessarily used in the transaction of his business.<sup>2</sup> In respect to the character of the boat, he is not an in-

<sup>1</sup>*Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25, 36 Am. Rep. 501; *Wyckoff v. Queens County Ferry Co.* 52 N. Y. 32, 11 Am. Rep. 650.

<sup>2</sup>*Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973.

<sup>3</sup>*Sanders v. Young*, 1 Head, 219, 73 Am. Dec. 175.

<sup>4</sup>*Evans v. Goodrich*, 46 Minn. 388, 49 N. W. 188.

<sup>5</sup>*Hazman v. Hoboken Land & Improv. Co.* 50 N. Y. 53.

A ferryman is liable for neglect to use ordinary care to prevent the escape of horses in ordinary contingencies,—as, if a horse escaped, without negligence on the owner's part, from the deck because of a spliced guard rail when frightened by the blowing of a steam whistle. *Sturgis v. Kountz*, 165 Pa. 358, 27 L. R. A. 390, 30 Atl. 976.

<sup>1</sup>*Race v. Union Ferry Co.* 138 N. Y. 644, 34 N. E. 280.

One operating a ferry for the transportation of passengers and teams is bound to furnish safe approaches to, and passages from, the ferry-house to the streets connecting therewith, so that strangers unfamiliar with the place may make safe ingress or egress by night or day, and is liable to a person who, after leaving the ferry, drives at night

along a passage left open for express wagons and is injured by a train which strikes the wagon while it is caught and held in a switch. *Magorio v. Little*, 23 Blatchf. 399, 25 Fed. 627.

A ferry company is bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means employed; but it is not bound to adopt and use new and improved methods because they are safer and better than the method employed by them, if they are not requisite to the reasonable safety or convenience of passengers, and if the expense is excessive. *Le Barron v. East Boston Ferry Co.* 11 Allen, 312, 87 Am. Dec. 717.

A ferry company which places a log at the threshold of its gate in such a way that passengers are in danger of stumbling over it in the dark will be bound to do everything in its power to guard against that danger. *Osborn v. Union Ferry Co.* 53 Barb. 629.

Where the bank of a stream is slippery and wet, it is the duty of the owner of a ferry to supply a support or approach leading to the ferryboat sufficient to enable carriages to enter safely;

surer against injury to passengers, but he is bound to use due care that no injury shall result to persons of ordinary prudence.<sup>3</sup> The wharf provided must be safe,<sup>4</sup> as must also be the apron connecting the boat with the shore.<sup>5</sup> The means by which the boat is fastened to the shore must also be safe.<sup>6</sup> While a ferryman is under no obligation to land a carriage upon its arrival at the shore, he may, either by express contract, or by usage from which a contract may be implied, assume such duty, and if he does he is liable for negligently performing it.<sup>7</sup>

**317c. Liability of public corporation.**—To render a county or municipal corporation liable for injuries caused by a ferry which they

and where the person in charge of the ferry placed a piece of wood at one side of the boat and some brush at the other, and the horse and wagon were thrown into the river by reason of the wheel sinking as it passed over the brush, such approach was defective and the owner was liable. *Miles v. James*, 1 M'Cord L. 157.

A ferryman, whose duty it is by statute to cause the banks of a river or creek to be kept in good, passable order for the passage of passengers and vehicles, is liable for damages occasioned by an accident caused by the breaking of a wagon as the result of a sudden pitch of the wheels from the apron of the boat on some rough logs laid down as a track or road from the boat to the bank, in the absence of proof by the ferryman of want of care on the part of the plaintiff to avoid the injury. *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

<sup>3</sup> See post, § 318.

<sup>4</sup> *Polk v. Coffin*, 9 Cal. 56.

<sup>5</sup> *Willoughby v. Horridge*, 16 Eng. L. & Eq. Rep. 437; *Willoughby v. Horridge*, 12 C. B. 742, 22 L. J. C. P. N. S. 90, 17 Jur. 323.

A ferryman is not liable for injury occurring to one horse of a team attached to a vehicle and in charge of the driver, caused by its becoming frightened when being driven from the ferryboat and crowding the other horse off the boat and thrusting its own leg into the opening between the boat and the apron from the outside, thereby breaking the leg, in the absence of any finding that the opening was caused by any defect in the construction of the boat or the negligence of the ferryman, or that he had failed to provide reasonably safe and convenient means for departure from the boat, or to manage the

boat with due care. *Yerkes v. Sabin*, 97 Ind. 141, 49 Am. Rep. 434.

A steam ferry company is liable for the death of a passenger, who, in attempting to leave the boat at night after he had reason to believe it had landed, fell into the river through a space about 2 feet wide between the pontoon and the boat, and was drowned, where the place was not well lighted, and no gate was maintained to prevent passengers from prematurely disembarking, nor any signal given as to when it was safe and proper to go ashore. *Holmes v. Oregon & C. R. Co.* 5 Fed. 523.

The court says: Defendant was a common carrier of passengers for hire, and for their protection was subject to very strict responsibility. Therefore, it was bound to provide for the safety of the deceased while upon its boat and getting on shore, so far as was practicable by the exercise of human care and foresight.

<sup>6</sup> Where a loss of property, placed on a ferryboat to be carried, results from the sinking of the boat, owing to a defective chain which fastened the boat to the bank of the stream, the ferryman is liable. And it seems that he is liable in such a case although the break in the chain was due to an internal defect which was undiscoverable by the closest inspection. *Albright v. Penn*, 14 Tex. 290.

The keeper of a ferry is liable for the drowning of a slave and a mule, where the accident was due to the boat being forced from the shore on account of the insufficiency of the fastening, while the slave was attempting to drive a wagon and team upon it. *Richards v. Fuqua*, 28 Miss. 792, 64 Am. Dec. 121.

<sup>7</sup> *Walker v. Jackson*, 10 Mees. & W. 161, 12 L. J. Exch. N. S. 165.

are operating, it must, in the first instance, be shown that defendant has authority to carry on such business. The carrying on of a ferry is no part of the duty of this class of corporations, and the power to do so must be expressly conferred by the legislature authorizing it to be done. If no authority has been received, there is no liability for acts done in attempting to perform the duties;<sup>1</sup> and if authority has been conferred by statute, and a liability imposed for injuries caused, plaintiff must bring himself directly within the terms of the statute to be enabled to recover.<sup>2</sup>

**317d. Respondeat superior.**— If the owner of the ferry leases it and places the lessee in possession, relinquishing all control over it on his part, he is not liable for injuries caused by the negligence of the lessee.<sup>1</sup> Even though the lease is not permitted by law, the lessor cannot be held liable for injuries, since the right to make the lease cannot be called in question in that form of action.<sup>2</sup> The same rule applies in favor of a married woman whose husband is operating the ferry, and also of her minor children.<sup>3</sup> The question whether or not a person will be liable for the acts of his copartner depends upon whether or not they were within the scope of the business which the firm was transacting.<sup>4</sup> To enable the owner to escape liability, however, he must have no control over the business.<sup>5</sup>

<sup>1</sup>*Cooper v. Athens*, 53 Ga. 638; *Hogard v. Monroe*, 51 La. Ann. 683, 44 L. R. A. 477, 25 So. 349.

<sup>2</sup>Recovery cannot be had against a county for the death of the husband of plaintiff by drowning in consequence of the faulty and negligent construction of its ferryboat and the careless and negligent conduct of its ferryman, under statutory provisions giving counties the right to erect and maintain ferries and making them liable as individuals owning them if toll is charged, where there is no allegation that toll was charged at the ferry. *Arline v. Laurens County*, 77 Ga. 249, 2 S. E. 833.

<sup>3</sup>A county is not liable for injuries resulting from the operation by its commissioners of a defective flatboat connecting a highway across a stream, under a statute making the county liable for injuries inflicted through a defect in the repair of a highway or bridge. *Chick v. Newberry & Union Counties*, 27 S. C. 419, 3 S. E. 787.

<sup>4</sup>*Henry v. Volts*, 1 Tex. App. Civ. Cas. (White & W.) § 775, p. 426; *Felton v. Deall*, 22 Vt. 170, 54 Am. Dec. 61; *Bouryer v. Anderson*, 2 Leigh, 550; *Ladd v. Chotard*, 1 Minor (Ala.) 366; *Biggs v. Ferrell*, 34 N. C. (12 Ired. L.) 1.

<sup>5</sup>*Blackwell v. Wiswall*, 24 Barb. 355; *Claypool v. McAllister*, 20 Ill. 504.

<sup>1</sup>*Henry v. Volts*, 1 Tex. App. Civ. Cas. (White & W.) § 775, p. 426.

<sup>2</sup>Where the question as to whether or not one partner of a ferry across a stream in attempting to swim cattle across the river while the water was so low that the boat was not running was within the scope of his authority as a partner, and his act binding as such upon both, depends solely upon the construction to be given to the written contract between the parties, it is the duty of the court to construe the contract, and is not a question of fact to be left to the jury. *Einstman v. Black*, 14 Ill. App. 381.

<sup>3</sup>One operating a ferry under an agreement to share the proceeds, and giving him the entire control and management thereof, is not a lessee so as to relieve the owner from liability for the penalty which one detained thereat is entitled to recover from the owner of a public ferry, under Ala. act December 28, 1820, providing a penalty for the detention of anyone at any public ferry by reason of there not being good and sufficient boats or other proper craft and hands, or by neglect of

**317c. Remedy; damages.**—When a ferry keeper is required to give a bond to secure the performance of his duties, injuries caused by negligence in the keeping and management of the ferry are within the condition of the bond, and suit may be brought thereon.<sup>1</sup> But the action on the bond is cumulative merely, and an action may be maintained against the ferry keeper individually for the injuries caused.<sup>2</sup> In Alabama an action on a ferry bond cannot be brought in the name of the party injured, but should be brought in the name of the judge to whom it is given, or his successor, for the use of the party injured, as it is not a bond of an officer or a bond given in an official capacity within a statute authorizing suits on such bonds in the name of the party injured.<sup>3</sup> The damages for property lost are its actual value together with actual expense and loss of time caused by detention on account of the accident.<sup>4</sup>

**318. Extinguishment of ferry franchise by abandonment.**—A ferry franchise may be lost by abandonment,<sup>1</sup> as may be the right of a riparian owner to receive it.<sup>2</sup> The erection of a bridge on the site of a

duty, where he has no right of possession to the exclusion of the owner because of there being no definite period of time fixed during which he is to exclusively enjoy the ferry. *Taylor v. Rushing*, 2 Stew. (Ala.) 160.

The owner of land on which a ferry is located is bound to prevent the usage thereof as a public ferry by a tenant of the land, or to show that he has done all in his power to prevent such usage, in order to relieve himself from liability for the death of a horse precipitated into the river by the moving of the ferry away from the bank because of the insecure fastening thereof, due to the negligence of such tenant, under a statutory provision making the proprietors of ferries liable for damages resulting from neglect, carelessness, or bad conduct. *Printup v. Patton*, 91 Ga. 422, 18 S. E. 311.

<sup>1</sup>*Botts v. Bridges*, 4 Port. (Ala.) 274.

The condition put in the bond of the owner of a public ferry that good and sufficient "boats" shall be provided and kept is in legal effect the same as the condition which the statute requires such bond to contain, that a good and sufficient "boat or boats" shall be provided and kept, as the latter condition would be broken by not keeping more than one boat if it could be proved that the injury complained of could have been avoided thereby, and no recovery could be had upon the condition

contained in the bond for failure to have more than one boat except upon the same proof. *Botts v. Bridges*, 4 Port. (Ala.) 274.

<sup>2</sup>*Wells v. Steele*, 31 Ark. 219.

<sup>3</sup>*Harris v. Plant*, 31 Ala. 639.

<sup>4</sup>*Evans v. Rudy*, 34 Ark. 383.

<sup>1</sup>*Brearly v. Norris*, 23 Ark. 514; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

A ferry franchise must be held to be abandoned after forty years' omission to furnish the public with the service due from the owner. *Smith v. Harkins*, 33 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

The right to run a ferry established and for many years maintained when the legislature passed an act establishing it and authorizing such tolls as the freeholders might prescribe is not lost, or to be deemed abandoned, merely because no application was ever made to the freeholders to fix the rates of tolls. *Columbia & D. Bridge Co. v. Geisse*, 34 N. J. L. 268.

The forfeiture of a ferry franchise, by reason of unreasonable delay in putting the same in use, will not be excused by the death of the grantee soon after the grant and the disability of his heir, where no exception in favor of such disability is contained in the grant. *Clarke v. Calloway*, Sneed (Ky.) 46, 2 Am. Dec. 706.

<sup>2</sup>Equity cannot aid the founder of a town who reserves the ferry rights in

ferry will extinguish the rights of the ferry as such.<sup>3</sup> Long delay in providing accommodations for ferrying wagons is not evidence of bad faith on the part of one having a ferry franchise, if they were provided as soon as traffic justified, suitable accommodations for passengers having been provided from the first.<sup>4</sup> The ferry company is not chargeable with nonuser because no ferrying is done when the stream is frozen over.<sup>5</sup> Equity will not oust the owners of a ferry franchise from its exercise when the conditions of its grant were violated by its nonuser during a time which expired five years before the bringing of the quo warranto. The delay would of itself be a reason for at least hesitating to interfere with the franchise.<sup>6</sup> Abandonment of the operation of a ferry does not extinguish the other rights of grantees of the use of streets for wharves and landings and to collect and receive the income therefrom, where they did not surrender possession, and the right abandoned by them they were not, by the grant, required to exercise.<sup>7</sup> The purchaser of a ferry, the right to use which has been lost by nonuser, acquires no right to its use.<sup>8</sup> A for-

his deeds, to establish them against grantees of the town after he has permitted the grantees to expend money in establishing the ferry, and enjoy the rights for a period of nearly forty years. *Bowman v. Wathen*, 1 How. 189, 11 L. ed. 97; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740.

<sup>3</sup>*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773.

The owner of a ferry franchise, who voluntarily surrenders the same upon the enactment and acceptance of a charter for the maintenance of a toll bridge and the construction thereof, and who subsequently becomes sole owner of such bridge charter, cannot claim any privileges, benefits, or powers beyond such charter, which gives no exclusive right, by virtue of his former ownership of the ferry right, as against the constructors of another bridge interfering with the profitableness of his toll bridge. *Janesville Bridge Co. v. Stoughton*, 1 Pinney (Wis.) 667.

The right of a town to operate a ferry under a grant permitting the exercise of such privilege during the pleasure of the legislature is revoked upon the acceptance, by commissioners appointed for that purpose, of a bridge constructed under a charter providing that whenever the bridge company shall have repaired its bridge and raised the causeway, to the acceptance of the commissioners, the ferries established across

the river shall be discontinued. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

<sup>4</sup>*Douglass's Appeal*, 118 Pa. 65, 12 Atl. 834.

<sup>5</sup>*Bridgewater Ferry Co. v. Sharon Bridge Co.* 145 Pa. 404, 22 Atl. 1039.

The failure which will warrant the forfeiture of a ferry franchise made exclusive so long as the grantee affords facilities for crossing the stream must be a persistent and general course of conduct, and not be limited to special days or acts. *Com. ex rel. Hensel v. Sturtevant*, 182 Pa. 323, 37 Atl. 916.

<sup>6</sup>*Com. v. Hulings*, 129 Pa. 317, 18 Atl. 138.

<sup>7</sup>*Cincinnati v. Covington & C. Bridge Co.* 20 Ohio C. C. 396.

But all rights under a franchise for the operation of a ferry and construction of wharves in connection therewith, including the right to the use and occupation of land for that purpose, extending from the line of high tide to a point below low tide, are lost under a statute declaring that all rights granted shall become forfeited to the state on failure to commence and complete the wharves and establish the ferry within a specified time, on failure to comply with the terms thereof, no action being necessary to enforce the same. *Upham v. Hosking*, 62 Cal. 250.

<sup>8</sup>*Jeffersonville v. The John Shallcross*, 35 Ind. 19.



feiture cannot be claimed because, for public convenience, the route was established a short distance higher up the stream than the point designated in the grant.<sup>9</sup> The licensee cannot relieve himself from his obligations by ceasing to perform them against the will of the state.<sup>10</sup> Forfeiture of the franchise must be duly declared by the court, and a franchise cannot be treated as a nullity until it has been declared forfeited.<sup>11</sup>

**319. Other means of extinguishment.**—The right of the ferry keeper may be extinguished by the exercise of the power of eminent domain,<sup>1</sup> and may be canceled for failure to comply with its terms.<sup>2</sup> Unless the grant is exclusive the state may resume possession of the ferry at its pleasure.<sup>3</sup> But acting upon authority conferred to establish a ferry may confer vested rights which cannot be taken away without the making of compensation.<sup>4</sup> And if the grant constitutes a perpetual contract the state has no power to resume possession of the franchise.<sup>5</sup> If, however, the right to alter the charter has been reserved by the legislature, it may, at pleasure, resume possession of it

<sup>9</sup>*Davis v. Police Jury*, 1 La. Ann. 288.

<sup>10</sup>Mere failure on the part of the state for twenty years to take steps to compel a railroad company to comply with its duty to operate a ferry does not show such acquiescence on the part of the state in the abandonment of the ferry as to prevent the legislature from requiring its operation. *Brownell v. Old Colony R. Co.* 164 Mass. 29, 29 L. R. A. 169, 49 Am. St. Rep. 442, 41 N. E. 107.

<sup>11</sup>*Greer v. Haugabook*, 47 Ga. 282; *Cotton v. Houston*, 4 T. B. Mon. 288; *Maysville v. Boon*, 2 J. J. Marsh. 224.

<sup>1</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Leake County v. McFadden*, 57 Miss. 618; *Crosby v. Hanover*, 36 N. H. 404.

<sup>2</sup>*Phillips v. Bloomington*, 1 G. Greene, 498.

A municipal corporation which has leased a ferry to a railroad company cannot forfeit the franchise because the railroad carries passengers across the ferry and some distance along its road for the same fare that it charges for merely crossing the ferry. *Staten Island Rapid Transit R. Co. v. New York*, 119 N. Y. 96, 23 N. E. 175.

<sup>3</sup>*East Hartford v. Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518; *Robinson v. Lamb*, 126 N. C. 492, 36 S. E. 29.

A lease of a ferry privilege during pleasure of the Crown is revoked by a subsequent grant of a precisely similar

lease to another. *Reg. v. Davenport*, 16 U. C. Q. B. 411.

An act of legislature requiring the school commissioners to sell certain lots belonging to school trustees of a township, from which the trustees had established, under a regularly authorized license, a ferry across a river on which the lots bordered and providing that the purchaser thereof at public auction might forever have the ferry privileges pertaining thereto, provided he should within a stated time build a highway leading through bottom land to and from the ferry, above high-water mark, is not unconstitutional and void, although its effect was to deprive such trustees of their ferry franchise, and for which they received no compensation at the sale because of the condition imposed for its continuance, although it is not claimed that they did not receive full value for the lots independent of the ferry franchises. Ferry franchises are not an incident to the ownership of land, and, when granted, as in this case, to a public corporation, may be revoked by the legislature at pleasure, so long as such revocation does not devalue their property of the uses and objects for which it was given or purchased. *Trustees of Schools v. Tatman*, 13 Ill. 27.

<sup>4</sup>*Benson v. New York*, 10 Barb. 223.

<sup>5</sup>*McRoberts v. Washburne*, 10 Minn. 23, Gil. 8.

or of a portion of it.<sup>6</sup> A ferry franchise which imposes no obligations on the grantee to accept or retain the franchise, or to conduct the ferry, which does not expressly provide that it shall have the force of a contract, and which requires no large expenditure, does not amount to a contract so that it may not be repealed by the legislature before the expiration of its term.<sup>7</sup> The exclusive rights of the ferryman will be protected by a court of equity so far as they go.<sup>8</sup> Statutory provisions for the forfeiture of ferry franchises should be strictly complied with;<sup>9</sup> and the record must show that the requirements were complied with.<sup>10</sup> The forfeiture must be declared by an appropriate judicial proceeding after notice to the owner.<sup>11</sup> It must be declared in a direct proceeding and cannot be done in an action of tort, where it is incidentally sought to be shown that the ferry was operated without legal authority.<sup>12</sup> An act of legislature revoking the exclusive ferry franchise previously granted a certain ferry, and authorizing the counties concerned to establish ferries within the designated distance on that river the same as though the exclusive right had never been granted, is a special act, and therefore within the constitutional provision prohibiting the legislature from chartering or licensing ferries or toll bridges by local or special laws.<sup>13</sup> Where

<sup>6</sup>*Perrin v. Oliver*, 1 Minn. 202, Gil. 176.

<sup>7</sup>*Chapin v. Crusen*, 31 Wis. 209; *Sullivan v. Lafayette County*, 58 Miss. 790.

<sup>8</sup>An injunction will be granted, at the instance of the owner of a ferry charter, to restrain the laying out of a highway through his premises which will interfere with his ferry privileges and also with the use of such premises as a wood and lumber yard in connection with a wharf built by him for the purpose of supplying boats, contrary to a statute prohibiting the laying out of a public or private road through fixtures or erections used for the purposes of trade, without the owner's consent. *Flanders v. Wood*, 24 Wis. 572.

<sup>9</sup>*Brown v. Givens*, 1 Dana, 259.

<sup>10</sup>An order granting a ferry franchise across the Ohio river will not be set aside as being in violation of the provisions of the law prohibiting (except in certain cases) the establishment on the Ohio river of a ferry within less than 1 mile above or below any other ferry previously established, unless it is established by competent evidence that such proposed ferry is within the prohibited distance of another previously established. *Watts v. Horsley*, 3 Bibb, 374.

<sup>11</sup>*Martin v. McKinney*, Sneed (Ky.) 321.

<sup>12</sup>*Brown v. Given*, 4 J. J. Marsh. 28; *Combs v. Sewell*, 22 Ky. L. Rep. 1026, 59 S. W. 520.

<sup>13</sup>A ferry franchise cannot be revoked on the ground that the original grantee has left the state without renewing his bond as required by law, without personal notice to him to renew his bond, where the former statute permitting revocation of a ferry license without notice for failure to renew the bond as required by law has been superseded by a statute expressly requiring ten days' notice. *Garrett v. Ricketts*, 9 Ala. 529.

But where the legislature grants a ferry franchise, and in the same act imposes on the grantee certain duties, and reserves the power to repeal the act in case the grantee fails to perform those duties, it may, in case he does so fail, repeal the act without a previous judicial determination that he had so failed. Whether he had failed so that the repeal was effectual is a question for the courts. *Myrick v. Brawley*, 33 Minn. 377, 23 N. W. 549.

<sup>14</sup>*Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722.

<sup>15</sup>*Frye v. Partridge*, 82 Ill. 267.

a turnpike company is incorporated under a general incorporation act, and a right to maintain a ferry is granted merely as an incident to the turnpike in order to facilitate travel thereon, the forfeiture of the turnpike franchise carries with it the privilege of maintaining the ferry.<sup>14</sup>

<sup>14</sup>*Darnell v. State*, 48 Ark. 321, 3 S. W. 365.

## CHAPTER XIII.

### BRIDGES, FORDS, LEVEES, AND OTHER PUBLIC IMPROVEMENTS.

- 320. Construction of bridges a sovereign power.
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**320. Construction of bridges a sovereign power.**—The construction and maintenance of highways are duties resting upon the sovereign, and the power to perform the acts necessary to effect that purpose inheres in him as one of the royal prerogatives. It is necessary to the efficiency of a highway that it shall not be obstructed by rivers and streams which cross its course, and, therefore, the power to construct highways necessarily includes the power to provide means for crossing such streams. A bridge is a structure thrown across a water course for the purpose of furnishing a passage over the stream to travelers on the highway.<sup>1</sup> It may be erected on piers so as to be clear of the water, or it may rest upon boats or pontoons which are themselves supported by the water. The characteristics of a bridge apply in either case, and the rules of law governing the construction and maintenance of bridges apply to either class. The power to provide such means, and, if necessary, to build bridges for that purpose, inheres, as an attribute of sovereignty, in the law-making power of the state.<sup>2</sup> To enable the state to construct necessary bridges, it may exercise its powers of eminent domain<sup>3</sup> and taxation.<sup>4</sup> It is for the

<sup>1</sup> Not every structure thrown across a water course constitutes a bridge, although there must be a water course for the structure to be a bridge. *Rex v. Whitney*, 3 Ad. & El. 69, 4 Nev. & M. 594, 7 Car. & P. 208, 4 L. J. Mag. Cas. N. S. 86.

<sup>2</sup> *Kirkwood v. Newbury*, 122 N. Y. 571, 26 N. E. 10; *Catawba Toll-Bridge Co. v. Flowers*, 110 N. C. 381, 14 S. E. 918.

<sup>3</sup> *Young v. Harrison*, 6 Ga. 130.

As it is no part of the contract between the state and its grantees, or those claiming under them, that the land granted shall not be taken for a public use upon just compensation, an act of the legislature incorporating a

company to construct a bridge over a river at a given point on such land, being a determination that the bridge is for a public use, is not unconstitutional as an impairment of the obligation of the contract. *Young v. McKenzie*, 3 Ga. 31.

<sup>4</sup> An injunction will not be granted in a suit in equity by taxpayers to restrain the collection of a tax for bridge purposes, in the absence of an allegation in the bill that the tax levied exceeds the cost of the bridge built or contracted for, as it will not be presumed that there was an abuse of the power granted the inferior courts by the act of 1799 to levy taxes to pay for public bridges,

legislature alone to say what kind of bridge is best suited to the needs of the public, and what shall be the description of the draws; so that it is not a diversion of a fund provided for the repair of bridges, arising from taxation of certain inhabitants, to use it in widening the draws.<sup>5</sup> The cost of the bridge may be assumed by the state as a public improvement, or it may be imposed upon the municipal subdivision which is most interested in the improvement.<sup>6</sup> But the power to impose the cost of bridges upon local communities is subject to abuse, and this abuse has been sufficient in former times to cause the people to make formal complaint of it. One of the provisions of Magna Charta is that "no town or freeman shall be distrained to make bridges but such as of old time and of right have accustomed to make them in the time of King Henry, our grandfather."<sup>7</sup> Like all other improvements, there are some cases where the improvement will be so clearly for the benefit of the local community that no one can question the right of the legislature to impose the cost upon such community.<sup>8</sup> There are other cases in which the size and character of the improvement are such, when compared to the purpose for which the bridge is needed, that the cost of the bridge should become a general charge upon the resources of the state. The cost should not be imposed upon the local community when it is not the chief beneficiary of the improvement, but the fixing of the bounds of the taxing district is a matter committed to the legislature, and its action cannot be interfered with by the courts. It has been held that a statute requiring the state to build a bridge "over navigable rivers" refers only to the great or principal rivers, such as are navigable by large vessels, or as are declared to be navigable by the legislature, and does not include those which are merely floatable.<sup>9</sup> That question would depend, of course, upon the language of the statute and the custom of the state. As has been seen,<sup>10</sup> the term "navigable" in law includes every stream which is in fact navigable; and, unless there is something in the language of the statute or the custom of the state to the contrary, a statute making it the duty of the state to build the bridges over navigable streams would include all streams in fact navigable. The sovereign

to which there is no limit other than the cost of erection. *Tucker v. Inferior Court Justices*, 34 Ga. 370.

<sup>5</sup>*Dow v. Wakefield*, 103 Mass. 267.

<sup>6</sup>*Guilder v. Dayton*, 22 Minn. 366;

*Gulder v. Otsego*, 20 Minn. 74, Gil. 59.

<sup>7</sup>Chap. 15.

<sup>8</sup>The people of the town and county where a bridge is situated have an interest in it and derive a benefit from it

greater in degree than the rest of the community according to their local position, and may, therefore, on general principles of justice, be required to contribute a larger share for its erection and support. *Norwich v. Hampshire County*, 13 Pick. 60.

<sup>9</sup>*Tunkhannock Bridge*, 26 Pa. Co. Ct. 625.

<sup>10</sup>§ 23, ante.

may delegate its power to regulate the construction of the bridges to such inferior officials or municipal subdivisions as it chooses.<sup>11</sup>

**321. Power and duty of counties.**—As stated in the preceding section, the legislature may impose upon counties the duty of building bridges, and may delegate to them the necessary attributes of sovereignty to enable them to perform the obligations so imposed. The county may be required to pay for a bridge which extends beyond its limits,<sup>1</sup> or to pay for bridges built by other authorities.<sup>2</sup> If the statute provides that the county may maintain a bridge, the word “may” will be construed “must” if the public welfare demands such construction.<sup>3</sup> The county may be given authority over the bridges, whether they are within the boundaries of a municipal corporation or not.<sup>4</sup> Under statutes providing that bridges on county lines shall be built at the equal expense of adjoining counties, which do not provide means for compelling a nonconsenting county to join in the work, it cannot be compelled to do so.<sup>5</sup> The funds for the construction of the bridge

“It is within the power of Congress to devolve upon the Secretary of War the power to approve the plans for a bridge authorized by it, and such approval need not be made under the hand of the Secretary of War, but he may direct notice of such approval to be given to the persons interested. *Miller v. New York*, 18 Blatchf. 212, 10 Fed. 513; *United States v. Milwaukee & St. P. R. Co.* 5 Biss. 410, Fed. Cas. No. 15,778.

<sup>1</sup>*Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249.

<sup>2</sup>A county may be compelled to pay for a bridge which towns within its borders contracted for without authority. *People ex rel. Conway v. Livingston County*, 68 N. Y. 114, Reversing 6 Hun, 572.

The provision of the act of Congress requiring the assent of the Secretary of War to the building of a bridge over tidal water does not justify the inaction of county authorities under a state statute requiring them to build such a bridge. *People ex rel. Keene v. Queens County*, 142 N. Y. 271, 36 N. E. 1062.

<sup>3</sup>*Phelps v. Hawley*, 52 N. Y. 23.

In Iowa the county is charged with the duty of building the larger bridges, but the duty of building bridges over smaller streams throughout the county is imposed upon the respective road districts. *Taylor v. Davis County*, 40 Iowa, 295; *Moreland v. Mitchell County*, 40 Iowa, 394.

<sup>4</sup>*Oskaloosa Steam-Engine Works v. Pottawattamie County*, 72 Iowa, 134, 33 N. W. 605.

A county may, by virtue of the authority “to provide for the erection of all bridges which may be necessary and which the public convenience may require within their respective counties, and to keep them in repair,” conferred upon the supervisors by Rev. Stat. § 312, subdiv. 18, assist a municipal corporation in the erection of a free bridge across a large river which will be used by citizens of the county generally, although the city charter gives the council general care, supervision, and control of all bridges within the city, when the bridge tax provided for by Rev. Stat. § 710, is levied upon all the taxable property of the county including that within the city, although the voters of the county have voted to appropriate a part of another fund to the erection of the bridge. *Bell v. Foutch*, 21 Iowa, 119; *Barrett v. Brooks*, 21 Iowa, 144.

<sup>5</sup>*Brown v. Merrick County*, 18 Neb. 355, 25 N. W. 356.

Where a stream is the boundary between two counties the laws of Kentucky do not authorize one county to compel the other county to take steps or provide means for its share of the cost of erecting a bridge across such stream between the two counties, but permits such county to decide upon the expediency of such erection; and, upon an appeal from an adverse decision by

must be obtained in the manner pointed out by statute;<sup>6</sup> but, in case the statute is silent upon that subject, and the county has authority to make the improvement, it may acquire the funds in any legal manner.<sup>7</sup> It may appropriate county funds to that purpose,<sup>8</sup> or issue bonds if that seems the best method of acquiring the funds.<sup>9</sup> But bonds cannot be issued unless the statute authorizes such procedure either expressly or by necessary implication.<sup>10</sup> Contracts necessary for the making of the improvement are valid and enforceable;<sup>11</sup> and, if the county is given authority to appropriate money for building bridges, it may enter into contracts for that purpose.<sup>12</sup> If the matter

the judge of the circuit court thereof, who is made the arbitrator to decide the question of expediency, his judgment, being that of one on the ground and knowing the wants, necessities, and financial condition of such county, will be entitled to great weight. *Garrard County v. Boyle County*, 10 Bush, 208.

<sup>6</sup>*McAnn v. Otse County*, 9 Neb. 324, 2 N. W. 707.

The raising of money by taxation in counties in pursuance of a general law of the state, for the purpose of building bridges, is not the levying of a tax for a strictly local, corporate purpose. Municipal authorities levying taxes for such purposes are, in a large sense, mere agencies of the state in carrying into effect general laws which have been enacted for the common good. *Will County v. People*, 110 Ill. 511.

<sup>7</sup>It is unnecessary that the contract under which a bridge is to be built be first submitted to a vote of the people before the supervisors of the county can appropriate funds out of the proceeds of swamp lands for the construction of the bridge under § 986, as amended by act of 1862, requiring the question to be submitted to the people whether swamp-land money may be used in the construction of the bridge. *Barrett v. Brooks*, 21 Iowa, 144.

<sup>8</sup>An agreement made by the supervisors of a county to aid a railroad company in the construction of a bridge across a river which is a boundary between two counties, the bridge to have a separate roadway for teams and footmen, is valid under § 2713, Pol. Code, and binding on the county when the other county also aids in its construction. *Croley v. California P. R. Co.* 134 Cal. 557, 66 Pac. 860.

But a bridge constructed within a municipality, which is solely a municipal improvement, is not a county purpose in aid of which the county can

appropriate part of the fund raised by a general county tax, where, by the Constitution, its power of taxation is limited to county purposes. *Skinner v. Henderson*, 26 Fla. 121, 8 L. R. A. 55, 7 So. 464.

<sup>9</sup>*State ex rel. Peterson v. Keith County*, 16 Neb. 508, 20 N. W. 856; *Union P. R. Co. v. Colfax County*, 4 Neb. 450; *Fremont Bldg. Assn. v. Sherwin*, 6 Neb. 48; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253.

Where the middle of a stream is the dividing line between two counties, and one of them attempts to erect a bridge across the stream without the co-operation of the other, it may use bonds voted for the purpose to complete the bridge in the other county. *Brown v. Merrick County*, 18 Neb. 355, 25 N. W. 356.

Bonds issued for the purpose of constructing a regular county bridge on a public highway should not be reckoned in determining whether or not a county is within the prohibition of a constitutional provision that donations to railroads or other works of internal improvement shall not exceed 10 per cent of the assessed valuation of the county. *De'lerq v. Hager*, 12 Neb. 185, 10 N. W. 697.

<sup>10</sup>*Colburn v. Chattanooga Western R. Co.* 94 Tenn. 43, 28 S. W. 298.

<sup>11</sup>Where county commissioners, authorized to build a bridge agree with a landowner to pay him a certain sum for land required, and to protect his remaining land from washing and abrasion, the county will be held to the agreement, and will be estopped from taking advantage of the omission of the county auditor to enter such agreement on the minutes of the commissioners as required by statute. *Wilder v. Hamilton County*, 41 Ohio St. 601.

<sup>12</sup>*Bayne v. Wright County (Minn.)* 95 N. W. 456.



is left discretionary with the county authorities mandamus will not lie to compel them to act.<sup>13</sup> Mandamus will lie directing a county council to build a bridge over a river between two townships where a distance of 12 miles intervenes between bridges across the river, when the benefit of the neighborhood and public generally demand it at that particular point, under a statute providing that it shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county.<sup>14</sup>

**322. Power and duty of municipal corporation.**—As in the case of counties, so the legislature may impose upon municipal corporations the duty of constructing bridges, and may even require them to incur indebtedness for that purpose.<sup>1</sup> The erection of bridges is not properly a municipal function, and, therefore, the municipality is under no obligation to do so unless it is imposed by the legislature.<sup>2</sup> And the duties as imposed by the statutes are conclusive,<sup>3</sup> so that port wardens invested with the general supervision of the navigable waters

<sup>13</sup>*State v. Essex*, 23 N. J. L. 214; *Atty. Gen. v. Kalkaska County*, 120 Mich. 357, 79 N. W. 567; *State ex rel. Houck v. Morris*, 43 Iowa, 192; *Kinnear v. Haldimand County*, 30 U. C. Q. B. 398.

<sup>14</sup>*Brooks v. Haldimand County*, 41 U. C. Q. B. 381.

<sup>1</sup>*Simon v. Northup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560; *Philadelphia v. Field*, 58 Pa. 320.

An indebtedness authorized by the legislature to be incurred by a city for the completion of a bridge upon its borders is for a city purpose. *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, 5 Abb. N. C. 383.

The legislature has power, in dividing a town, to compel the new town to maintain a bridge at its expense across a river, although the bridge is situated in part in the old town. *Grandby v. Thurston*, 23 Conn. 416.

<sup>2</sup>The question how far the approaches to a bridge are included within the bridge franchise which the corporation is bound to maintain, if not defined by the statute may be determined by a consideration of what is reasonable under the circumstances. *Com. v. Deerfield*, 6 Allen, 449.

A statute requiring a town to contribute towards the expense of maintaining a bridge will not include the causeways extending from the high land to the bridge in the absence of any custom, usage, or agreement giving such

meaning to the word. *Swansey v. Somerset*, 132 Mass. 312.

Where a bridge which a town was not authorized to build had been built by private subscription, a subsequent vote by the town, within which part of it lay, to accept the part lying within its boundaries and pay a certain amount toward the expense incurred in building it was without consideration and beyond the power of the town. *Abendroth v. Greenwich*, 29 Conn. 356.

<sup>3</sup>*Stoffel v. Estes*, 104 Mich. 208, 62 N. W. 347.

A municipality has power to enter into contracts relating to the maintenance and repair of bridges situated within its limits under a charter requiring it to keep, maintain, and repair bridges; and its agreement is valid by which it assumes the duty of maintaining and repairing bridges originally constructed across a mill race under an ordinance which required the mill owner to maintain them. *State ex rel. Carthage v. Cowgill & H. Mill Co.* 156 Mo. 620, 57 S. W. 1008.

Under the power to erect bridges, a municipal body may erect a highway bridge over a stream created entirely by surface water, as such streams may be at times very rapid and turbulent, and a bridge may be as necessary over it as over a spring-fed stream. *McKinley v. Union County*, 29 N. J. Eq. 164.

The relative liability of towns for the

surrounding a city cannot interfere with the erection of a bridge by a municipal corporation under a subsequent law, although their wharf line is disregarded and an obstruction placed in the river thereby.<sup>4</sup> The duty of the municipality is no broader than the language of the statute.<sup>5</sup> A bridge is so much a part of a highway, however, that statutory authority over the highways has been held to include authority to construct and maintain bridges.<sup>6</sup> If the municipal corporation has authority to build bridges, it may adopt those built by private individuals or corporations.<sup>7</sup> The towns on the opposite sides of the stream may be compelled to share in the expense of a bridge across it.<sup>8</sup> A township may voluntarily assume the erection and

construction of bridges between them under the New York act of 1841 cannot be permanently changed by judgment of a court or submission to arbitration. *Corey v. Rich*, 4 Lans. 141.

*Philadelphia Port Wardens v. Philadelphia*, 42 Pa. 209.

To render towns liable for the building of bridges over streams dividing them there must exist a highway leading to the bridge on each side. *Beckwith v. Whalen*, 9 Hun, 408, Affirmed in 70 N. Y. 430; *Beckwith v. Whalen*, 5 Lans. 376.

A statute making adjoining towns jointly liable for the building of bridges over streams dividing them does not apply to bridges over bays or other bodies of water not streams; so that the towns cannot be compelled to build bridges over such bodies of water. *Re Irondequoit*, 68 N. Y. 376.

*White v. Loring*, 24 Pick. 319.

A town lying on both sides of a river, which is given control over the streets, may, from its duty to improve the same so as to afford an easy and safe transit to all its parts, bridge the river. *Mullock v. Cedar Falls*, 19 Iowa, 21.

The facts that a bridge, partly within the corporate limits of a village, was originally built by a toll-bridge company, and the bridge was used as a toll bridge for a number of years until the same was purchased by the highway commissioners of the town in which it is situated, with the aid of the county and the village, and made a free bridge; and that thereafter the highway commissioners had assumed control thereof, and had made all the repairs that had been made thereon since the purchase,—do not relieve the village from its charter duty to keep its highways and bridges in repair, although it had never

formally accepted the bridge, but had simply allowed the same to be used as a part of the street approaching it, without refusing to accept its dedication as a highway; and the village will be liable for injuries received by a person by reason of the want of repair of that part of the bridge within the corporate limits. *Marseilles v. Howland*, 124 Ill. 547, 16 N. E. 883, Affirming 23 Ill. App. 101.

County commissioners in laying out a highway cannot compel the town to tend a draw in a bridge over a navigable river and keep lights thereon. *Brain-tree v. Norfolk County*, 8 Cush. 546.

A bridge built by a railway company over a navigable stream within the limits of a municipal corporation for the use of the railroad, under an ordinance of the municipality granting permission, and providing the manner in which it shall be constructed, may be regarded as having been built by the municipality itself, and as falling fairly within the power given it by its charter to construct and repair bridges and regulate the use thereof. *McCartney v. Chicago & E. R. Co.* 112 Ill. 611.

*Kirkwood v. Newbury*, 122 N. Y. 571, 26 N. E. 10, Affirming 45 Hun, 323.

Under a statute providing that two towns shall maintain a bridge at joint expense without reference to town lines, the expense must be borne by them equally without regard to the portion located in either one. *Lapham v. Rice*, 55 N. Y. 472.

The legislature may authorize county commissioners to cause the construction of a bridge across a river between two towns and divide the expense between them in proportion to their assessed valuation; such a law being a reasonable regulation for the benefit of the

maintenance of a drawbridge over a navigable stream when duly authorized by the board of supervisors and by express grant of the legislature, although the stream is the boundary line between it and another township.<sup>9</sup> The statutory provisions as to the method of expending public funds for bridges must be strictly pursued;<sup>10</sup> but the municipality is impliedly authorized to procure the funds necessary to enable it to perform the duties imposed upon it.<sup>11</sup> Failure to comply with an order of the Secretary of War directing an alteration in a bridge to facilitate navigation will not subject municipal officers to criminal prosecution, where such officers have not in their hands the funds to do the work, or, under the laws of the state, cannot obtain them within the time fixed for the completion of the work.<sup>12</sup> The location of the bridge, if within the discretion of the municipal authorities, will not be interfered with by the court.<sup>13</sup>

**323. Right and duty of individual.**—Bridges are not maintained for the benefit of the individuals, and they cannot, in their character as such, institute proceedings to compel the maintenance of a bridge. There are circumstances under which an individual, as one of the public, may compel their maintenance if he will be specially injured by their removal and the duty is one positively imposed by statute. As said in *Coster v. Albany*,<sup>1</sup> the removal of a public bridge which discommodates a private individual gives him no claim against the state, or against the municipal corporation which has by bond assumed the obligation of the state, for compensation, if there is still access to the property, though by a more circuitous route. The bridging of private streams is a matter exclusively within the discretion of the one owning the abutting land; and a private individual or corporation may bridge a public stream for his own accommodation or convenience if he receives authority from the legislature.<sup>2</sup> In addition

people as required by the court. *Water-ville v. Kennebec County*, 59 Me. 80.

<sup>9</sup>*Dietrich v. Schremms*, 117 Mich. 298, 75 N. W. 618.

<sup>10</sup>*Ritz v. Tannehill*, 69 Iowa, 476, 29 N. W. 424.

<sup>11</sup>*Dietrich v. Schremms*, 117 Mich. 298, 75 N. W. 618.

<sup>12</sup>*Rider v. United States*, 178 U. S. 251, 44 L. ed. 1057, 20 Sup. Ct. Rep. 838.

<sup>13</sup>*Matthiessen & W. Sugar Ref. Co. v. Jersey City*, 26 N. J. Eq. 247.

<sup>14</sup>3 N. Y. 399, Reversing 52 Barb. 276.

<sup>15</sup>The provision of Mich. Const. 1850, art. 18, § 4, that no navigable stream shall be bridged or dammed without authority from the board of supervisors

of the proper county, refers only to streams wholly within the state, and not to boundary waters. *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154.

The provision only requires special leave, where the stream is not adapted in its natural condition to any valuable boat or vessel navigation. The supervisors may make general regulations in regard to shallow streams. *Shepard v. Gates*, 50 Mich. 495, 15 N. W. 878.

The owner of a private bridge is not liable for loss of life or injury sustained by a person in crossing it in the absence of an allegation of a special right to pass and an agreement on the part of the owner to repair. *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 533.

to the rights which may be acquired under special authority, the duty to build and maintain bridges may be imposed by an interference with the highway for private accommodation, which renders the maintenance of a bridge necessary. Therefore, one who builds a mill race across a highway for his own accommodation must build and maintain whatever bridging is necessary to restore the highway for the accommodation of the public.<sup>3</sup> And the same principle applies in case the highway is flooded. The one responsible for the flooding must provide for ferrying the public across the obstruction free of charge,<sup>4</sup> and the duty also rests upon the grantee of the one making the obstruction.<sup>5</sup> But the municipal corporation cannot impose the duty of maintaining a bridge upon the abutting owners who are not benefited by the race.<sup>6</sup> The one who constructs the race is not indictable for the maintenance of a nuisance for failure to build the bridge.<sup>7</sup> The remedy is for the municipal corporation to construct the bridge and recover the cost from the owner of the race,<sup>8</sup> or insti-

<sup>3</sup>*Rolle*, Abr. 368 Bridges, 2; *Waterloo v. Union Mill Co.* 59 Iowa, 437, 13 N. W. 433; *Re Trenton Water Power Co.* 20 N. J. L. 659; *Nobles v. Langly*, 66 N. C. 237; *Woodring v. Forks Twp.* 28 Pa. 355, 70 Am. Dec. 134; *Merrill v. Kalamazoo*, 35 Mich. 211.

Where the owners of a turnpike road have the right to require mill owners to bridge a mill trench which crosses the turnpike, and the general assembly pass a resolution appropriating \$1,000 for the purpose of making the turnpike road a free public highway, to be paid to the turnpike corporation on certain conditions to be performed or accepted by the turnpike corporation and the several towns in which the road is located, the turnpike corporation being required to release to the state its corporate rights and franchises under its charter and in and to its road, and to release to said towns all gravel pits and rights to get gravel which it might own or be entitled to, and the towns being required to accept the road and agree to maintain it as a free public highway,—the town in which the mill trench crosses the turnpike does not, under such resolution, succeed to the rights which the turnpike company has to require the mill owners to bridge the trench. *North Providence v. Dyerville Mfg. Co.* 13 R. I. 45.

<sup>4</sup>*Moirs v. Gallahue*, 9 Gratt. 94.

<sup>5</sup>*West Bend v. Mann*, 59 Wis. 69, 17 N. W. 972.

But a purchaser of mill property supplied with water from a race conducted

from other premises is not burdened with the duty of keeping a bridge over such race, where it crosses the highway beyond the limits of his premises, in repair, in the absence of anything of record to inform him that the property is burdened with such a covenant, and there is nothing to show knowledge upon his part of any agreement of his grantors to maintain the bridge in question. *Hord v. Montgomery*, 26 Ill. App. 41.

<sup>6</sup>*People ex rel. Curtis v. Rochester*, 54 N. Y. 507.

<sup>7</sup>*State v. Yarrell*, 34 N. C. (12 Ired. L.) 130.

But he may be liable to the statutory penalty provided for the obstruction of highways. *Burton Twp. v. Tuttle*, 30 Ohio St. 62.

<sup>8</sup>*Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43.

The owner of a mill race cut by him across a highway is liable for the cost of building a bridge over the same by township authorities where, in consideration of the compromise of a suit for penalties for obstructing the highway because of his failure to rebuild a bridge washed away by high water, and in consideration of his duty to build and maintain a bridge over the race, he entered into a written contract with the township trustees to put in a bridge within a reasonable time and keep the same in repair, but which he failed to do within six months thereafter, whereupon the trustees built the bridge. *Union Twp. v. Anthony*, 26 Ind. 457.

tute a proceeding in mandamus to compel him to perform his duty.<sup>9</sup> The municipality may relieve him from his duty with respect to maintaining a bridge.<sup>10</sup> If the highway is laid out over the race, the municipality, and not the landowner, is responsible for the construction of the bridge.<sup>11</sup> The owner of an irrigation ditch must maintain the necessary bridges over it.<sup>12</sup> And if a navigation company makes a cut across the highway, it is bound to maintain the necessary

<sup>9</sup>A mandamus will lie to compel the owners of a milldam to construct and keep in repair a bridge across a race way at a public highway, where such race way was constructed by such owners' grantor, by license, or with the acquiescence of the public authorities, across the public highway for his own private use and to avail himself of water power; and, where they own such race as tenants in common, the law does not cast upon the public the burden of apportioning either the work or its cost among such cotenants. *Haines v. People*, 19 Ill App. 354.

Under an ordinance authorizing the construction of a mill race across public streets provided it does not interfere with the public use of the streets, the owner will not be compelled by mandamus to construct bridges at the crossings, where, at the time of the issuance of the alternative writ, there were in use at such crossings bridges safe and convenient for public travel although they were constructed by the municipality on the failure of the mill owner to do so, and were not directly in line with the streets. *State ex rel. Carthage v. Cowgill & H. Mill. Co.* 156 Mo. 620, 57 N. W. 1008.

<sup>10</sup>*Phaenixville v. Phaenix Iron Co.* 45 Pa. 135.

An agreement by a municipality to assume the duty of constructing and repairing bridges over a mill race at places where it crosses public streets neither grants a franchise nor annuls the original ordinance authorizing the construction of the mill race, under which it became the mill owner's duty to construct the bridges; and it may be adopted by resolution and need not be in the form of an ordinance. *State ex rel. Carthage v. Cowgill & H. Mill. Co.* 156 Mo. 620, 57 N. W. 1008.

<sup>11</sup>*Hord v. Montgomery*, 26 Ill. App. 41; *North Providence v. Dyerville Mfg. Co.* 13 R. I. 45.

So a municipal corporation whose charter gives it control of the streets

of the city cannot compel the bridging of a ditch at street crossings by the proprietors thereof, who acquired the right of way for their ditch through such lands after the incorporation of the city and the laying out and use of streets over such lands but while the same were still a part of the public domain and before the city acquired title thereto. *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

<sup>12</sup>*State v. Lake Koen Nav. Reservoir & Irrig. Co.* 63 Kan. 394, 65 Pac. 681.

To exempt an irrigation company from an act requiring the construction and maintenance of bridges over ditches by the owners thereof is special legislation. *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 1, 80 N. W. 52.

A municipal corporation which accepts the dedication of streets across which an irrigation ditch had been previously located and the right of way therefor acquired takes the same subject to the prior rights of the ditch owner, and cannot afterwards compel him to bridge the ditch at the street crossings. *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

A statute requiring the owners of ditches constructed after its passage to keep highways crossed or encroached by them open for safe and convenient travel by proper bridging, has no application to an irrigation ditch constructed previous to its passage and running parallel to a highway but not encroaching upon the same so as to interfere with travel. *Farmers' High Line Canal & Reservoir Co. v. Westlake*, 23 Colo. 26, 46 Pac. 134.

And the negligence of public authority in allowing a highway to become narrowed by seepage from a spring does not render the owner of an irrigation ditch which runs parallel to the road liable for the precipitation into the ditch at that point of a vehicle caused in part by the narrowness of the road way. *Ibid.*

bridges.<sup>13</sup> So, changes in a mill pond may render the owner of the pond liable to maintain bridges if the highway is thereby interfered with.<sup>14</sup> So if, for its own convenience, a corporation undertakes to change the course of a stream, it is bound to provide the bridges made necessary by the change.<sup>15</sup> But if, under the statute, the municipal corporation within which the bridge is situated may recover damages for the change of the highway, it may be required to construct the bridge and look to the corporation for repayment of damages.<sup>16</sup> A county, and not a mill owner, is charged with the repair of a bridge erected by the mill owner across the water of a ford through which there is a public highway, although the water of the ford has been greatly deepened by the mill owner constructing a dam where, previous to the construction of the dam, the ford had been at times so deep that passage across it was inconvenient and unsafe for the public.<sup>17</sup> The circumstances which will warrant a special assessment upon abutting property for the construction of the bridge must be peculiar. Bridge improvements are for the most part public improvements, and not within the reason of the rule which permits assessment of abutting property for the cost. The courts will set aside an assessment under a statute authorizing a municipal corporation to erect a bridge at the expense of owners of "benefited" property when approximate accuracy or equality was not attained.<sup>18</sup>

**324. Defective bridges.**—The duty of the public authorities with respect to the safety of the bridges constructed by them, both as to original construction and maintenance, is governed by the law applicable to highways generally, and is not within the scope of the present work. But it may be stated that the bridge must be constructed in

<sup>13</sup>*Rea v. Kerrison*, 3 Maule & S. 526, 16 Revised Rep. 342.

As to the duty to bridge a canal, see § 104a, *ante*.

<sup>14</sup>*Mulholland v. Brownrigg*, 9 N. C. (2 Hawks) 349.

The duty to keep in repair a highway and bridge which were required to be changed by the construction of a mill pond may be assumed by the mill owner so as to bind his successors in title, and may be enforced by the town. *Middlefield v. Church Mills Knitting Co.* 160 Mass. 267, 35 N. E. 780.

<sup>15</sup>*Goodhue County v. Duluth, R. W. & S. R. Co.* 67 Minn. 213, 69 N. W. 898; *Pennsylvania R. Co. v. Irwin*, 85 Pa. 336.

But a railroad company is not bound to repair, and is not liable for want of repair of, a bridge built by it over a

creek necessarily crossed by a new highway cut by it on changing the course of an old public road for its convenience, where by common consent the old road has been abandoned and the new one used and worked by the public for more than twenty years, and is therefore a public highway, which it is the duty of the public to repair. *Brookins v. Central R. & Bkg. Co.* 48 Ga. 523.

<sup>16</sup>*Peterborough v. Grand Trunk R. Co.* 32 Ont. Rep. 154.

<sup>17</sup>*Rex v. Kent*, 2 Maule & S. 513, 15 Revised Rep. 330.

<sup>18</sup>In that case all neighboring property was assessed in proportion to proximity whereas the rules as to benefits from sewers and pavements are not equitable when applied to a bridge. *Re Saw-mill Run Bridge*, 85 Pa. 163.

such a manner that it will be reasonably safe for the uses to which it is likely to be put,<sup>1</sup> and that the one injured by a defect in a bridge has a right of action for the damages thereby caused, provided he was not guilty of negligence which contributed to his loss.<sup>2</sup>

**325. Bridge as property.**—A bridge is property, for the protection of which the owner is entitled to the same remedies which are available for the protection of other property.<sup>1</sup> The owner may maintain an action for negligent injuries to it.<sup>2</sup> A town whose bridge has been washed out through the fault of another may recover, not necessarily the amount it has expended in rebuilding the bridge, but so much thereof as, under all the circumstances, it was necessary and suitable it should expend to make the way there safe and convenient for travelers, not necessarily limited to the cost of the original structure.<sup>3</sup> And the owner of the bridge is entitled to procure relief from a court of equity if injuries are threatened which may be irremediable and there is no adequate remedy at law.

**325a. Taxation of bridge.**—The bridge, being property, is subject to taxation, and, being a fixture to the land, is to be taxed in the same manner as real estate is taxed;<sup>1</sup> and the fact that it is constructed

<sup>1</sup>A town maintaining a bridge without railings across a rapid river peculiarly subject to sudden overflows, so low that in time of freshets the water entirely overflows it and the highway on each end, is guilty of negligence, and liable for injuries and loss of property occasioned thereby, although a bridge built higher and provided with a railing would be in greater danger of being destroyed and carried away by ice in the time of spring freshets. *Bronson v. Southbury*, 37 Conn. 199.

<sup>2</sup>A boy driving across a bridge which was without a railing, and swept off and drowned by the waters which overflowed the bridge and part of the highway, cannot be said to have been guilty of contributory negligence where he was not familiar with the bridge, and, when he reached the water at a point about 15 feet from the bridge, he either attempted to turn around, which was so difficult from the narrowness of the highway that he failed and was swept off by the current, or he kept on and was carried off the bridge by the same force. *Bronson v. Southbury*, 37 Conn. 199. The court distinguished this case from *Pow v. Glastenbury*, 29 Conn. 204, by the fact that in that case the persons driving were familiar with the bridge, were warned and saw the danger before

driving on, and had an opportunity safely to turn back when part way across.

One whose horse was drowned by being swept off a bridge by the overflowing stream while being driven across by a person was not guilty of contributory negligence in intrusting the horse and wagon, at the time of the accident, to her son for the purpose of taking a parcel across, the boy being a little less than twelve years of age, a stout boy, a good driver, able to harness and unharness the horse, and having driven it almost daily for two years. *Ibid.*

<sup>3</sup>*Texas & P. R. Co. v. Interstate Transp. Co.* 155 U. S. 585, 39 L. ed. 271, 15 Sup. Ct. Rep. 228.

<sup>1</sup>*Pierrepont v. Lovelass*, 4 Hun, 696, Reversed on other grounds in 72 N. Y. 211.

A town has such property in a highway bridge as entitles it to bring an action against one who maintains a lower bridge in such a manner as to cause an ice jam, whereby the township bridge is destroyed. *Ft. Jovington v. United States & C. R. Co.* 6 App. Div. 223, 40 N. Y. Supp. 313.

<sup>2</sup>*Topsham v. Lisbon*, 65 Me. 449.

<sup>3</sup>*Hudson River Bridge Co. v. Patterson*, 74 N. Y. 365, Affirming 11 Hun, 525.

over water the title to the bed of which is in the public does not prevent its being taxed.<sup>2</sup> The bridge is taxable by the state within whose jurisdiction it lies to the limits of such jurisdiction, regardless of the relation of the boundary to the middle of the stream;<sup>3</sup> and it may be taxed by a municipal corporation so far as it is within the exterior boundaries of the municipality.<sup>4</sup> If the municipality is bounded generally by a stream, so that its boundary goes to the middle

Toll bridges are subject to taxation, where they are not held under a lease from the state, although apt technical words to create a lease were employed in granting the franchise, and after a time they revert to the state. *Proprietors of Bridges v. State*, 21 N. J. L. 384.

*Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802.

But a bridge across the Ohio river at Louisville, although it is subject to taxation by the state to the low-water mark on the Ohio side, cannot be taxed by the city of Louisville, although within its limits, since it is not upon territory over which the power of taxation has been extended to the city. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

The legislature of Kentucky is not deprived of its right and power to authorize a municipal corporation to tax that part of a bridge across the Ohio river lying within the corporate limits of such municipality because of the provision of the Virginia compact making the navigation of the Ohio river free and common to all citizens of the United States. *Henderson Bridge Co. v. Henderson*, 105 Ky. 32, 36 S. W. 561; *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486.

A toll bridge built under a charter from New Hampshire, across the Connecticut river, over which that state has jurisdiction, and substantially within its limits, is taxable in New Hampshire, although it extends to, and a portion of it is in, a town in Vermont, and a charter had been procured there to authorize the erection in such town. *Cornish Bridge v. Richardson*, 8 N. H. 207.

If the bridge crosses a river between two states, it is locally assessable to a point midway between the two banks in the absence of other specified limits to the jurisdiction. *State, Delaware & E. Bridge Co., Prosecutor, v. Metz*, 29 N. J. L. 122; *Dunlieth & D. Bridge Co. v. Du-*

*buque County*, 55 Iowa, 558, 8 N. W. 443; *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468; *Buttenueth v. St. Louis Bridge Co.* 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439; *St. Joseph & G. I. R. Co. v. Devcreux*, 41 Fed. 14.

That part of a bridge over a navigable river between the center of the stream and the shore line on one side, being within the corporate limits of a municipal corporation, is subject to taxation for corporate purposes equally with all the property within the corporate limits, and the fact that such territory, being covered with water, is not in any way improved, and is not capable of ever being improved by the city, in no way affects its jurisdiction over the same and all forms of property having a situs thereon; and it is no valid objection to a tax levied on such bridge structure that it derives no appreciable benefit or protection from the municipal corporation. *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, 12 N. E. 723; *Henderson Bridge Co. v. Henderson*, 105 Ky. 32, 36 S. W. 561.

A bridge across the Ohio river from a city on the Kentucky shore is subject to taxation to low-water mark on the opposite side, for municipal purposes, by virtue of a city ordinance, accepted by the bridge company, granting the company the use of a street for its bridge approach, also the use of land on the Ohio river for the erection of wharves, etc., necessary and convenient for the successful operation of such company, with a proviso that nothing in such ordinance should be construed as waiving the right of the city to tax the approaches to such bridge, the bridge itself, and all appurtenances thereto within the limits of such city, although, in the absence of such contract, the bridge itself could not be taxed for ordinary city purposes because it derives no actual or presumed benefits by the city government being extended over it. *Henderson Bridge Co. v. Henderson*, 90 Ky. 498, 14 S. W. 493.



of the main channel, the right to tax the bridge may extend to that point.<sup>5</sup> And the same rules apply to county taxation.<sup>6</sup> The fact that the bridge carries interstate traffic does not prevent the state from taxing it.<sup>7</sup>

**326. Interference with rights of shore owner.**—When considering the rights of an owner of land bordering on navigable waters<sup>1</sup> we saw that he had certain rights with which the public could not interfere without making compensation to him for the injuries thereby inflicted on him. Structures could not be placed on the soil belonging to him, and his right of access to and from the navigable portion of the river could not be cut off. These rules are applicable to the building of bridges. Piers or other structures cannot be placed on the soil belonging to the riparian owner without making compensation to him for the land thus used.<sup>2</sup> When the bridge simply joins with the ends of a highway terminating on the bank on either side there is no additional servitude imposed upon the land of the owner abutting on the highway whether he owns the fee of the highway or not, and he is not entitled to compensation for such use of the highway.<sup>3</sup> When it is necessary to change the grade of the highway to form an approach, the rule governing is the same as that governing the change of grade in highways in general, which is not within the scope of this work. If, however, compensation has been made for the right to construct a causeway leading to the bridge, any subsequent raising of its height does not entitle the abutting owner to additional compensation.<sup>4</sup> The

<sup>1</sup>*Albany R. Bridge Co. v. People*, 197 Ill. 199, 64 N. E. 350.

In Arkansas, where the boundaries of a municipal corporation extend only to high-water mark on navigable rivers, a municipal corporation can tax only that part of a bridge across such river which is above high-water mark, although the bridge to the middle of the stream is within the county in which the municipality is located. *Ft. Smith & V. Bridge Co. v. Hawkins*, 54 Ark. 509, 12 L. R. A. 487, 16 S. W. 565.

<sup>2</sup>Such portion of a railroad bridge across the Missouri river, constructed under authority of Congress, that lies within a particular county in the state is taxable by the officers of that county, and not by the state officers as part of the roadway of the railroad, where there is no provision in the statute for estimating its value over that of other portions of the track and assessing a tax on it. *Cass County v. Chicago, B. & Q. R. Co.* 25 Neb. 348, 2 L. R. A. 188, 41 N. W. 246; *Chicago, B. & Q. R. Co. v.*

*School Dist. No. 1*, 25 Neb. 359, 41 N. W. 249.

<sup>3</sup>*Henderson Bridge Co. v. Com.* 95 Ky. 623, 29 L. R. A. 73, 31 S. W. 486. Affirmed in 166 U. S. 151, 41 L. ed. 953 17 Sup. Ct. Rep. 532.

<sup>4</sup>§§ 65 *et seq.*, *ante*.

The legality of a bridge is established by a statute legalizing the rates of toll to be charged thereon, and which were fixed by the board of supervisors; but such statute will not cut off the existing claim of a dock owner to damages arising from the fact that the bridge was illegally constructed, and precludes the profitable use of his property. *Maxwell v. Bay City Bridge Co.* 46 Mich. 278, 9 N. W. 410.

<sup>5</sup>*Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428.

<sup>6</sup>*Hudson v. Ouero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289.

<sup>7</sup>*Skinner v. Hartford Bridge Co.* 29 Conn. 523.

The acceptance by adjoining landowners of damages assessed to them for in-

grant of the right to place a bridge terminal on public property does not include the right to obstruct access to fords leading from such property across the river.<sup>5</sup> The riparian owner has a right of action for injury to his mill rights by the construction of a bridge;<sup>6</sup> also for damming back the water in the stream so as to flood his land.<sup>7</sup> Where the owner of a toll bridge across a tide-water river, which was erected under authority from the state, extends the abutment and pier near one bank of the river, and thereby forms a race way to his tide mill, no grant from the state of the easement of having the tide-water flow in the race way will be presumed where the owner of the mill, or his successor in interest, grants the bridge to the state while he is still its owner without any reservation, and with warranty and covenant that the bridge is free of all encumbrances.<sup>8</sup> A city which for more than thirty-five years has maintained a bridge over a race way in such a manner as not to obstruct the channel does not thereby acquire a prescriptive easement to maintain a pier in the channel.<sup>9</sup> The mere fact that the bridge is constructed in such a way as to be of special use to the riparian owner in the transaction of his business, as by using it as a standing place to raise his mill gates,<sup>10</sup> or as a portion of his milldam,<sup>11</sup> gives no right of action for failure to maintain it in the same condition. A statute giving a remedy by summary ac-

juries resulting from the erection of a bridge and causeway estops them, after the lapse of a long period, from questioning the validity of the proceedings under which the causeway was constructed and the damages assessed. *Ibid.*

<sup>5</sup>*Compton v. Waso Bridge Co.* 62 Tex. 715.

<sup>6</sup>*Riddle v. Delaware County*, 156 Pa. 643, 27 Atl. 569.

An injunction will be granted to restrain the unauthorized construction by village authorities of a bridge over a stream in front of a mill, where those operating the mill will be specially injured by reason of the interference thereby with their use and enjoyment of the mill pond in connection with their mill. *Potter v. Menasha*, 30 Wis. 492.

<sup>7</sup>See chap. XX., *post*.

<sup>8</sup>*Folsom v. Freeborn*, 13 R. I. 200.

<sup>9</sup>*McMillian v. Lauer*, 24 N. Y. Supp. 951.

<sup>10</sup>*Lewis v. Loomis*, 50 Wis. 497, 7 N. W. 429.

<sup>11</sup>Freeholders are not liable under the statute (Pamph. Laws, 633, §§ 20, 21) imposing liability when damage results

to any person, his team, or other property from want of repair of a bridge, to a mill owner whose dam is broken and water power dissipated in consequence of the carrying away of a highway bridge constructed over it and permitted to be out of repair. *Livermore v. Camden County*, 29 N. J. L. 245, Affirmed in 31 N. J. L. 507.

The owner of a mill dam upon which the abutments of a bridge rest has no right to depend upon such abutments to maintain his dam so that it will hold water, and he therefore has no right of action against the county because his mill is injured by water passing through a defectively constructed abutment. *Jermes v. Monmouth County*, 52 N. J. L. 553, 11 L. R. A. 416, 21 Atl. 295.

Where the owner of a dam built a wall of stone above the dam and filled in the intervening space with earth, leaving a culvert for the water to pass through, and subsequently dedicated such causeway to the public for a highway, the public, on accepting the same, imposed upon itself the duty of maintaining the way in a condition of reasonable convenience and safety for travelers; but it was entitled to exercise its

tion for injuries theretofore and that may be thereafter sustained by riparian owners by unauthorized obstructions to a navigable stream by a railroad company's failure to construct a bridge "of the same height and dimensions, and of the same width, between the piers" as the old one, as required by its charter, is not unconstitutional as impairing the obligation of the contract implied by its charter; neither is the act objectionable, either for removing the bar of limitation, or for permitting the assessment of damages by a jury of inquest; nor is it unconstitutional on the ground that it is a partial remedy given to certain persons against the railroad company only, as the remedy is given to all who are subject to damages, and against those, only, who can do the injury.<sup>12</sup>

**327. Interference with navigation rights.** — The public has the right to use a navigable river for purposes of navigation, with which the private individual has no right to interfere, unless he obtains the right by legislative grant.<sup>1</sup> And the riparian owner has a right to navigate the river from his property to the sea, with which the public has no right to interfere without making him compensation for the interference.<sup>2</sup> Furthermore, the Federal government in the United States has a paramount right over commerce with which the states cannot interfere.<sup>3</sup> The question, therefore, becomes important as to how far the bridging of a stream interferes with any or all of these rights. There is no question that the bridging of a navigable stream without legislative authority in such a way as to interfere with navigation is a public nuisance.<sup>4</sup> Even the officers of the subdivisions of the state cannot construct bridges in such a way as to interfere with navigation without express authority from the legislature. A general statute giving authority to construct highways and bridges is not sufficient to authorize the construction of a bridge over a public, navi-

discretion as to the manner in which it would perform that duty; and, in rebuilding the structure after it had been washed away by a flood, the town was not bound to reconstruct the embankment, but might, if it saw fit, construct a bridge with a railing. *Welton v. Wolcott*, 50 Conn. 259.

<sup>12</sup>*Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593.

<sup>1</sup> See § 86, *ante*.

<sup>2</sup> § 85, *ante*.

<sup>3</sup> § 14a, *ante*.

<sup>4</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527.

A private drawbridge with an open-

ing 20 feet wide, constructed by an individual with the consent of town authorities, but without legislative authority, across a bay navigable in fact, but at a point where the tide does not ebb or flow, is a nuisance *per se*, although, if legally authorized, it would not unreasonably obstruct navigation. *People ex rel. Howell v. Jessup*, 28 App. Div. 524, 51 N. Y. Supp. 228.

If a public bridge in its original construction and its condition impedes the free navigation of a stream for rafting timber; for which purpose it has been used for many years, that fact may be shown in defense of an indictment for the destruction of the bridge. *Owens v. State*, 52 Ala. 400.

gable water, the title to the bed of which is in the state.<sup>5</sup> And general authority to construct bridges will not permit their construction in such a way as seriously to obstruct navigation.<sup>6</sup> As said in *Com. v. Coombs*,<sup>7</sup> general authority to a court of sessions to lay out highways will not include power to lay a highway over a navigable river, fresh or salt, so that the river may be obstructed by a bridge. A navigable river is, of common right, a public highway, and general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public. But the acts of a board of supervisors in determining the necessity for the erection of a bridge across a river and in providing for its construction are legislative, and the county is not liable therefor in an action for the obstruction of navigation by reason of alleged improper construction of the bridge.<sup>8</sup> Even when a municipal corporation is required to build a bridge over a navigable river, it will be liable for constructing it in such manner as to obstruct the free navigation of the river.<sup>9</sup> If the title to the bed of the water way is in the municipal corporation, it may construct such bridges as it wishes, provided it does not unnecessarily interfere with the right of navigation.<sup>10</sup> It is possible to construct a bridge in such a way that it will not obstruct navigation, and such method of construction should in all cases be insisted on; although in case the bridge is not constructed in that manner, a private individual cannot treat it as a nuisance, and have it abated as such, because, as in the case of other public nuisances, the question of the right to maintain it is one which the government alone can raise; and, therefore, the right of a corporation to maintain a bridge over navigable waters cannot be determined in a private action for damages for an alleged obstruction to navigation caused by the bridge.<sup>11</sup> Under ordinary circumstances, there is no objection to the

<sup>5</sup>*Ryder v. Foster*, 77 Iowa, 638, 42 N. W. 506; *State v. Anthoine*, 40 Me. 435; *Charlestown v. Middlesex County*, 3 Met. 202.

Local commissioners of highways will be restrained from erecting bridges over streams which are navigable and the beds of which belong to the state, until permission to do so is obtained from the legislature. *People v. Gutches*, 48 Barb. 656.

See also § 84, *ante*.

<sup>6</sup>*Barnes v. Racine*, 4 Wis. 454; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255.

<sup>7</sup>2 Mass. 489.

<sup>8</sup>*Larkin v. Saginaw County*, 11 Mich. 86, 82 Am. Dec. 63.

<sup>9</sup>*Harlem v. Emmert*, 41 Ill. 319.

<sup>10</sup>The fee in the streets of Chicago being vested in the corporation, so much of the Chicago river as is measured by the width of the streets crossing it is likewise vested in it, including the river, the soil covered by it and its banks, subject only to the easement for navigation; and, being so owned, it is competent for the corporation to build bridges over it so as to meet the great public needs therefor, and such right is not inconsistent with the right of free navigation of that river, provided such bridges do not essentially injure the same. *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295.

<sup>11</sup>*Dugan v. Bridge Co.* 27 Pa. 303, 67 Am. Dec. 464.

A town situated above a toll bridge

bridging of a navigable stream by the riparian owner for his own convenience provided he does not interfere with public rights; and, since the bridge may be constructed without interfering with navigation, a private individual cannot complain if one is constructed by another individual without authority, provided his own private rights are not interfered with. The public, however, has a right to have the navigation remain absolutely free, and the public authorities may at any time proceed to abate a bridge that has been thrown across a stream without authority, or one which interferes with navigation. As commerce upon land has increased and become more important, its requirements have modified to some extent the old rule which prevented any interference whatever with navigation rights, and each right modifies the other; so that the obstruction to the navigation will not be regarded as unreasonable and a nuisance, unless it is material and unnecessary in view of the requirements of the land traffic. As said in *Devoe v. Penrose Ferry-Bridge Co.*,<sup>12</sup> the common-law rule that every obstruction, however small, to the free navigation of a public river is in strictness a nuisance, is unreasonable and absurd when applied to every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, as against the construction of a railroad or other highway thereover for the convenience of the public. The question in every such case is as to the relative importance of the two interests in that particular instance.<sup>13</sup> The question as to whether a bridge over a navigable stream is a public nuisance does not depend upon the amount of public benefit conferred by it; but, if a bridge is

which does not permit of vessels above a certain size passing through its draws cannot, as representing its inhabitants, maintain a bill to abate the nuisance on the ground, merely, that some of its inhabitants owning wharfs are affected in their private shipping interests. *Dover v. Portsmouth Bridge*, 17 N. H. 200.

<sup>12</sup> 5 Clark (Pa.) 313, 3 Am. L. Reg. 79, Fed. Cas. No. 3,845.

<sup>13</sup> *Reg. v. Betts*, 16 Q. B. 1022, 4 Cox Ch. Cas. 211, 19 L. J. Q. B. N. S. 501, 22 Eng. L. & Eq. Rep. 240; *Thurlow v. Bogart*, 15 U. C. C. P. 9; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Thompson v. Paterson & H. R. R. Co.* 9 N. J. Eq. 526.

A bridge cannot be presumed to be a public nuisance for interfering with navigation when the facts show that there are other bridges above and below the one complained of which are more likely to obstruct navigation. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

Every bridge may be said to be an obstruction, but the delay or risk inseparable to its existence does not make it an obstruction in contemplation of law. *Columbus Ins. Co. v. Peoria Bridge Asso.* 6 McLean, 70, Fed. Cas. No. 3,046; *United States v. Railroad Bridge Co.* 6 McLean, 517, Fed. Cas. No. 16,114.

The construction of a bridge across a stream at a point above the tide, but where the public by user has a right of navigation, will not be prevented where it does not, and is not likely to, interfere with navigation. *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839.

A Canadian case, however, held that, although a bridge is of very great public benefit, while the prejudice it causes to the public as an obstruction to navigation is of the slightest possible degree, if unauthorized, it is an illegal structure amounting to a public nuisance. *Queen v. Moss*, 26 Can. S. C. 322, affirming 5 Can. Exch. 30.

necessary for the convenience of the public, and does not prevent the free use of the stream as a public highway, although causing some slight inconvenience to those who had been in the habit of navigating the stream by obliging them to take some additional precautions in passing it, it is not necessarily a nuisance.<sup>14</sup> The fact that the channel is somewhat abridged, or that vessels are delayed to a slight degree, does not render the bridge a nuisance.<sup>15</sup> But if, when the draw in a railroad bridge across navigable water is closed, it is a complete obstruction to the navigation of the river by tugboats as they are usually and generally constructed, it is a nuisance *per se*, and no notice is necessary to be given the company to abate it, for it is its duty to do so when it is necessary or proper for the river to be so used.<sup>16</sup> The opinion of experts is admissible upon the question whether or not a bridge is an obstruction to a river.<sup>17</sup> The above rules do not prevent the public authorities from abating a bridge if it is found that the interests of the public require that it should be abated. The question of the relative necessities of land and water traffic is committed to the legislature, and it may, as against the public, authorize the complete obstruction of the navigation if it considers it for the public interests; and it may authorize such obstruction as against all private individuals except those whose access from their property to the sea will be cut off by the obstruction.<sup>18</sup> Authority granted by the legislature to

<sup>14</sup>*Williams v. Beardsley*, 2 Ind. 591.

<sup>15</sup>*Milnor v. New Jersey R. & Transp. Co.* 3 Wall. 782, Appx., 16 L. ed. 799, Appx., 6 Am. L. Reg. 6, Fed. Cas. No. 9,820.

Bridges across a navigable river within the limits of a city, furnished with capacious draws for the passage of vessels, do not unlawfully obstruct navigation because vessels are subject to delay on account of an ordinance of the city requiring such draws, during a portion of the day, to be closed after remaining open ten minutes, and remain closed for a like period, if necessary for the needs of the public desiring to cross the bridge, before being again opened for the passage of vessels. *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295.

The Central Railroad Company of New Jersey, being chartered by special statute declared in terms to be a public act and commanding the courts so to recognize it, and having power, by a supplement thereto, to extend its road to New York bay, and in doing so to construct a suitable bridge over all navigable waters crossed on the way, is not liable, under allegations, for obstruct-

ing Newark bay by a viaduct bridge otherwise properly located and constructed by driving 500 piles so near to the navigable channel as greatly to narrow it and impede and hinder navigation. *Stephens & C. Transp. Co. v. Central R. Co.* 33 N. J. L. 229.

<sup>16</sup>*Gates v. Northern P. R. Co.* 64 Wis. 64, 24 N. W. 494.

<sup>17</sup>*Gault v. Concord R. Co.* 63 N. H. 356.

<sup>18</sup>A town owning wharves above a toll bridge which does not permit of vessels above a certain size passing through its draws has rights similar to those possessed by any other owner of property, and, to maintain a bill to abate the bridge as a nuisance, must, like an individual, allege some particular grievance beyond that sustained by the public generally. *Dover v. Portsmouth Bridge*, 17 N. H. 200.

A court of equity will not require a railroad company to substitute a draw-bridge for a permanent one, sought by the owners of land abutting on a slough upon the ground that the railroad company is required by its charter to restore all streams crossed by it to their

construct a bridge usually provides that the navigation shall be obstructed as little as possible; but, if the legislature authorizes the bridge, which merely obstructs without destroying the navigation, no private individual has any right to complain, and the Federal government cannot interfere unless the obstruction is forbidden by an act of Congress.<sup>19</sup> The rule forbidding the bridging of streams without authority is for the protection of navigation, and, when the only navigation of which the stream is capable is the floatage of logs and flat-boats, authority is not necessary to legalize the bridge.<sup>20</sup> If the one about to construct a bridge across a navigable river which will obstruct the navigation in any degree wishes to protect himself from liability to have his bridge abated by the public authorities, or from liability to have private individuals question the legality of the structure, it is necessary for him to obtain the authority of the legislature to its construction. If he does not do so, he is liable for all injuries which are caused by it.<sup>21</sup> The power to authorize the erection of a

former condition so as not to impair their usefulness, and that such permanent bridge obstructs the passage of vessels in the slough between their land and a navigable river, where it appears that such owners could not avail themselves of the slough for the purpose alleged because there was a space of ground over which they had no control, which cut off the water connection between a canal or slip owned by them and the slough, and, therefore, to require such action on the part of the railroad company would result only in injury and expense to it without any corresponding advantage to such owners. *Joliet & C. R. Co. v. Healy*, 94 Ill. 416, Reversing 2 Ill. App. 435.

In one case it was held that a bridge may be authorized over a stream which is floatable for logs only 1½ miles above it, and when only one person is interested in the floatage, although the effect will be to cut off all possibility of floating logs on the stream. *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528. But this could only be done by compensating the riparian owner for the loss thereby inflicted upon him.

<sup>19</sup>*Highway Comrs. v. Chaffee*, 1 Mich. N. P. 147.

<sup>20</sup>*Spring v. Chase*, 2 Dane Abr. 696.

The board of supervisors will not be enjoined from erecting a bridge over a navigable stream at a point incapable of use for purposes of practical navigation. *People v. Meach*, 14 Abb. Pr. N. S. 429.

A toll bridge constructed with a space

of over 50 feet for the passage of logs, and having guide booms to direct the logs to this opening, fulfills all the requirements of navigation at that point, where the stream is navigable only for floatage of logs. *Bucki v. Cone*, 25 Fla. 1, 6 So. 100.

There are three cases in which the authority of the legislature to erect a bridge across a stream is necessary: (1) Where the stream is navigable; (2) where the title to the bed of the stream is in the public; (3) where the right to take tolls is desired. *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44.

<sup>21</sup>*Works v. Junction R. Co.* 5 McLean. 425, Fed. Cas. No. 18,046.

The public may, by user, have a right to navigate a stream at a point above the action of the tide, and riparian proprietors will not be permitted to construct bridges or other structures where they interfere with the navigation. *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839.

A bridge company will be restrained from proceeding with its works and placing piles in a navigable river, without proof of substantial injury to the public, where it is proceeding in violation of law and in a manner tending to public injury. *Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co.* L. R. 21 Ch. Div. 752, 51 L. J. Ch. N. S. 746, 46 L. T. N. S. 687, 30 Week. Rep. 916.

A statute authorizing a railroad company to erect a bridge similar to one already erected by it is no defense in an action by a steamboat owner to recover

bridge rests in the legislature, and not in a municipal corporation, unless the power has been expressly conferred upon it. But, if a town has received a grant from the Crown of the power to control the waters within its limits, it may grant authority to construct a bridge over them.<sup>22</sup> All authority conferred must be strictly pursued,<sup>23</sup> and all conditions imposed must be strictly complied with.<sup>24</sup> In granting a franchise to erect a bridge over a navigable stream, with the limitation that navigation be not impeded thereby, the legislature is presumed to have had all the natural growth of navigation in view, and the grantees take the franchise *cum onere*.<sup>25</sup> Authority granted may be withdrawn, even after the work is partly completed, where the power to make such withdrawal is reserved in the statute.<sup>26</sup> The ri-

damages for the obstruction of navigation caused by the bridge during the time it was in existence prior to the passage of the statute. *Feltus v. Swan*, 62 Miss. 415.

So, one who rightfully maintains a milldam, whereby a stream sufficiently large and deep to permit of the floating of logs at some seasons of the year is rendered of sufficient capacity to float a steamer which has long been used to transport the products of the mill up the river, the bridges across which have been built so as to permit of the passage of the boat, is entitled to an injunction restraining local authorities from rebuilding a bridge so as to deprive him, without condemnation or compensation, of his right to run his boat. *Stofflet v. Estes*, 104 Mich. 208, 62 N. W. 347.

"A resolution passed by the trustees of a town, which gives a person "liberty to make a roadway and erect a bridge," and which is passed in the exercise of a governmental power conferred by a charter in colonial days, creates a franchise, rather than a license or easement. *Southampton v. Jessup*, 162 N. Y. 122, 50 N. E. 538.

"*Cape Elizabeth v. Cumberland County*, 64 Me. 456.

"*Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 1 McCrary, 281, 2 Fed. 285.

Under a statute granting the privilege of constructing a railroad bridge across a navigable stream, provided it be at least 42 feet above the bed of the river, that the railroad company pay the expense of putting hinges on the smokestacks of steamboats, and transport certain fertilizers at a specified rate, the conditions are continuing ones, and the bridge, after its construction at the pre-

scribed height, becomes a nuisance if the distance between it and the bed of the stream becomes less than 42 feet by reason of the raising of the bed of the stream by natural deposits or other causes. *State v. South Carolina R. Co.* 28 S. C. 23, 4 S. E. 796.

When a railroad is authorized to construct a bridge over a public stream provided that the free and uninterrupted navigation thereof shall not be interfered with, the condition of the grant is not met unless navigation is left open at all times,—that is, entirely uninterrupted. *Snure v. Great Western R. Co.* 13 U. C. Q. B. 376.

A bridge permitted by an act of the state legislature, but not constructed in accordance with it, is an unauthorized obstruction, and the owner of a vessel injured by a collision with it may maintain a suit *in personam* in admiralty against the owner of the bridge for damages; but he must allege and prove that the collision was caused by the defective construction or maintenance of the bridge in some specified particular. *Oregon City Transp. Co. v. Columbia Street Bridge Co.* 53 Fed. 549.

"*Dugan v. Bridge Co.* 27 Pa. 303, 67 Am. Dec. 464.

"*Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143; *Southampton v. Jessup*, 10 App. Div. 456, 42 N. Y. Supp. 4.

Where a road company obtained leave to build a bridge at a point on a river from the department of public works under whose control this portion of the river was, upon condition that, in the event of navigation being resumed, the bridge should be removed or a drawbridge substituted; and where, upon navigation being resumed, the bridge



parian owner cannot grant the right to bridge the stream to the injury of navigation.<sup>27</sup> After the completion of a bridge, the legislature may require its alteration in such a way that it shall not constitute an obstruction to navigation.<sup>28</sup> It may commit to administrative officers the power to determine whether or not the intended bridge will be an obstruction to navigation.<sup>29</sup> If the structure has stood for a long period of time without any objection on the part of the state, it may be regarded as lawful.<sup>30</sup> If authority has been granted by the

was ordered removed by the department of public works, and was removed by the county into whose control the road had passed,—a mandamus will not be granted compelling the county to build a swing or other bridge at that point; it having been discretionary in the government to allow a bridge there or not, the county was neither authorized, nor compelled, to build it. *Wescott v. Peterborough County*, 33 U. C. Q. B. 280.

<sup>27</sup>*Simmons v. Mumford*, 2 R. I. 172.

<sup>28</sup>The penalty provided by 25 Stat. at L. 424, 425, in case a railroad company fails, after notice, to alter its bridge over a river so that it will not obstruct navigation cannot be recovered from receivers into whose hands the railroad passed after service of the notice; nor is the company liable, since its dispossession by the receiver is a sufficient excuse. *United States v. St. Louis, A. & T. R. Co.* 43 Fed. 414.

<sup>29</sup>*E. A. Chatfield Co. v. New Haven*, 110 Fed. 788.

Congress may declare that, upon a certain fact being established, a bridge over a navigable river may be deemed a lawful structure, and may employ the Secretary of War as an agent to ascertain that fact. *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

So, the provision of the act of September 10, 1890, § 4, conferring upon the Secretary of War power to give notice of alterations required in bridges deemed by him to be obstructions to navigation, and to prescribe a reasonable time in which they must be made, and empowering the District Attorney to prosecute persons refusing to comply with such notice,—is not unconstitutional as delegating legislative or judicial power to the Secretary of War. *United States v. Moline*, 82 Fed. 592.

A notice given by the Secretary of War to bridge owners so to alter the structure as to render navigation through or under it free, easy, and un-

obstructed is insufficient for failure to point out the alterations required to be made, although it recites that the bridge is an obstruction to navigation, rendering the passage of boats and rafts through its western pier difficult. *United States v. Keokuk & H. Bridge Co.* 45 Fed. 178.

But Congress cannot confer upon the Secretary of War the right to declare that bridges lawfully erected in accordance with the requirements of the acts authorizing them are obstructions to free navigation and must be remodeled or removed. *Ibid.*

A statutory requirement that the plan of a bridge over any navigable water must be approved by a board of public works or an acting commissioner having charge of the public works where such crossing is proposed embraces all waters of the state navigable by the works of art or nature, and does not limit their power to places where public works exist, or to waters made navigable by the state. *Works v. Junction R. Co.* 5 McLean, 425, Fed. Cas. No. 18,046.

Under a statute authorizing the acting commissioner or the board of public works to approve of the plan or structure of a proposed bridge over navigable waters, the favorable decision of the acting commissioner is final where no provision is made for an appeal therefrom, and a reversal of his decision by the board of public works is a nullity for want of jurisdiction. *Ibid.*

<sup>30</sup>It cannot be urged that a draw-bridge over a navigable stream is not a legal structure because not located at the exact point authorized by the board of supervisors, where it has been in existence for twenty-nine years without anyone questioning its legality, and the legislature and board of supervisors have recognized it by providing for its maintenance. *Dietrich v. Schremons*, 117 Mich. 298, 75 N. W. 618.

When the Crown has had power to grant the bed of a navigable stream for

legislature acting within its constitutional powers, the bridge cannot be regarded as a nuisance.<sup>31</sup> As said in *Illinois River Packet Co. v. Peoria Bridge Asso.*,<sup>32</sup> the right to build a bridge over a navigable stream under a grant of the legislature having jurisdiction thereof is coextensive with the right of navigating such stream; and, if such bridge is constructed so as to interfere as little as possible with free navigation, upon the most approved plan, with a sufficient way left for the passage of boats in ordinary conditions of wind and stages of water, it cannot be adjudged to be a material obstruction to such navigation, although in times of high wind or water ordinary prudence would require a boat to delay passing through the draw until the condition of the elements should become more favorable. Authority conferred will be construed so as to carry out the intent of the legislature, and permit the continuance of the structure erected if it can be done.<sup>33</sup> Therefore, one seeking to recover for injury done by a bridge crossing a navigable river of the United States, on the ground that it does not conform with the act by which it was authorized, has the burden of showing that fact.<sup>34</sup> If the character of the improvement is not specified by the authorities, the grantee has a wide discretion as to the manner in which the work shall be done, and he may adopt any kind of improvement which will not necessarily interfere with the rights of the public; and he is not limited to one exercise of the power, but may change the structure if it is not adequate to his needs.<sup>35</sup> A bridge constructed without authority may be legalized.<sup>36</sup>

more than twenty years, and during the navigating said waters," is not subject to indictment for "obstructing and impeding" such river, as such acts to a certain extent are necessary and reasonable to the enjoyment of its franchise. *State v. Portland & K. R. Co.* 57 Me. 402. *Queen v. Moss*, 26 Can. S. C. 322, affirming 5 Can. Exch. 30.

<sup>31</sup>*People ex rel. State Harbor v. Potrero & B. V. R. Co.* 67 Cal. 166, 7 Pac. 445.

<sup>32</sup>38 Ill. 467.

<sup>33</sup>A provision in an act authorizing the erection of a railroad bridge over a river, that suitable and sufficient draws shall be made so as not to obstruct navigation, is not a prohibition against building a bridge if navigation shall be at all obstructed thereby, but simply a requirement that the draws shall be sufficient not to obstruct navigation. *Atty. Gen. ex rel. Easton v. New York & L. B. R. Co.* 24 N. J. Eq. 49.

A railroad company authorized to construct a bridge over tidal, navigable waters, provided it does not "prevent

An authorization to erect a viaduct across a river does not limit the power to cases where the crossing is from bank to bank, but confers the power of building them over such waters generally. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631.

An interstate boundary river above tidal waters will not be presumed to be excluded from the provisions of an act authorizing the building of railroad viaducts over any navigable or other rivers, streams, or bay of water. *Ibid.*

<sup>34</sup>*Silver v. Missouri P. R. Co.* 101 Mo. 79, 13 S. W. 410.

<sup>35</sup>One granted a franchise by the trustees of a town to make across a bay a roadway the character of the construction of which is not specified does not,

The main channel of a river, within the meaning of a statute authorizing the erection of a bridge over the main channel, is that part of the river bed over which the principal volume of water flows.<sup>37</sup> The question whether or not the bridge is an obstruction, and how far it may be permitted, is a legislative, and not a judicial, question.<sup>38</sup> There is no liability for accidental obstructions not caused by the construction of the bridge, although such construction may contribute thereto.<sup>39</sup> The bridge owner is not responsible for the acts of strangers.<sup>40</sup> The state may require the abatement of bridges constructed without its authority whenever it chooses to do so. And equity may enjoin the construction of a bridge which will constitute a public nuisance.<sup>41</sup> Injunction is not the proper remedy for the act of a public body clothed with legislative authority in locating a bridge by an illegal exercise of authority in such a way as to injure riparian owners, as, by acting arbitrarily toward them, or denying

by building a temporary trestle, elect to construct in that manner so as to prevent him thereafter from building a roadway of earth or any other ordinary material. *Southampton v. Jessup*, 162 N. Y. 122, 56 N. E. 538, Reversing 64 App. Div. 525, 72 N. Y. Supp. 312, 780, and Overruling 10 App. Div. 456, 42 N. Y. Supp. 4.

<sup>37</sup>The passage of an act declaring a bridge a lawful structure pending a suit to procure an abatement of the bridge as a nuisance renders the structure lawful, and is binding upon the circuit court, which must be governed by the law as it is at the time when it is called upon to act. It is decisive of the question by furnishing a rule of law by which it must be decided, and not by depriving the court of jurisdiction. *The Clinton Bridge*, 1 Woolw. 150, Fed. Cas. No. 2,900; *Wisner v. Great Western R. Co.* 17 U. C. Q. B. 510.

<sup>38</sup>*St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. 755.

<sup>39</sup>*Milnor v. New Jersey R. & Transp. Co.* 3 Wall, 782, Appx., 16 L. ed. 799, Appx., 6 Am. L. Reg. 6, Fed. Cas. No. 9,620.

In a suit between citizens of the state of New York to enjoin the erection of a bridge as a public nuisance the circuit court is without jurisdiction so far as a state law may be violated, but may inquire whether the bridge is being built in conformity with the Constitution and laws of the United States. *Miller v. New York*, 13 Blatchf. 469, Fed. Cas. No. 9,585.

<sup>40</sup>County commissioners are not liable for the detention of a boat, caused by the erection of a bridge across a navigable river authorized by the commissioners, where the bridge, when erected, was no obstruction to the navigation of the river along the channel then used, but, by reason of a freshet, a dam previously constructed under authority of law for the improvement of navigation gave way causing the water to abandon the new channel and lock, through which the improvement caused it to flow, and resume the old channel, which had, in the meantime, become obstructed by a bar so as, in connection with the bridge, to create an obstruction to navigation. *St. Joseph County v. Pidge*, 5 Ind. 13.

<sup>41</sup>A railroad company lawfully constructing its road in a proper manner over navigable water is not liable for damages resulting from the obstruction, without its fault, of an open space left for the passage of vessels, as such space, simply spanned by its draw for the passage of trains, is left, not only to the free use, but to the control and care of the public. *Pensacola & A. R. Co. v. Hyer Bros.* 32 Fla. 539, 22 L. R. A. 368, 14 So. 381.

<sup>42</sup>*Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136.

Equity will not, however, restrain the construction of a bridge over navigable waters to be built in substantial compliance with the terms of legislation. *Flanagan v. Philadelphia*, 42 Pa. 219.

A preliminary injunction will not

them a fair hearing on the merits; but the remedy must be by certiorari.<sup>42</sup> Where a bridge over a navigable river has been allowed to proceed almost to completion in sight of all the parties, a preliminary injunction will not lie to stop the work until the rights can be adjudicated.<sup>43</sup> A Federal court will not grant a preliminary injunction to restrain the erection of a bridge over a public stream entirely within one state when the legal right is disputable, and especially when the right depends on the law of a state which has prohibited the enjoining of the erection of public works until questions of title and damages have been finally decided by a common-law court.<sup>44</sup> A law prohibiting the granting of an injunction "against the erection or use of any public works of any kind erected, or in process of erection," under legislative authority until title and damages have been finally decided by a common-law court applies to the erection, under franchise, of a bridge over a navigable river.<sup>45</sup>

**327a. Implied grants of power.**—The right to bridge streams is necessarily included in some grants of power to construct public works, although not expressly mentioned. Thus, the grant of a right to construct a railroad between two points on opposite sides of the stream necessarily includes a right to construct a bridge across it, if that is the only feasible manner of carrying tracks across.<sup>1</sup> And the same is true of the grant of the right to construct a road under similar circumstances.<sup>2</sup>

**328. No right to obstruct navigation will be implied.**—*Pennsylvania v. Wheeling & B. Bridge Co.*<sup>1</sup> held that the right of bridging a river

issue to restrain a bridge corporation from completing its work unless and until it specifically performs a contract with reference thereto with a navigation corporation, as it would, by indirection, enjoin the specific performance of a contract, contrary to principles of equity. *Philadelphia & R. R. Co. v. Philadelphia*, 9 Phila. 112.

<sup>1</sup>*Tucker v. Burlington County*, 1 N. J. Eq. 283.

<sup>2</sup>*Atty. Gen. ex rel. Easton v. New York & L. B. R. Co.* 24 N. J. Eq. 49.

<sup>3</sup>*Murtagh v. Philadelphia*, 1 W. N. C. 37.

<sup>4</sup>*Flanagan v. Philadelphia*, 8 Phila. 110.

<sup>5</sup>*Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 559; *People ex rel. State Harbor v. Potrero & B. V. R. Co.* 67 Cal. 166, 7 Pac. 445.

A railroad company authorized by act of Congress to lay out, locate, construct, furnish, maintain, and enjoy a continu-

ous railroad between specified points, with all the powers, privileges, and immunities necessary to that end, is entitled to bridge a navigable river which it must necessarily cross, although it will in some measure impair the navigability of the river, and the extent of such obstruction is a question the courts must determine in the absence of specific directions on the part of Congress. *Hughes v. Northern P. R. Co.* 9 Sawy. 313, 18 Fed. 106.

<sup>1</sup>*Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255.

A statute conferring power to lay out highways, although silent as to the construction of bridges, carries with it by implication the power to construct bridges along its route, even over navigable waters, necessitating the construction of bridges provided with draws. *Brown v. Preston*, 38 Conn. 219.

<sup>2</sup>13 How. 518, 14 L. ed. 249.

could only be maintained when so exercised as not to be incompatible with the right of navigation. Therefore, the mere grant of a right to bridge a river will never be construed so as to give a right to obstruct the navigation of the stream.<sup>2</sup> As said in *Clement v. Metropolitan West Side Elev. R. Co.*,<sup>3</sup> a bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition therefor. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, give warning of the position of the bridge, and of its opening and closing. If, for any reason, the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. So, county commissioners as successors of a plank-road company have no authority to construct a bridge over a navigable river in such a manner as to interfere with the navigation thereof, under charter power to such company to construct it as part of its road, where the act confers no express power to obstruct navigation, and that is not necessary for the accomplishment of the purpose contemplated by the general power granted.<sup>4</sup>

**329. Liability for injuries caused by construction operations.**—The operations necessary for the construction of a bridge are likely to cause more interference with the navigation of the stream than is the bridge after its completion. These are, however, temporary in character, and are of the class of acts which one may do in the exercise of

<sup>2</sup>*Terre-Haute Drawbridge Co. v. Halliday*, 4 Ind. 36; *State v. Freeport*, 43 Me. 198; *Southern R. Co. v. Ferguson*, 105 Tenn. 552, 59 S. W. 343; *Little Rock, M. River & T. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Columbus Ins. Co. v. Peoria Bridge Asso.* 6 McLean, 70, Fed. Cas. No. 3,046; *Selman v. Wolfe*, 27 Tex. 68.

A railroad company authorized to construct its road across a mill stream will not be allowed, in the absence of necessity, to construct its bridges so low as to interfere with the flow of the water

or the passage of barges. *Manser v. Northern & H. Counties R. Co.* 2 Ry. & Canal Cas. 380, 5 Jur. 983.

In Texas, railroad companies are forbidden to erect a bridge or other obstructions across, in, or over any navigable stream so as to prevent or unreasonably impede the navigation thereof. (*Oldham & White's Digest*, art. 1634). *Selman v. Wolfe*, 27 Tex. 68.

<sup>3</sup>123 Fed. 271.

<sup>4</sup>*Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255.

his lawful rights without liability for the injury thereby inflicted so long as he keeps within the limits of his rights. No one has a right to obstruct the navigation of a stream even by the building of a bridge without authority from the legislature. But if he has received such permission, he is not liable for the delay of traffic so long as he exercises due care in the performance of the work and is guilty of no negligence.<sup>1</sup> A company authorized to erect a bridge over a navigable river has the right to drive piles in the bed of the river but is bound to observe all reasonable precaution to secure the safety of boats navigating the stream; but if, at an ordinary flood-stage of the river, such piles are likely to become a hidden and dangerous obstruction to navigation, it should mark the spot by buoys or otherwise, and is not relieved from such duty although the piles might create a break on the surface of the water which a skilful navigator would, in daylight, observe and understand.<sup>2</sup> Under a statute permitting a railroad company in constructing a bridge across a navigable stream to construct a temporary bridge for the purpose of aiding in the erection of the permanent one, the temporary structure, operated in a bona fide effort to carry out the purpose contemplated, is not rendered illegal by the fact that it is also used for other purposes, if no further impediment to the navigation is created thereby.<sup>3</sup> But obstruction to navigation, caused by the erection of temporary structures, by a railroad company, in constructing a bridge across a navigable stream, is a public nuisance, rendering such company liable to any person damaged thereby, where the charter of said railroad company, authorizing it to build such bridge, contained a proviso that the navigation of said stream should not be obstructed thereby, and it was not shown that such temporary structure was indispensable, without which such bridge could not have been built, and that the same was constructed only for a reasonable time, and it was not possible to keep a passageway open for the needs of navigation.<sup>4</sup> And a railroad company authorized by act of Parliament to construct a bridge across a navigable river, and entering into a contract with another to construct it, is liable for delay caused

<sup>1</sup>*Jutte v. Keystone Bridge Co.* 146 Pa. 400, 23 Atl. 235; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206, Affirming 34 La. Ann. 970, 44 Am. Rep. 451; *Cantrell v. Knoxville, C. G. & L. R. Co.* 90 Tenn. 638, 18 S. W. 271.

Temporary obstructions to a navigable stream caused by necessary temporary structures in the erection of a railway bridge, are not within the

meaning of a statute prohibiting the obstruction of navigation by a "milldam, fishtrap, bridge, or other improvement." *Cantrell v. Knoxville, C. G. & L. R. Co.* 90 Tenn. 638, 18 S. W. 271.

<sup>2</sup>*The Modoc*, 26 Fed. 718.

<sup>3</sup>*Pricstley v. Manchester & L. R. Co.* 4 Younge & C. Exch. 63, 2 Ry. & Canal Cas. 134.

<sup>4</sup>*Memphis & O. R. Co. v. Hicks, & Sneed*, 427.

a vessel by the failure of the contractor properly to construct the bridge.<sup>5</sup>

330. The placing of piers.—When the plan of bridge chosen requires it to rest upon piers placed in the channel of the river, so far as the statute specifies the location of them, its provisions must be complied with to save the bridge company from liability for injuries caused by them and from prosecution for the maintenance of a nuisance. A general right to construct a bridge includes the right to maintain such structures as are essential portions of it and serve as a protection for it.<sup>1</sup> When a bridge is authorized to be erected in such manner as not to injure, stop, or interrupt navigation, but to be erected upon piers, it admits of no question that some interference with navigation is authorized, as otherwise the grant would convey no right at a time when it is customary to erect bridges upon such piers.<sup>2</sup> And if the title to the soil upon which the piers are placed is not in the state, it cannot treat the piers as a purpresture, and order their removal, if they do not constitute a nuisance to navigation.<sup>3</sup> A statute authorizing a bridge, the piers of which shall be parallel with the current of the river, will be sufficiently complied with if the piers are located fairly and substantially parallel with the usual and ordinary course of the current.<sup>4</sup> A bridge corporation prohibited

<sup>1</sup>*Holt v. Sittingbourne & S. R. Co.* 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274.

<sup>2</sup>*Silver v. Missouri P. R. Co.* 101 Mo. 79, 13 S. W. 410; *Piscataqua Bridge Co. v. New-Hampshire Bridge* 7 N. H. 35; *Mark v. Birmingham & P. Bridge Co.* 41 Pa. 147.

A right to erect a bridge and construct piers in a navigable river included a right to fix the number and location of the piers without liability for a mere mistake of judgment. *Ibid.*

The removal of a false pier which is a necessary part of the construction of a bridge is as much a part of the discretionary power of the persons exercising the franchise of building the bridge as is any other part of the work. *Jutte v. Keystone Bridge Co.* 146 Pa. 400, 23 Atl. 235.

<sup>3</sup>*Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527.

So, a bridge corporation is not liable for damages to navigation because of its bridge, constructed in a proper manner, when the legislature located it and determined that it be built on piers, but made no express provision for payment of consequential damages. *Ibid.*

<sup>4</sup>*Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631.

<sup>5</sup>*Silver v. Missouri P. R. Co.* 101 Mo. 79, 13 S. W. 410.

Where an act of Congress providing for the construction of a bridge across a navigable river required that it be equipped with a draw with spans of not less than 100 feet in the clear on each side of the pivot pier of the draw, and that the piers should be parallel with the current of the river, it intended to reserve for the navigation of vessels a space of the prescribed limits, measured at right angles with the current of the stream; and a bridge constructed diagonally across the stream, with such space consisting of only 150 feet when so measured, is an unlawful structure, although such space, when measured along the chord or line of the bridge, gives a measurement of 100 feet; and its owners are liable for injuries to vessels, caused or contributed to by the unlawful structure while such vessels are attempting to pass through the draw in charge of pilots exercising usual or ordinary skill. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 79 Mo. 478.

from obstructing or impeding navigation on the stream is responsible if the river bed is changed for the worse by natural causes influenced in their operation by the piers of the bridge, as it is bound to foresee the necessary and natural effects of placing piers in the river.<sup>5</sup> To render a lessee of a bridge which is not parallel with the current, as required by the act under which it was constructed, liable for injuries caused thereby, he must have notice of that fact, although the request to abate the nuisance is not necessary to render him liable. But direct evidence of knowledge of the nuisance is not necessary. It may be inferred from facts and circumstances sufficient to impart it.<sup>6</sup> Although a railroad company, in the construction of a bridge authorized by an act of Congress, makes the spans between the piers of less width than the act provides, yet this violation of law does not give one whose boat collided with the bridge a right of action against the company, unless it caused or contributed to the injury complained of.<sup>7</sup>

**331. The construction and operation of draws.**— Since without legislative authority there is no right to obstruct the navigation of a river by the erection of a bridge, if the bridge is placed so near the water that vessels cannot pass under it, it must be provided with openings or draws so as to permit the passage of vessels.<sup>1</sup> And if the statute requires a draw and specifies its openings, the provisions of the statute must be complied with or the bridge may be declared to be a nuisance, and treated as such.<sup>2</sup> If the draw was not placed in the bridge

A bridge erected under a statute requiring the piers at the draw to be placed parallel to the current of the river is not an unlawful structure, nor is the company erecting it chargeable with negligence because a subsequent excavation made by the government in the bed of the river changed the direction of the current at the draw, if the passage remains reasonably safe. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. 755.

<sup>1</sup>*Dugan v. Bridge Co.* 27 Pa. 303, 67 Am. Dec. 464.

<sup>2</sup>*Silner v. Missouri P. R. Co.* 101 Mo. 79, 13 S. W. 410.

<sup>3</sup>*Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 1 McCrary, 281, 2 Fed. 285.

<sup>4</sup>A statute authorizing the construction of a bridge over navigable waters is not void as an interference with the rights of navigation because of failure to specify the size of the draw to be made therein, since it will not be held to have intended the construction of a bridge

without a sufficient draw for the convenience of navigation. *Baltimore v. Stoll*, 52 Md. 435.

The specification in the act of Congress granting the right to a railroad company to construct its road between certain points of certain streams in the bridges over which draws shall be maintained does not, by implication, dispense with draws required in bridges over other streams by the states through which the road passes. *New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 28 L. ed. 619, 5 Sup. Ct. Rep. 19.

Gross carelessness or wilful negligence cannot be imputed to the officer erecting a public bridge if he fails to put in a draw, when the navigability of the stream is questionable. In this case it was only navigable for six months in a year and then evidently attempted by only one person. *Staton v. Wimberly*, 122 N. C. 107, 29 S. E. 63.

<sup>5</sup>*State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5.

A railroad company which constructs



at the time of its construction, it may be required to be placed there as a condition to the continued maintenance of the bridge.<sup>3</sup> If the statute specifies the width of the span, it is sufficient if that width exists at the level of the bridge.<sup>4</sup> And the distance may be calculated at right angles to the piers, and need not be calculated at right angles across the current.<sup>5</sup> But if the bridge is constructed diagonally across the stream, the distance allowed between piers must be calculated at right angles across the channel, and not from pier to pier.<sup>6</sup>

over a navigable river a bridge with a draw narrower than that required by the act of Congress authorizing the structure, and which failed to submit the plans to, or secure the approval of them by, the Secretary of War, as provided by the act, is chargeable with the maintenance of an illegal structure, and liable for damages sustained by a boat owner whose vessels are detained by an accumulation of driftwood against the piers of the bridge. *Tezakana & Ft. S. R. Co. v. Parsons*, 20 C. C. A. 481, 40 U. S. App. 13, 74 Fed. 408.

\*On assuming control of a navigable river, Congress may, without payment of compensation, require a bridge company to construct a draw, where the state legislature, in granting the company its franchise, reserved the right to require such alteration in the event of a certain contingency which has happened. *United States v. Molne*, 82 Fed. 592.

Notice given by the Secretary of War to county commissioners to provide with a draw a state bridge determined by him to be an obstruction to navigation does not give a reasonable time to do so, when the commissioners are without funds, and cannot levy taxes for that purpose within the time specified, and the state legislature has refused to appropriate the requisite amount. *United States v. Rider*, 50 Fed. 406.

\*A bridge constructed under an act requiring draws not less than 130 feet in width in the clear, and providing that the location and construction of the bridge and draws shall be approved by a competent board of engineers, will not be held to be an unlawful obstruction, where the draw space, while 130 feet wide in the clear between the abutments down to the level of low water, was of less width below that point because of the outward sloping of the riprap foundation of the piers, when such construction was at the time approved by the board of engineers, and confirmed by the court as within the requirements of the

act. *Gildersleeve v. New York, N. H. & H. R. Co.* 82 Fed. 763.

In Massachusetts, the owner of a vessel delayed by the fact that the draw in a bridge maintained by a municipal corporation under statutory obligation as part of a highway is not of the width required by statute has no right of action against the municipality unless expressly given by statute. *Fremok v. Boston*, 129 Mass. 592, 37 Am. Rep. 393. This is put upon the ground that no private action can be maintained against a city for the neglect to perform a public duty from the performance of which it receives no benefit or advantage.

But the Federal court held that a city owning a bridge, which it is required to keep in good repair, is liable to one whose vessel is injured because of failure to maintain a draw of the requisite width. *Boston v. Crowley*, 38 Fed. 202.

It has been held that the duty of maintaining and operating a drawbridge constituting part of a public highway across a navigable river is a public governmental duty, relieving the town operating it from liability to a person injured while crossing it for negligence in operating the draw. *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397.

\**St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. 755.

When a railroad company has power by statute to build a viaduct across navigable water, located at a point convenient for navigation, with a pivot draw thereon with two openings, each 75 feet in width at right angles to the channel, in the absence of any allegation of bad faith or want of care in selecting the location, and of the width of the draw openings, an action does not lie for alleged mislocation, or for placing the draw other than at right angles to the channel. *Stephens & C. Transp. Co. v. Central R. Co.* 34 N. J. L. 280.

\**Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 1 McCrary, 281, 2 Fed. 285; *Assante v. Charleston Bridge Co.* 41 Fed. 365.

The required space must be left in the main channel of the stream.<sup>7</sup> The fact that the statute specifies the minimum space will not prevent the court from declaring a bridge constructed with that space to be an illegal obstruction to the navigation if it is in fact so.<sup>8</sup> Mere diminution of space required by statute to be left for the passage of vessels, in the construction of a bridge by private individuals, does not of itself require a removal of the bridge if sufficient space still exists for the purpose for which it is required.<sup>9</sup> The maintenance of a bridge, even with an adequate draw, is likely to cause some delay in the operation of vessels upon the water, but if the maintenance of the bridge is authorized by the legislature, and the draws are operated with due care, there is no liability for the increased delay.<sup>10</sup> But the bridge owner cannot delay boats longer than is necessary without being liable for the injury thereby inflicted.<sup>11</sup> The draw must be so operated as to permit the passage of vessels.<sup>12</sup> This requires the bridge owner to exercise due care to open the draw upon receiving notice of a desire on the part of a vessel-owner to pass through it.<sup>13</sup> An act requiring a bridge proprietor

<sup>7</sup>*Columbus Ins. Co. v. Peoria Bridge Northern P. R. Co.* 64 Wis. 64, 24 N. W. 494.  
<sup>8</sup>*Asso. 6 McLean*, 70, Fed. Cas. No. 3,046.

<sup>9</sup>*Hatch v. Wallamet Iron Bridge Co.*  
<sup>7</sup> *Sawyer*, 127, 6 Fed. 326.

<sup>10</sup>*Thompson v. People*, 23 Wend. 537.

<sup>11</sup>*Works v. Junction R. Co.* 5 McLean,  
 25, Fed. Cas. No. 18,046.

The power of a city to build bridges across a navigable river within its limits being expressly granted by its charter, the power to regulate them by prescribing the time and manner of vessels passing through them is a necessary incident to the power to erect them; and an ordinance for that purpose, being a proper and reasonable exercise of that power, is valid. *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295.

<sup>12</sup>*Gates v. Northern P. R. Co.* 64 Wis. 64, 24 N. W. 494; *Piscataqua Nav. Co. v. New York, N. H. & H. R. Co.* 89 Fed. 362; *Minturn v. Lisle*, 4 Cal. 181.

A railroad company maintaining a drawbridge across a stream is liable for damages arising from the consequent loss to the navigators thereof by reason of the additional cost in getting out logs at a low and unfavorable stage of water, due to the delay caused by the failure of the railroad company to open the draw, where such unfavorable condition arises from the usual variation of the water with the change of season, such as is to be anticipated. *Gates v.*

A county is not liable in damages for the delay of vessels detained by failure due to a broken casting, to open a swing bridge maintained by it, where the bridge tender had reported that the bridge was operated with difficulty, and the breakage was due to the defective work of the repairers sent to repair it. *Pettit v. Camden County*, 34 C. C. A. 159, 63 U. S. App. 286, 91 Fed. 998.

<sup>13</sup>*Lockwood v. Charleston Bridge Co.*  
 60 S. C. 492, 38 S. E. 112, 629.

<sup>14</sup>*Ecorse Twp. Bd. v. Wayne County*,  
 75 Mich. 264, 42 N. W. 831.

The Chicago river is a public navigable highway, and it is the duty of the city, upon the approach of a propeller with sound of whistle or notice of her intended passage, to use all proper and reasonable efforts to open the bridges in view of the state of the weather and the existing circumstances. *Scott v. Chicago*, 1 Biss. 510, Fed. Cas. No. 12,526.

It is an unreasonable and unjustifiable obstruction of a tug and tow to refuse to open the draw of a bridge when they are coming up with the tide not over 1,500 or 2,000 feet away, in order to give a preference to a freight train 2 miles away. *Pennsylvania R. Co. v. Central R. Co.* 59 Fed. 190.

to erect and keep in good repair a sufficient draw for the passage of boats, by implication requires him to provide the means for raising it, and to raise it when boats are passing.<sup>14</sup> A bridge company is responsible for injuries sustained by a vessel because of the negligent failure of the bridge tender to open the draw for the passage of the boat, if he had been notified of the time the vessel would pass, although he was absent at the time.<sup>15</sup> The law forbidding the doing of certain kinds of labor on Sunday does not excuse a bridge company from opening the draw on that day for the passage of a steamboat engaged in the transportation of passengers and freight.<sup>16</sup> And a failure to open the draw constitutes an unlawful obstruction of navigation.<sup>17</sup> In order to avoid injury signals must be adopted to warn those on board the vessel when they cannot proceed in safety.<sup>18</sup> A requirement in a statute giving permission to bridge a navigable river that the draw shall be raised for any vessel that shall be passing up or down, will include lighters with movable masts if they cannot conveniently pass without the raising of the draw.<sup>19</sup> A municipal corporation which undertakes to manage a draw will be liable for injuries inflicted by its negligence in so doing.<sup>20</sup> A county

<sup>14</sup>*Davis v. Jenkins*, 50 N. C. (5 Jones L.) 290.

Where it is the duty of a bridge corporation to provide its bridge "with a draw of sufficient width for vessels to pass through," and to keep the whole bridge in good and safe repair, the corporation will be liable for failure to provide suitable ropes for working the draw, and for failure to open the said draw for the passage of vessels. *Patterson v. East Bridge*, 40 Me. 404.

<sup>15</sup>*Boland v. Combination Bridge Co.* 94 Fed. 888.

<sup>16</sup>*Boland v. Combination Bridge Co.* 94 Fed. 888.

<sup>17</sup>In *Minturn v. Lisle*, 4 Cal. 181, which was an action to recover damages for the obstruction of navigation, it was contended that the closing of a draw in the bridge did not amount to an absolute obstruction of navigation, because of the possibility of passing the bridge through the slough, but the court said that this defense, if proved, would go in mitigation of damages, but would not relieve defendant from liability.

But a railroad company, failing to open its bridge for the passage of a boat, is not guilty of detaining the boat within the meaning of the statute forbidding detention of boats, where the mast of the boat was so constructed that

it could have been lowered, and the boat have passed under the bridge. *West Lancashire R. Co. v. Iddon*, 49 L. T. N. S. 600.

<sup>18</sup>*Pennsylvania R. Co. v. Central R. Co.* 59 Fed. 190.

The owner of a drawbridge is liable for damages sustained by a barge in tow which collided with the bridge, where the tender, after discovery that the draw was obstructed, unreasonably delayed to signal such fact, in consequence of which the collision occurred. *Hartley v. American Steel-Barge Co.* 47 C. C. A. 229, 108 Fed. 97.

<sup>19</sup>*Hood v. Dighton Bridge*, 3 Mass. 263.

<sup>20</sup>*Greenwood v. Westport*, 62 Conn. 575, 53 Fed. 824, 63 Conn. 587, 60 Fed. 560; *Van Etten v. Westport*, 60 Fed. 579.

A town owning a bridge over a navigable stream, a condition of the right to maintain which is that a draw shall be maintained therein and operated when required for navigation, and a village in which such bridge is situated, whose duty it is to repair bridges within its limits, are jointly and severally liable for the death of a person navigating a stream, due to the obstruction of the navigation thereof by failure of the officers and agents of both such town and village, who had charge, control, and

cannot be sued for injuries sustained by the detention of a steamer on a river by reason of the defective construction of a bridge, in the absence of any statutory provision subjecting counties to actions for detaining steamers or craft of any kind upon the water.<sup>21</sup> Where, by statute, the keeper of a railroad drawbridge is forbidden to open the draw for the passage of vessels within fifteen minutes of the time a train is due, the corporation will not be liable for injuries to a vessel which becomes caught under the bridge and is sunk by the rising tide because of refusal to open the bridge to release her, when it does not appear that the request to open the bridge was made at a time when it could have been complied with under the statute.<sup>22</sup>

**332. Repairs.**—The owner of a bridge must keep it in such a state of repair that it will not cause obstruction to the stream because of its defective condition.<sup>1</sup> He may make use of such structures as are necessary for effecting the repairs, and will not be liable for delays caused by such structures, in case he proceeds with due haste, and does not delay navigation unnecessarily. He cannot escape liability, however, if he makes use of a structure or a method of doing the work which necessarily obstructs navigation, when he could have made the repairs and permitted the navigation to continue at the same time.<sup>2</sup> A corporation maintaining a drawbridge over navigable waters, and exempted from liability for obstructing navigation for the time required to make necessary repairs, has no right to compare benefits and injuries, and keep open or close the draw as it may decide public interest and convenience will be best promoted during that time.<sup>3</sup>

management thereof, to operate the draw. *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871.

But the court, in *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397, in deciding that the operation of a drawbridge constituted a governmental duty, relieving the town from liability for negligence, stated that such determination was not in conflict with *Greenwood v. Westport*, 62 Conn. 575, 53 Fed. 824, and 63 Conn. 587, 60 Fed. 560, as that decision rested upon the somewhat peculiar and exceptional state of facts in that case, and upon principles of maritime law.

<sup>21</sup>*White Star Line S. B. Co. v. Gordon County*, 81 Ga. 47, 7 S. E. 231.

<sup>22</sup>*Jennings v. Fitchburg R. Co.* 146 Mass. 621, 16 N. E. 408.

<sup>1</sup>*Etheridge v. Philadelphia*, 18 Phila. 539; *Ripley v. Essex & H. Counties*, 40 N. J. L. 45.

<sup>2</sup>*Lister v. Newark Pl. Road Co.* 36 N. J. Eq. 477; *Kansas City, M. & B. R. Co.*

*v. J. T. Wiggul & Son* (Miss.) 61 L. R. A. 578, 33 So. 965; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. 566.

A railroad company authorized to maintain a bridge so as not unreasonably to obstruct navigation is not liable to a shipper compelled to pay increased freight by rail during a temporary obstruction of navigation due to necessary repairs on the bridge, where the railroad company provided for the transfer of freight at the bridge without charge to shippers. *Rhca v. Newport News & M. Valley R. Co.* 50 Fed. 16.

A corporation maintaining a bridge over navigable waters is subject to a general law exempting such corporations from liability for obstructing or stopping navigation while making necessary repairs. *Lister v. Newark Pl. Road Co.* 36 N. J. Eq. 477.

<sup>3</sup>*Lister v. Newark Pl. Road Co.* 36 N. J. Eq. 477.

The language of the statute may be such as to render the bridge owner liable for injuries caused by the making of repairs.<sup>4</sup> And if the statute provides for the making of repairs between certain dates, they cannot be made at other times.<sup>5</sup> Obstructing navigation for a period of forty-seven days, by the erection of false work so as to enable a railroad company to repair a drawbridge across a navigable stream, is not unreasonable, so as to render such company liable therefor, where its charter authorizes the construction of bridges "so as not unreasonably to obstruct the navigation of any navigable stream," and the work was done after due notice had been given navigators, at a season of the year when it was likely to interfere with navigation the least, and was done as expeditiously as possible; and although by the expenditure of more money, and the stopping of traffic over the road during the interval, such bridge, by an unusual method, might have been built without the use of such false structure, yet such course was not required under its charter.<sup>6</sup>

**333. Liability for injury to vessel.**—In case a bridge is erected without authority, in such a way as to interfere with the navigation of the stream, or does not conform to the authority granted, the owner is liable for the injuries inflicted by it on passing vessels. The liability also extends to injuries caused by negligent construction of the bridge,<sup>1</sup> or by its being handled negligently so as to cause injury.<sup>2</sup> The right of action may be defeated by contributory negligence. But

<sup>1</sup>*Jones v. Baltimore & P. R. Co.* 4 Mackey, 100.

A bridge company is responsible for the loss of boats by collision with a pier while attempting to avoid going through a span generally used when the main channel was obstructed, after discovery of the obstruction of the span by false work in violation of a condition attached to permission given by the government to reconstruct the bridge, that while the channel span was temporarily obstructed no false work should be permitted in other spans of the bridge, where the officers of the boats were free from negligence in not sooner noticing the obstruction of the span by such false work. *Jutte v. Cincinnati & N. Bridge Co.* 21 Ohio C. C. 422.

<sup>2</sup>*Delaware, L. & W. R. Co. v. Mehrhof Bros. Brick Mfg. Co.* 53 N. J. L. 205, 23 Atl. 170.

<sup>3</sup>*Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co.* 88 Ky. 1, 2 L. R. A. 540. 2 Inters. Com. Rep. 515. 10 S. W. 6.

<sup>4</sup>*Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271, 53 Am. Rep. 581.

In an action by the owner of a steamboat against the owners of a railroad bridge over a navigable stream to recover for injuries to the boat resulting from a collision with the bridge, on the ground that such bridge, as constructed, materially obstructed the navigation of that stream, it was proper, to prove the existence of such obstruction, to ask experienced river steamboat men whether the same was a material obstruction to the navigation thereof. *Illinois River Packet Co. v. Peoria Bridge Asso.* 38 Ill. 468.

<sup>5</sup>*Etheridge v. Philadelphia*, 26 Fed. 43; *Central R. Co. v. Pennsylvania R. Co.* 8 C. C. A. 86, 20 U. S. App. 136, 59 Fed. 192.

A verdict in favor of the owner of a schooner will not be disturbed where the facts appear that in a severe storm the schooner signaled the guard of a drawbridge to open the same, and, in consequence of his omission so to do, was lost; the signal being given by blowing a conch shell until within 100 yards of the bridge, and there was evidence that such a signal had been often used at this

officers of boats approaching a bridge are not bound to anticipate the negligent and unlawful obstruction by the bridge company of a side span generally used for the passage of boats in case of the obstruction of the main channel, and required by government permission for the reconstruction of the bridge not to be obstructed while the main span is obstructed, but have the right to rely upon its being free and open for the passage of boats, and are not guilty of contributory negligence in failing to discover the obstruction of the side span on turning a bend above the bridge, which will defeat recovery for damages from collision with a pier, although it could have been seen far enough up the stream to have placed the boats in a position to run the partly obstructed main span, where, after discovering the obstructed condition of the side span, they made every effort to turn their boats into the main channel.<sup>3</sup> Liability for injuries inflicted on passing vessels may be imposed by statute.<sup>4</sup> Damages for injuries to the vessel may include the value of her time during the making of repairs.<sup>5</sup> And damages for detention of the vessel may include her reasonable worth during the time of detention, including wages of the crew.<sup>6</sup> In an action against a bridge company by the owner of boats, for damages occasioned by the detention of his boats by an obstruction created by the bridge, also for the loss of a boat for the same cause, it is a

bridge, and could be heard from 1½ to 5 miles, according to the state of the atmosphere. *Louisville & N. R. Co. v. McDonald*, 79 Miss. 641, 31 So. 417, 418.

Although an ordinance of a city declares it to be unlawful for a vessel to attempt to approach nearer than the end of the bridge protection while the bridge may be opening or closing, nevertheless, when the same ordinance designates the means by which those in charge of vessels plying the river shall know whether the bridge is or is not open for passage, the city cannot escape liability for injury to a schooner which was caused by a tug accepting the invitation of the bridge tender upon the signal that the way was clear, and that the draw of the bridge was open for passage, when it in fact had not been fully opened and locked, owing to the gross negligence of the bridge tender. *Chicago v. Mullen*, 116 Fed. 292.

*Jutte v. Cincinnati & N. Bridge Co.* 21 Ohio C. C. 422.

The officers of a steamer injured in passing through a defective draw are not shown to be guilty of contributory negligence by the mere fact that they attempted to pass through with knowl-

edge of its defective condition. *Crouch v. Charleston & S. R. Co.* 21 S. C. 495.

The failure of a steamer injured in passing through a defective draw to conform to a statute requiring vessels passing under a bridge to drop anchor and drag through does not render its officers guilty of contributory negligence, even if the statute applied to drawbridges, where to have done so would not have lessened the danger to the vessel. *Ibid.*

*Mattlage v. Hudson County*, 63 N. J. L. 583, 44 Atl. 756.

The statute (Rev. 86, § 9) charging upon townships and freeholders the duty of building and repairing bridges, and charging them with liability for injuries to person and property due to neglect of such duty, does not limit such liability to persons or property passing along the bridge, but there is included a liability for injuries to vessels passing through drawbridges. *Ripley v. Essex & Hudson Counties*, 40 N. J. L. 45.

*Missouri River Packet Co. v. Hannibal & St. J. R. Co.* 79 Mo. 478.

*Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43.

question for the jury to determine whether such bridges created such an obstruction to navigation as to render the company liable for the damages occasioned thereby.<sup>7</sup>

**334. Liability for injury to bridge.**—If the bridge has been constructed under legislative authority, it is a lawful structure, and the owner has a right to be free from injury caused by negligent management of a vessel upon the water. The owner of a boat will be liable for injuries caused by attempting to pass a bridge while it is in an unmanageable condition, and the fact that the master was not on board at the time is immaterial.<sup>1</sup> The requirements of statute and ordinance intended for the protection of bridges must be complied with.<sup>2</sup> A particular manner of using the bridge will not be enjoined at the suit of the bridge owner, in the absence of anything to show that the safety of the bridge is endangered, or that the bridge was properly constructed.<sup>3</sup>

**335. Power to license toll bridge.**—The power to construct and maintain a bridge being one of the prerogative powers of the state, it may either exercise the power itself, impose it upon one of its subdivisions, or confer the right upon a private individual or corporation, and authorize the latter to reimburse itself for its outlay by exacting a toll for the use of the bridge.<sup>1</sup> And if, to induce the individual to undertake the exercise, it is necessary to make a grant

<sup>7</sup>*Terre-Haute Drawbridge Co. v. Halliday*, 4 Ind. 36.

<sup>1</sup>*Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255.

<sup>2</sup>Under the act of Feb. 27, 1833, for protection of bridges (Rev. 88, § 17), an approaching vessel is required to lower sail only to such an extent as will diminish headway enough to permit the moving of the drawbridge and a gentle passage through it. *Ripley v. Essex & Hudson Counties*, 40 N. J. L. 45.

A municipal corporation has the power to pass an ordinance imposing a penalty upon the owners of boats for wilfully or negligently injuring bridges within the corporate limits while navigating the waters of a canal, under the authority conferred by its charter to establish, erect, and keep in repair bridges within the corporate limits, to impose fines for forfeitures, and penalties for the breach of any ordinance, to adopt all ordinances necessary and proper for the regulation of the police of the city, and to carry into execution the powers conferred by its charter. And a previous act of legislature conferring the power on the canal board of trustees to estab-

lish such rules, by-laws, and regulations in relation to transportation on the canal, the conduct of boats and rafts, and the general police of the canal, as are usual or might be found necessary, in so far as the same is repugnant to the power conferred upon the municipal authorities by its charter, must give way to and be controlled by it. *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255.

<sup>3</sup>*Texas & P. R. Co. v. Interstate Transp. Co.* 42 Fed. 261.

An injunction to restrain a transportation company from taking its tow boats through the draw of a railroad bridge at high water with more than two boats in tow will not be granted, where the railroad is authorized to erect the bridge provided it does not unnecessarily impair the public convenience, and the bridge is not shown to have been constructed so as not to unnecessarily impair the usefulness of the stream. *Texas & P. R. Co. v. Interstate Trust Co.* 45 Fed. 5.

<sup>1</sup>*Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453; *Plecker v. Rhodes*, 30 Gratt. 795.

exclusive: for a certain term, it may be made so.<sup>3</sup> Justice Story, in the great case of *Charles River Bridge v. Warren Bridge*,<sup>4</sup> said that the grant of a right to erect a bridge over a navigable stream is not a monopoly, because it is a grant of a right which is not of common right, and therefore is no restriction of any common right, which is necessary to a monopoly. So that the legislature is not prevented from granting an exclusive bridge franchise by the fact that it is prohibited from granting monopolies.<sup>5</sup> The power to confer the franchise rests in the legislature, and not in municipal corporations, unless it has been conferred upon them by the legislature.<sup>6</sup> If the stream constitutes a boundary between two states or nations, authority to construct a toll bridge over the stream can be conferred only by the concurrent legislation of both states.<sup>6</sup> It is not for a court, but for the legislature, to judge how necessary a grant of exclusive power to build a toll bridge within cer-

<sup>3</sup>*Piscataqua Bridge v. New Hampshire* Bridge, 7 N. H. 35.

<sup>4</sup>11 Pet. 420, 9 L. ed. 773.

<sup>5</sup>An ordinance passed by a city owning a ferry franchise, whereby the erection of a bridge is permitted, in consideration of a sum to be paid annually to the city, which agreed not to exercise its ferry franchise for a period of twenty-five years, does not create a monopoly within the prohibition of the Texas Constitution. *Loredo v. International Bridge & T. Co.* 14 C. C. A. 1, 30 U. S. App. 110, 66 Fed. 246.

But it has been held that the grant of a right to construct and maintain a toll bridge over a river, coupled with the exclusive privilege within a prescribed distance, is in the nature of a monopoly and must be strictly construed. *McLeod v. Burroughs*, 9 Ga. 213.

And that an exclusive toll-bridge franchise cannot be granted by the legislature of a state whose Constitution asserts "that perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." *Washington Toll Bridge Co. v. Beaufort*, 51 N. C. 491.

<sup>6</sup>*Williams v. Davidson*, 43 Tex. 1.

In that case it is held that, although it may be contended that a city, under its general powers to provide for the necessities and conveniences of its inhabitants, may build a bridge across a stream, to be paid for by taxation, it has no power to erect a toll bridge to be paid for by unequal burdens in the

way of tolls,—especially where it appears that the erection of such a bridge would involve the city in a private partnership with individuals for the purpose of profit.

A city has no power, by virtue of its charter authorizing it "to improve sidewalks, alleys, and streets," and to make by-laws necessary and proper for the "good regulation, safety, and health of the city," to erect, or aid in the erection of, a toll bridge by a loan of corporate credit. *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423.

<sup>7</sup>*Delaware Bridge Co. v. Trenton City Bridge Co.* 13 N. J. Eq. 46.

So, toll cannot be collected by a corporation under a charter in one state for the use of that portion of its bridge which is in another state or country. *Middle Bridge Corp. v. Marks*, 26 Me. 326.

And where, at the time of the renewal of a charter authorizing the operation of a toll bridge extending across a river forming a boundary between the grantor state and another, a municipality situated in the other state was collecting toll at its end under the claim of having purchased the bridge, the grantee in the renewal charter is denied the right to collect toll of persons going from his end of the bridge, who are also compelled to pay at the other end, by a provision in his charter declaring that the collecting of toll from such persons should not subject them to double toll. *South Carolina R. Co. v. Jones*, 4 Rich. Eq. 469.



tain limits may be, and the extent and exclusiveness of the powers granted.<sup>7</sup>

**336. Toll cannot be exacted without franchise.**— From the fact that a bridge stands in the path of public travel, the right to exact compensation from the persons who desire to make use of the bridge is a parcel of the prerogative power of the state, and cannot be exercised without a franchise from the sovereign.<sup>1</sup> A town has no implied authority to construct a toll bridge for pecuniary profit.<sup>2</sup> And where the habit of the legislature has been to make a grant of the franchise, a right to maintain the bridge and take toll cannot be shown by proof of user.<sup>3</sup>

**337. Toll bridge franchise strictly construed.**— Like all grants of prerogative powers, a grant of a toll bridge franchise will pass only what is expressed in the grant. The grant will be construed strictly in favor of the state, but, at the same time, not so strictly as to defeat the object of the grant.<sup>1</sup> A ferry license will not authorize the construction of a toll bridge.<sup>2</sup> The grant will not be cut down by the fact that the preamble is narrower than the grant.<sup>3</sup> In Pennsylvania it is held that the distance for which the franchise is to be exclusive is to be measured in a straight line.<sup>4</sup> While in Georgia it is held that such distance is to be measured along the course of the stream.<sup>5</sup> The board of supervisors, in consenting to the construction by a bridge company of a toll bridge over a navigable river, may limit their consent to a period of twenty years, although the corporation is organized under the statute for the period of thirty years.<sup>6</sup>

**338. Location.**— If the franchise of the bridge is to be exclusive, it is necessary to fix its location so definitely that applicants for other franchises may know what are the bounds of the first licensee. An act of the legislature conferring upon a corporation the exclusive right to build and maintain a toll bridge anywhere between two

<sup>7</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>1</sup>*Whelchel v. State*, 76 Ga. 644; *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *Nashville Bridge Co. v. Shelby*, 10 Yerg. 280; *Truckee & T. Turnp. Road Co. v. Campbell*, 44 Cal. 89; *Smith v. Harkins*, 38 N. C. (3 Ired Eq.) 613, 44 Am. Dec. 83; *Dyer v. Tuscaloosa Bridge Co.* 2 Part. (Ala.) 296, 27 Am. Dec. 655.

<sup>2</sup>*Mullarky v. Cedar Falls*, 19 Iowa, 21. Nor can it, after constructing a bridge, convey it to trustees with power to take toll and pay the expense of construction, and with power to sell the franchise in case the tolls prove insuffi-

cient to retire the bonds issued to pay the construction expenses. *Ibid.*

<sup>3</sup>*Williams v. Davidson*, 43 Tex. 1.

<sup>4</sup>*Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527; *McLeod v. Savannah, A. & G. R. Co.* 25 Ga. 445.

<sup>5</sup>*Payne v. Partridge* 1 Salk. 12; *Contra, Oliff v. Shreveport*, 52 La. Ann. 1203, 27 So. 688.

<sup>6</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>7</sup>*Catawba Toll-Bridge Co. v. Flowers*, 110 N. C. 381, 14 S. E. 918.

<sup>8</sup>*McLeod v. Burroughs*, 9 Ga. 213.

<sup>9</sup>*Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585.

specified points will not be construed as giving it only the exclusive right of selecting a site for its bridge within certain limits, and that, having made its selection, and erected the bridge, the place of erection shall become thenceforth the only exclusive right the corporation can claim under its charter, since such a construction would defeat the only object in granting it exclusive rights.<sup>1</sup> If the location is not fixed with sufficient particularity in the charter, any defect will be aided by the actual location of the bridge as against any claim by the grantee to change the location.<sup>2</sup> The charter description will be sufficient if it is such that the places intended can be easily determined.<sup>3</sup> The bridge must be located at the place specified in the charter.<sup>4</sup> But a slight departure from the place specified for the accommodation of a stranger will not defeat the rights of the bridge company.<sup>5</sup> Where a charter has been granted to build a toll bridge along a river where it flows through a narrow gap, there is a substantial compliance with the contract of the grantee to build the bridge, and he does not forfeit his charter where, after building six different wooden bridges over 300 feet in length, which were carried away by the current in time of high water, he builds a strong and sufficient turnpike of earth and rock for most of the distance, and bridges the balance of about 10 feet, it appearing that the turnpike and bridge answer the public want and necessity as well as if the bridge extended the whole of the way.<sup>6</sup> A company authorized to build a toll bridge across a river at a place

<sup>1</sup>*Piscataqua Bridge v. New Hampshire* Bridge, 7 N. H. 35.

Authority to build a bridge over a lake or its outlet, and to rebuild it in case it is destroyed, will not give the right, upon the destruction of the bridge, to rebuild it on its old location, and also to build a new one over the outlet, so as to extend the restrictive limits against other bridges. When the grantee located and built its bridge its situation and rights were precisely the same as though the place had been specified in the charter. *Cayuga Bridge Co. v. Magee*, 6 Wend. 85.

<sup>2</sup>*Cayuga Bridge Co. v. Magee*, 6 Wend. 85.

<sup>3</sup>The description in a charter to erect a bridge "at the town of Clinton" is sufficiently answered where a public ferry had existed at the point in question for more than thirty years, generally known and spoken of as the ferry on the Guelph river, at the town of Clinton (although not within the limits of the town), where the travel to and from

Clinton was accustomed to cross the river. *Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 28 Am. Rep. 289.

<sup>4</sup>But where the charter of a corporation authorized to build a bridge "at or near the village of Old Town" is extended on condition that it rebuild its bridge which has been destroyed "at the Old Town Falls," which has a different location, it will not comply with the conditions by rebuilding the bridge on its old foundation nearly  $\frac{1}{2}$  mile from the Falls. *State v. Old Town Bridge Corp.* 85 Me. 17, 26 Atl. 947.

<sup>5</sup>*Re New York, W. S. & R. R. Co.* 28 Hun, 472.

But the owner of a toll bridge, rebuilding it at a point 200 yards from where he was authorized by his charter, cannot maintain an action against the proprietor of another bridge for rebuilding his bridge at a different point than that authorized by his charter. *Henderson v. Maybin*, 3 Rich. L. 153.

<sup>6</sup>*Chandler v. State*, 38 Ark. 107.

where it is divided by an island may abandon the right to maintain a toll bridge across the lesser channel, and retain its privilege as to the main channel.<sup>7</sup>

**339. Rights and duties beyond the building of the bridge.**—The purpose of the granting of the toll bridge franchise is the public accommodation, and if that requires the conferring of additional rights or the imposition of additional duties upon the corporation besides the mere building and maintaining of the bridge, they may be granted or imposed. Where the grant of the right provided that the grantee build locks in order to avoid injuring navigation, and authorized the grantee to receive toll for the use of the locks, and subsequently the period for building the bridge was extended by the legislature, such extension applied to the erection of the locks as an indispensable adjunct to the bridge.<sup>1</sup> After the bridge is erected the state cannot require changes in it unless the power to make them was reserved in the charter.<sup>2</sup> But the bridge is for the accommodation of the public, and the owner must maintain the bridge in such condition that the public will be accommodated. Therefore, if a portion of the bank of a river over which is erected a toll bridge is washed away so as to widen the stream, the owner of the bridge must, in the absence of any limitation, extend the bridge to the new bank.<sup>3</sup> An act of the legislature requiring a bridge company to open a draw in its bridge for the passage of vessels on reasonable notice, and providing a penalty for failure so to do, does not violate or impair the charter of such company, which provided that the bridge should have a draw at some convenient place in the channel, and that the company should "keep the bridge in repair, subject to the inspection of the general assembly."<sup>4</sup>

**340. Compensation for injuries inflicted.**—A toll bridge company being a private corporation, its charter usually provides that it shall make compensation for all injuries inflicted by the construction of its structure. And in case it does so, it is bound to pay the damages suffered by a ferry company whose franchise is injured or destroyed by the erection of the bridge.<sup>1</sup> The grant of a charter to a corporation, authorizing it to build a toll bridge across a river, and to hold real estate, but which makes no provision for compensation for, nor authorizes the taking of, private property, will not confer upon it the

<sup>7</sup>*State v. Madison*, 50 Me. 538.

<sup>1</sup>*Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28.

<sup>2</sup>*Com. v. New Bedford Bridge*, 2 Gray, 339; *Washington Bridge Co. v. State*, 18 Conn. 53.

<sup>3</sup>*Com. v. Deerfield*, 6 Allen 449.

<sup>4</sup>*New-Haven & E. H. Toll Bridge Co. v. Bunnell*, 4 Conn. 54.

<sup>1</sup>*Buckwalter v. Black Rock Bridge Co.* 38 Pa. 281.

right to build the bridge without the consent of another bridge company, when such bridge must necessarily be constructed within limits in which the other company owns the exclusive privilege of maintaining a bridge, whether it makes compensation to the bridge company for the property taken, or not.<sup>2</sup> The grant of a charter to a company, with authority to erect a toll bridge within certain limits, which are within the limits wherein another corporation has the exclusive right to build and maintain a toll bridge, while conferring no rights as against the latter, is not void, and, as against the public, authorizes it as a corporation to build a bridge and take tolls.<sup>3</sup>

**341. Rights of riparian owner.**— Land cannot be appropriated for the approaches to the bridge without making compensation to its owner.<sup>1</sup> But the land taken for this purpose is for a public use which will authorize the exercise of the right of eminent domain.<sup>2</sup> Because of his favorable location, the riparian owner should be given the first refusal of the franchise.<sup>3</sup> The erection of a bridge in the highway imposes no additional servitude upon the abutting property, for which compensation must be made to its owner.<sup>4</sup> But if the grade of the highway is raised so as to constitute a causeway and interfere with the access of the abutting owner to and from the street, compensation should be made for the injury thereby caused.<sup>5</sup>

<sup>1</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>2</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>3</sup>*Hall v. Boyd*, 14 Ga. 1; *Thacher v. Dartmouth Bridge Co.* 18 Pick. 501.

<sup>4</sup>*Plecker v. Rhodes*, 30 Gratt. 795; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453.

A legislative grant of a toll-bridge franchise is not unconstitutional as depriving the owner of land of his property without due process of law and without just compensation, where it provides for the selection of a site therefor, for the assessment of damages by a jury, and for payment of the damages assessed before the ground can be used. *Dyer v. Tuscaloosa Bridge Co.* 2 Port. (Ala.) 296, 27 Am. Dec. 655.

<sup>5</sup>*Williams v. Davidson*, 43 Tex. 1.

But the action of the ordinary in changing and laying out a road, and constructing a bridge thereon over a river, will not be interfered with by certiorari at the instance of the owner of land over which it will pass, who purchased his land for the purpose of constructing a toll bridge thereon under the laws of the state, and who was

under contract with a bridge company to construct one swept away by a flood, where everything was done in accordance with the Code provisions, his remedy under the Code being by an assessment by a jury of the damages caused by the appropriation or injury of his property. *Hightower v. Jones*, 85 Ga. 697, 11 S. E. 872.

One who buys the right to land or abut a bridge on both sides of a river, connecting public highways, is not within the terms of a statutory provision granting authority to the owner of any land on both sides of a stream to establish a ferry or bridge and charge toll, which gives a mere privilege to the owner to pass from one side of the river to another on his own farm by a private ferry or bridge, and as incidental thereto, to pass others across the stream on the payment of toll. *Whelchel v. State*, 76 Ga. 644.

<sup>1</sup>*Hudson v. Cuero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289; *Jones v. Keith*, 37 Tex. 394, 14 Am. Rep. 382.

<sup>2</sup>Where a bridge company made its causeway of the height prescribed by its charter, and paid to the adjoining owners the damages assessed against it for

if required, to provide against accidents to frightened teams.<sup>9</sup> The owner is liable criminally for failure to make repairs, and civilly for the injuries done by his negligence.<sup>10</sup> After a municipal corporation has adopted the bridge, the duty to repair it rests upon it, and not upon the former owner.<sup>11</sup> The owner cannot escape liability if he permits use of the bridge with knowledge of defects.<sup>12</sup> The owner cannot relieve himself from liability by contract with another to make the repairs in consideration of receiving the tolls.<sup>13</sup> The owner is not liable for injuries received by one attempting to use it while it is closed for repairs, and is plainly not safe for use.<sup>14</sup> A person cannot recover for injuries received while he is making a use of the bridge which he had no right to make.<sup>15</sup> The approaches must be kept safe as well as the bridge itself.<sup>16</sup> A municipal corporation operating a toll bridge over a river, the abutment of which on one side thereof is in another state, is, as to the part of the bridge in that state, engaged in private business for gain, and is not protected by its character as a municipal corporation from liability for injuries sustained by reason of its failure to guard such abutment beyond the end of the bridge by a proper railing.<sup>17</sup>

**344. Right to take tolls.**— As stated in a preceding section,<sup>1</sup> there is no right to take tolls for use of a bridge without a grant of the right from the state; and in making the grant the legislature may impose such conditions as it chooses. It may require the posting of the rates as a condition to receiving the tolls,<sup>2</sup> or it may require the giving of a bond to maintain the bridge in a safe condition,<sup>3</sup> or it may specify

<sup>9</sup>*Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

<sup>10</sup>*State v. Madison*, 63 Me. 546.

<sup>11</sup>*State v. Norridgecock Falls Bridge*, 65 Me. 514.

<sup>12</sup>*Stokes v. Tift*, 64 Ga. 312, 37 Am. Rep. 75.

It is the duty of the proprietors of a toll bridge, who keep it open for travel and take toll while making repairs on it or renewing it, to keep it in such condition as to be reasonably safe for such use; and they are liable for personal injuries caused by the backing of a frightened team off the bridge at a point where the railing had been removed by those working thereon. *Thrasher v. Postel*, 70 Wis. 503, 48 N. W. 600.

<sup>13</sup>*Tift v. Towns*, 53 Ga. 47.

<sup>14</sup>*Tift v. Jones*, 52 Ga. 538.

<sup>15</sup> A toll-bridge company is not liable under its statutory duty to provide its bridge "with a railing on each side for the safety of passengers," if a passenger

is injured who has leaned on such railing for rest, and has fallen from the bridge because of its breaking, as any liability of the bridge company rests upon statute regulations rather than upon the common-law principles applicable to analogous contracts. *Orcutt v. Kittery Point Bridge Co.* 53 Me. 500.

<sup>16</sup>*Watson v. Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49.

<sup>17</sup>*Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 678, 94 Ga. 135, 21 S. E. 289.

<sup>1</sup>*Ante*, § 336.

<sup>2</sup>*Bonham v. Taylor*, 10 Ohio, 108.

A bridge company cannot maintain an action for the recovery of a fine alleged to have been incurred through a failure to pay toll, when it has not maintained the painted notification prescribed by the statute, informing passengers of the established rates of toll. *Middle Bridge v. Brooks*, 13 Me. 391, 39 Am. Dec. 510.

<sup>3</sup> A provision of the charter of a bridge company requiring it to give a bond for

the method in which the bridge shall be constructed, and forbid the taking of all tolls until the specifications are complied with.<sup>4</sup> A town having power to collect tolls on a bridge cannot delegate such power to an individual by a deed of trust.<sup>5</sup>

**345. Right of legislature to interfere with tolls.**— One of the objects of requiring a license for the taking of tolls on a bridge by the legislature is that they should not be made so high as to impose an unreasonable burden upon the public. Therefore, they are a matter for regulation by the legislature, and unless it has made a definite contract as to the amount which the bridge owner may receive, it has a right to fix the tolls at its pleasure so long as it does not fix them so low as to amount to a practical confiscation of the property.<sup>1</sup> The regulation of tolls or other charges for the use by the public of a bridge or a ferry is a governmental power belonging to the legislature, and when such a power is contracted away by the legislature it must be done by positive grant, or the use of such language in the charter or grant as carries with it necessarily an abandonment of legislative control.<sup>2</sup> The charter of a bridge com-

the proper construction of the bridge was a condition subsequent, and a breach may be waived. *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28.

<sup>1</sup> A bridge company is liable to indictment for failure to comply with the terms of its charter requiring it to maintain piers on each side of its draw, if it begins to take toll before the piers are erected, although it is given three years for the completion of the bridge, which have not yet elapsed. *Com. v. Newburyport Bridge*, 9 Pick. 142.

But a toll-bridge company is not precluded from enforcing the penalty for attempting to pass the bridge without payment of toll by the fact that, by deducting the width of the central framework of the bridge from its entire width, the passageway for travelers is less than the width prescribed by the company's charter. *Damariscotta Toll-Bridge v. Cotter*, 31 Me. 357.

So, one attempting to pass a toll-bridge without paying the toll cannot defeat the statutory penalty on the ground that the bridge is not of the width required by the charter of the company. *South West Bend Bridge v. Hahn*, 28 Me. 300.

<sup>2</sup> *Mullarky v. Cedar Falls*, 19 Iowa, 21.

<sup>3</sup> *Macon v. Macon & W. R. Co.* 7 Ga. 221; *Canada Southern R. Co. v. International Bridge Co.* 8 Fed. 190.

Toll rates fixed by the board of supervisors to be collected at a toll-bridge may be modified or changed at the discretion of such board, subject to the supervisory control of the legislature, their power not being exhausted by the fixing thereof under a statute providing that such rates shall be charged and collected as such board shall fix, provided that the legislature may at all times modify or change the rates as fixed by them. *Stanislaus Bridge Co. v. Horsley*, 46 Cal. 108.

A provision in the charter of a bridge company, authorizing the construction of a bridge, giving the company the right to fix the rate of toll to be charged thereon, provided it shall from time to time reduce such rates so that the net profits shall not exceed 15 per cent per annum on its investment, does not take away from the legislature its power to regulate the toll on such bridge so long as the company realizes not exceeding 15 per cent per annum; and an act passed by it reducing such toll below that charged by the company, and which will reduce the net profit much below that per cent, is not unconstitutional as impairing the obligation of any contract with such bridge company. *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042.

<sup>4</sup> *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042. This

pany granting the privilege of erecting a bridge across a river, and imposing burdens by requiring that the bridge and causeway be constructed in a particular manner; and providing that upon the performance of the requirements of its charter the company might exact toll at a specified rate, and that when such tolls should have reimbursed the company for the sums advanced by them in building the bridge, together with a specified rate of interest, the rate of tolls should become subject to the regulations of the legislature,—becomes a binding contract upon the construction by the company of the bridge and causeway in the manner prescribed; and a later provision in said charter, that the grant may receive such alterations, from time to time, by the general assembly, as experience shall evince to be necessary or expedient, did not reserve the power to change the rates of toll, but merely referred to alterations in the plans for the construction and management of the bridge.<sup>3</sup> Rates which pay a reasonable return on the amount invested are all that the owner of the bridge can demand.<sup>4</sup> A statute permitting one who has advanced money to erect a bridge to take toll until he is reimbursed his outlay will give him the right to continue to take the toll until he has received the interest accruing on the advances, although the statute is silent upon that subject.<sup>5</sup> Noncompliance with a statute granting privileges to a toll-bridge company upon a relinquishment of part of its tolls cannot be taken advantage of by a private person.<sup>6</sup>

**345a. Power to authorize competition.**—The attempted application of the doctrine that a corporate charter or legislative grant was a contract with the state which could not be impaired under the Federal Constitution to the rights of toll-bridge proprietors has occupied more of the time of the courts than any other branch of the law relating to toll bridges. The question arose at a comparatively early date in Massachusetts, in a case which has become one of the historical landmarks in the development of American jurisprudence. The case

case was reversed in *Covington & O. Bridge Co. v. Kentucky*, 154 U. S. 214, 38 L. ed. 967, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, on the ground that the bridge in question being an interstate bridge, Congress alone had control of the rates of toll.

<sup>3</sup>*Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

<sup>4</sup>Bridge tolls which suffice to pay 6 per cent on the amount invested are not unreasonable. *International Bridge Co. v. Canada Southern R. Co.* 7 Ont. App. Rep. 226. Affirming 28 Grant Ch. (U. C.) 114.

An act of legislature reducing the rates of toll on the foot and wagon ways over a bridge is not unconstitutional and void as the taking of private property for public use without just compensation, although such rates may reduce the income below the expenses of keeping such ways in repair, where the profits on the entire structure are in excess of the total expenses thereof. *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042.

<sup>5</sup>*Adams v. Beach*, 6 Hill, 271.

<sup>6</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

was that of the *Charles River Bridge v. Warren Bridge*, and it was carried to, and fully considered by, the Supreme Court of the United States. The case in its essential features was simply the ordinary one of a grant of a bridge franchise, and a subsequent attempt to erect another bridge which would practically destroy the value of the former franchise because affording the public a passage over the river without crossing the toll bridge. A bill to enjoin the maintenance of the later bridge on the grounds, *inter alia*, that the earlier one had acquired the exclusive right of a ferry which had existed at the spot in question, and that the later bridge had taken its property without compensation, was dismissed, but the judges of the Massachusetts court were so divided in opinion that the only point that the majority of the court appears to have agreed upon was that the bridge did not succeed to the ferry right. Although it was stated that a mere grant of a toll-bridge franchise confers no exclusive right, and none will be implied. Putnam, J., however, held that a grant of a toll-bridge franchise includes the right to be free from injurious competition from the erection of adjacent bridges.<sup>1</sup> The case having been taken to the Supreme Court of the United States, that court held, against the dissent of Justices McLean, Story, and Thompson, that the mere grant of a ferry or toll-bridge franchise, without making it exclusive, will not prevent the erection of a free bridge by the side of the one erected under the franchise, although the effect is to destroy the value of the latter.<sup>2</sup> That decision settled the particular question involved.<sup>3</sup> Many attempts have been made to take particular cases out of the rule of the *Charles River Bridge Case* on the ground that the charter involved granted an exclusive right. All such charters will, however, be strictly construed, and the exclusive right will not be held to have been conferred unless it is conferred expressly.<sup>4</sup> An attempt was made to es-

<sup>1</sup>*Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

<sup>2</sup>11 Pet. 420, 9 L. ed. 773.

<sup>3</sup>*Janesville Bridge Co. v. Stoughton*, 1 Pinney (Wis.) 667; *Re Hamilton Avenue*, 14 Barb. 405; *Fall v. Sutter County*, 21 Cal. 237; *Mohawk Bridge Co. v. Union & S. R. Co.* 6 Paige, 559; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547.

In *Fall v. Paine*, 23 Cal. 302, the court refused to grant an injunction to restrain the operation of a ferry boat within the prohibited distance of a previously established toll bridge, under a license issued to the ferry owners by

the board of supervisors, saying that it was a question whether the judgment and determination of the board, which had full jurisdiction by statute over all matters relating to ferries, upon the point whether a ferry was demanded by public convenience within such distance, was not final and conclusive as a matter confided to their sound discretion; but that, if not final and conclusive, the remedy of the toll-bridge owners was by writ of certiorari to review their action, and not by suit for an injunction.

<sup>4</sup>*Cayuga Bridge Co. v. Magee*, 2 Paige, 116, Affirmed 6 Wend. 85.

Where the charter of a bridge com-



tablish the doctrine that a prohibition of the erection of rival bridges meant their erection under existing laws, and that the legislature might authorize them by subsequent legislation, at its pleasure.<sup>5</sup> But the Supreme Court of the United States held that such a grant was a contract protected by the Federal Constitution.<sup>6</sup> And it is settled that if the charter in fact makes the franchise exclusive, it cannot be violated.<sup>7</sup> The contract cannot be violated by the erection of a free bridge.<sup>8</sup> An exclusive contract cannot be granted by a subdivision of the state without express authority to do so from the legislature.<sup>9</sup> A grant of an exclusive franchise will not prevent the erection of railroad bridges which were not known when the franchise was granted.<sup>10</sup> And if the freedom from competition

pany confers upon it exclusive bridge privileges for a distance of 5 miles up and down a river, and prohibits the establishment of any other bridge or any ferry within that distance, the bridge company is not thereby authorized to close and interdict fords across the river, the free and uninterrupted use of which had theretofore been enjoyed by the public. Such exclusive privileges as those conferred on the bridge company by its charter approach very nearly the extreme limit of legislative power, and such legislation is so far antagonistic to a free government that it will be strictly construed. *Compton v. Waco Bridge Co.* 62 Tex. 715.

<sup>5</sup>*Chenango Bridge Co. v. Binghamton Bridge Co.* 27 N. Y. 87; *Thompson v. New York & H. R. Co.* 3 Sandf. Ch. 625.

<sup>6</sup>*Binghamton Bridge*, 3 Wall 51. 18 L. ed. 137.

<sup>7</sup>*Proprietors of Bridges v. Hoboken Land & Impror. Co.* 13 N. J. Eq. 81; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

Where the charter of a toll-bridge company authorized it to exact tolls at a specified rate until it was reimbursed for its expenditures in building and maintaining the bridge, an amendment adopted after the destruction of the bridge by a flood, authorizing its rebuilding in accordance with revised plans, and providing that, upon its reconstruction and acceptance, a ferry operated across the river be discontinued, thereby increasing the revenue flowing to the company, became a binding contract upon the reconstruction and acceptance of the bridge, entitling the company to such increased revenues, as well as the specified rate of tolls, and was impaired by a statute reviving the ferry.

*Hartford Bridge Co. v. East Hartford*, 16 Conn. 149. Reaffirmed in same case, 17 Conn. 79.

<sup>8</sup>*Norris v. Farmers' & Teamsters' Co.* 6 Cal. 590, 65 Am. Dec. 535.

Although not erected for lucre or gain, a free bridge erected across a river by a municipality within the prohibited distance of a toll bridge is an infringement of the franchise of the latter, which enacts that during thirty years no person shall erect any bridge for lucre or gain within the distance of one league up or down the stream from the toll bridge. *Aubert-Gallion v. Roy*, 21 Can. S. C. 456.

<sup>9</sup>*Wright v. Nagle*, 48 Ga. 367.

<sup>10</sup>*McLeod v. Savannah, A. & G. R. Co.* 25 Ga. 445; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1; *Proprietors of Bridges v. Hoboken Land & Impror. Co.* 13 N. J. Eq. 81; *Lake v. Virginia & T. R. Co.* 7 Nev. 204; *Thompson v. New York & H. R. Co.* 3 Sandf. Ch. 625; *Mohawk Bridge Co. v. Utica & N. R. Co.* 6 Paige, 559; *McRae v. Wilmington & R. R. Co.* 47 N. C. (2 Jones, L.) 186; *Proprietors of Bridges v. Hoboken Land & Impror. Co.* 1 Wall. 116, 17 L. ed. 571.

The lower court says a footpath is the vital part of the bridge. All the rest is but growth and development. Adding the artificial pier and the artificial abutment is nothing toward the bridge. Neither is necessary. It is still the pathway that is the bridge. So when, in the progress of skill, they widen the pathway to make it a horseway, and then again widen it so that beasts may draw wagons over it, it is still the pathway that makes the bridge. Nor has any structure which, in its development, stops short of this pathway for man and beast, ever, in ancient or in

is limited to bridges, it will not prevent the establishment of a ferry within the limits of the bridge franchise.<sup>11</sup> Where, after the destruction of a bridge by a flood, an amended charter was granted the company, authorizing the rebuilding of the bridge in accordance with revised plans, and providing that upon its reconstruction and acceptance a ferry operated across the river be discontinued, a further provision that such amended charter might be altered, amended, or repealed, in the same manner as the act incorporating said bridge company, reserved no greater power of repeal than the original act, which only permitted amendments affecting the plans for the construction and management of the bridge; and hence such amended charter was impaired by a legislative enactment reviving the ferry.<sup>12</sup> The infringement of a toll-bridge franchise by the erection of a private bridge within 2 miles thereof by land, although more than 2 miles therefrom by water, which the public is permitted to use, is not protected by the statute which prohibits the establishment of any other bridge or ferry within 2 miles thereof by water, as the statute was intended to limit the power of the authorities in establishing toll bridges and ferries, and not to enlarge the privileges of wrongdoers.<sup>13</sup>

**346. What is unlawful competition.**—If the bridge owner did not have an exclusive franchise, he cannot complain of competition, although it destroys the value of his bridge. Such competition, even

modern times, in any country or in any language having a synonym for the term, been called a bridge. A bridge is but the ordinary road, carried across the river. *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 13 N. J. Eq. 504.

But in Connecticut it has been held that the construction and operation of a bridge across a river by a railroad company for the use of its trains infringes an exclusive franchise granted a bridge company. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 63, 41 Am. Dec. 141.

Where the charter of a railroad company authorizes it to build its road by the most direct route, and to construct a bridge across a river, a further provision that nothing therein contained shall be construed to prejudice or impair any of the rights of a bridge company holding an exclusive franchise will not be construed as prohibiting the building of a bridge at a point within the exclusive territory of the bridge company. *Enfield Toll Bridge Co. v.*

*Hartford & N. H. R. Co.* 17 Conn. 455, 44 Am. Dec. 556.

<sup>11</sup>*Parrott v. Lawrence*, 2 Dill. 332, Fed. Cas. No. 10,772.

Although a statute authorizing the reconstruction of a bridge, and directing the discontinuance of the ferry established between two towns on the river, thereby granted the bridge company an exclusive franchise to carry people across the river at that point, a subsequent declaration in said statute that said towns shall not thereafter transport passengers across the river did not prevent the legislature from subsequently granting to a company a charter to establish a ferry across the river between the two towns at a point at least 1 mile below the bridge, and accommodating a different line of travel, although diverting some traffic from the bridge. *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210.

<sup>12</sup>*Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, Reaffirmed in 17 Conn. 79.

<sup>13</sup>*Harrell v. Ellsworth*, 17 Ala. 576.

on the part of the public by the erection of a free bridge, is not a taking of property for which compensation is required.<sup>1</sup> But if the franchise is exclusive, the owner has a remedy against one who attempts to compete with him, either by bridge or by ferry.<sup>2</sup> The ownership of land on both sides of the river gives no right to construct a bridge in violation of the exclusive franchise of another.<sup>3</sup> If the statute forbids other persons from taking travelers across the river for hire, it will not prevent their being carried across free of charge.<sup>4</sup> But a bridge company with exclusive franchise to maintain a bridge within certain limits cannot complain that another bridge erected within those limits is a nuisance or wrongful as to it, in so far as it does not interfere with its right to take tolls.<sup>5</sup> In consideration of the public advantages furnished by the erection of a toll bridge, the owner of the bridge has, by virtue of his franchise, although not so specified, the exclusive right, as against private individuals, to carry persons, their carriages, wagons, live stock, and the like, going, passing, and repassing ordinarily by that way, over its bridges; and any individual is liable for diverting traffic which would go over his bridge in the ordinary course of traffic, whether with-in or without five miles thereof, or for or without compensation.<sup>6</sup> Although the legislature may lawfully grant another ferry privilege in the place of an exclusive right to exercise a ferry privilege within certain limits extinguished by it, yet the state, by destroying such a right of ferry, does not gain a right to grant, nor a corporation the right to acquire, the privilege of erecting a toll bridge within the limits of the extinguished ferry privilege, if it is also within the

<sup>1</sup>*Clarksville & R. Turnp. Co. v. Montgomery County*, 100 Tenn. 417, 58 L. R. A. 155. 45 S. W. 345.

<sup>2</sup>One authorized by statute to build and maintain a toll bridge across a river on condition that if it was carried away or destroyed it should be rebuilt within fifteen months, during which time a ferry should be established across the river and tolls charged, has a right of action against one who, during the reconstruction of the bridge and maintenance of the ferry as required, establishes a temporary bridge within the limits of plaintiff's franchise, and allows it to be used by parties crossing the river. *Galarnau v. Guilbault*, 16 Can. S. C. 579.

<sup>3</sup>*Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 63, 41 Am. Dec. 141.

<sup>4</sup>*Trent v. Cartersville Bridge Co.* 11 Leigh. 521.

But a ferry operated without a license, under the guise of an association for the benefit of its members only, of which anyone desiring to use the ferry may become a member by the payment of a specified amount entitling him to a ticket good for one month, his membership in which must be renewed by a similar payment each month, is not a private, but a public ferry, the monthly payments for the use of which constitute toll; and is an evasion of a statute prohibiting the establishment of any bridge or ferry within 1 mile of a toll bridge, to restrain which, as a violation of his rights, the owner of such bridge is entitled to an injunction. *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 590. 65 Am. Dec. 535.

<sup>5</sup>*Chenango Bridge Co. v. Paige*. 83 N. Y. 178, 38 Am. Rep. 407.

<sup>6</sup>*Catawba Toll-Bridge Co. v. Flowers*, 110 N. C. 381. 14 S. E. 918.

limits of an exclusive right to build a toll bridge already owned by another corporation.<sup>7</sup> The exclusive right of the bridge owner cannot be questioned collaterally in an action for infringing the privilege.<sup>8</sup> The bridge owner may estop himself from questioning the lawfulness of the erection of another bridge.<sup>9</sup> Injunction is a proper remedy to prevent interference with an exclusive franchise.<sup>10</sup> The owner of a bridge cannot obtain the abatement of another as a nuisance to navigation.<sup>11</sup> Those engaged in erecting a bridge across a river in violation of the rights of a former bridge company are liable for loss of tolls by the former bridge in consequence of their act, whether they act as principals or agents.<sup>12</sup> In determining the damages to which the owner of a toll bridge lawfully erected, whose land is taken for the erection of a free bridge interfering with his bridge, is entitled, the cost of erection and the income derived from the bridge may be considered by the jury, together with all other facts and circumstances calculated to enhance or diminish the value of the property taken or damaged.<sup>13</sup>

**347. Enforcement of toll.**—Within the maximum amount fixed by law, the bridge owner may exact such sum as he chooses, or he may remit toll altogether in individual cases. There is nothing to require uniform rates unless the statute so provides.<sup>1</sup> Payment of toll can-

<sup>7</sup>*Pisoataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>8</sup>*Harrell v. Ellsworth*, 17 Ala. 576.

<sup>9</sup>One having an exclusive franchise to maintain a ferry or bridge across a river within a certain district will be estopped from questioning the right of another to maintain such a bridge within the district if he permits it to be erected without objection, or acquiesces and consents in its erection. *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18.

<sup>10</sup>*Micou v. Tallassee Bridge Co.* 47 Ala. 652; *Newburg & C. Turnp. Road v. Miller*, 5 Johns. Ch. 101, 9 Am. Dec. 274; *Cory v. Yarmouth & N. R. Co.* 3 Hare, 593.

The owner of a private bridge will be enjoined from infringing the rights of the owners of a toll bridge by permitting travelers, or other persons or things which may be the subject of toll at the toll bridge to pass on his bridge, as the private bridge, contemplated by the provision of the statute regulating toll bridges and ferries and permitting the construction of private bridges is one limited to the use of the owner and his family, or those in his employ. *Harrell v. Ellsworth*, 17 Ala. 576.

<sup>11</sup>*Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44.

<sup>12</sup>*Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407.

<sup>13</sup>*Dougherty County v. Tift*, 75 Ga. 815.

<sup>1</sup>*Saunders v. Hathaway*, 25 N. C. (3 Ired. L.) 402.

Where a toll-bridge company authorizes a corporation organized for the construction of a dam, along the top of which was to be a free road, to use a portion of the bridge as a part of the dam and road, it will lose its right to take tolls from those who come upon the bridge by that route. *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 296, 11 Am. Dec. 170.

The purchaser of a toll bridge, whose deed covenants that he shall not charge toll for any persons carrying country produce of the value of \$5 to the city to sell, and that he will in every respect carry out the act granting the bridge franchise, which contains a provision that the same rates of toll may be charged as are charged at a designated bridge, the charter of which exempts from toll persons bringing across the bridge specified classes of country pro-

not be evaded by crossing the river on the ice.<sup>2</sup> But there is no right of action against persons who open roads upon the ice to enable travelers to avoid payment of toll.<sup>3</sup> The rights of the toll-bridge owner cannot be impaired by the collection of toll from persons approaching the bridge along a public road.<sup>4</sup> A municipal corporation may be required to pay for the right to lay pipes to convey water across the bridge, if they act with knowledge that compensation will be exacted from them.<sup>5</sup> The tolls may be collected by an action of assumpsit.<sup>6</sup> And after the person has passed the bridge, force cannot be used to compel him to pay the toll.<sup>7</sup> The toll must be collected in the manner and at the place designated by the statute.<sup>8</sup>

**348. Protection of bridge from injury.**— A toll bridge being property, the owner has a right of action against one who negligently interferes with or injures it. One who attempts to float logs down a stream is liable for injuries to a bridge by negligently permitting them to carry it away.<sup>1</sup> A bridge company having an exclusive franchise to take tolls within certain limits cannot recover damages for the destruction of its bridge by the washing down stream of another bridge erected higher up the stream in violation of its rights but without negligence, since the mere erection of the bridge is not a violation of the rights of the owner of the lower bridge.<sup>2</sup> Although a statute

duce, will be enjoined from charging toll for the passage of persons carrying to market such exempt produce in any quantity whatever, or any other country produce of the value of \$5 or more. *Adams v. Ft. Gaines*, 80 Ga. 85, 5 S. E. 241.

<sup>2</sup>*Cayuga Bridge Co. v. Stout*, 7 Cow. 33, Overruling *Sprague v. Birdsall*, 2 Cow. 419.

In Arkansas it is held that a person is not liable where he avoids a toll bridge and the payment of tolls by crossing the river at another place near the bridge, nor where he induces others to do likewise, although he is prompted to do so by an ungracious dislike to the owners of the bridge. *Wright v. Morris*, 43 Ark. 193.

<sup>3</sup>*Union Bridge Co. v. Spaulding*, 63 N. H. 208.

<sup>4</sup>Injunction will lie to restrain the collection of tolls by the lessee of a toll-gate established by order of a commissioner's court of Alabama across a street which is the approach to a toll bridge established over a boundary river by a municipal corporation of Georgia under legislative authority, where the municipality had purchased

from the owners of the land through which the street ran, and on which the abutment of the bridge on the Alabama side of the river rested, the privilege granted them, or their assigns, by the legislature of Alabama, to take tolls there on payment of one half the cost of the toll-bridge, and forbidding the establishment of any other bridge or ferry within 2 miles thereof. *Columbus v. Rodgers*, 10 Ala. 37.

<sup>5</sup>*Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. 41.

<sup>6</sup>*Central Bridge Corp. v. Abbott*, 4 Cush. 473.

<sup>7</sup>*Bonham v. Taylor*, 10 Ohio. 108.

<sup>8</sup>A person cannot be stopped by force from crossing a toll bridge for nonpayment of toll, where the place provided for by the statute for the payment of this toll is on the farther end of the bridge. *State v. Dearborn*, 15 Me. 402.

<sup>1</sup>*Seacall's Falls Bridge v. Fisk*, 23 N. H. 171.

See also *ante*, §§ 34 *et seq.*

<sup>2</sup>*Chenango Bridge Co. v. Paige*, 83 N. Y. 178. 38 Am. Rep. 407. Reversing 8 Hun, 292, and *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

required vessels passing through a draw in a bridge to warp through, and not to sail through, the owner of a vessel sailing through, and in so doing injuring the draw, is relieved from liability to the bridge company for such injury by the fact that the company by long usage had permitted vessels to sail through.<sup>3</sup>

**349. Transfer and termination of franchise.**—A toll-bridge franchise is subject to forfeiture, abandonment, and resumption by the state, as well as to termination by expiration of the charter. Attorney General Garland was of opinion that a bridge franchise in grantee, his successors, or assigns confers no right to sell it, since the franchise is, in effect, a personal trust.<sup>1</sup> But the legislature may permit the franchise to be transferred.<sup>2</sup> The bridge and franchise may be taken for public use under the right of eminent domain.<sup>3</sup> Therefore, where a corporation has the exclusive privilege to build and maintain a toll bridge anywhere between two specified points, it is competent for the legislature to charter a second company with authority to build another bridge within the exclusive limits of the first company, without its consent, if the charter of the second company makes proper provision for compensation to the first company.<sup>4</sup> But the bridge franchise is property for which compensation must be made when it is taken or destroyed for public use.<sup>5</sup> The damages to be paid must be measured by the value of the bridge to the owner, and not to the public.<sup>6</sup> If the charter is not a contract, it may be repealed, and the rights of the bridge owner will then cease.<sup>7</sup> And the exclusive right may be surrendered by accepting another charter, or additional privileges.<sup>8</sup>

<sup>1</sup>*Toll Bridge Co. v. Belsworth*, 30 Conn. 380.

<sup>2</sup>18 Ops. Atty. Gen. 512.

<sup>3</sup>The want of general power on the part of towns to construct bridges across navigable streams, if such want of power exists, does not relieve a town from its liability on a contract to purchase a toll bridge of a bridge company, where the charter of the company authorized it to construct the bridge, and empowered the town to purchase it. *Naugatuck Bridge Co. v. Westport*, 39 Conn. 337.

<sup>4</sup>*West River Bridge Co. v. Dix*, 6 How. 545, 12 L. ed. 550; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 41 Am. Dec. 141, 17 Conn. 455, 44 Am. Dec. 556; *Milnor v. New Jersey R. & Transp. Co.* 3 Wall. 782, Appx., 16 L. ed. 799, Appx., 6 Am. L. Reg. 6, Fed. Cas. No. 9,620; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

Under a charter conferring upon a

railroad company all powers, privileges, and immunities necessary to carry into effect the purposes and objects of its incorporation, it has power, in the exercise of its right of eminent domain to take or impair bridge franchises. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 455, 44 Am. Dec. 556.

<sup>5</sup>*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

<sup>6</sup>*Blaine County v. Breuster*, 32 Neb. 264, 49 N. W. 183.

<sup>7</sup>*Mifflin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L. R. A. 431, 22 Atl. 896.

<sup>8</sup>*Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44.

<sup>9</sup>The prescriptive right enjoyed by a municipality to take tolls for the use of a bridge belonging to it is lost by its obtaining an act of Parliament which, after reciting its right to take the customary tolls, enacts that such tolls shall be vested in the municipality, and em-

An abandonment of the bridge and attempt to substitute a ferry for it will terminate the franchise.<sup>9</sup> Mere failure to perform the duties imposed by statute will not of itself forfeit the bridge franchise.<sup>10</sup> Where the charter of a bridge company, which provides for its termination and the reversion of the bridge property to the state at the expiration of a certain time, is extended on condition that a new bridge be built at a certain place, failure to comply with the condition will leave in force the provision as to reverter; and at the expiration of the time limited by the old charter all rights of the company will cease.<sup>11</sup> Upon the termination of the franchise the bridge becomes the property of the public, and its owner loses his right to control or remove it.<sup>12</sup>

**350. Fords.**—A ford is a place in a stream where a highway touches the banks, which is shallow enough for travelers on horseback or in vehicles to cross through the water in safety. The right to use a ford may be acquired in the same manner as the right to use a highway in general. It is, in fact, a part of the highway, and the same rules with regard to its use apply to each indiscriminately. The right to use the ford may be acquired by prescription;<sup>1</sup> and, after it has once been acquired, the rights of the public to use it cannot be interfered with by raising the water in the stream over it.<sup>2</sup> If the bed of the river belongs to the state, individuals cannot complain if it permits the raising of the water over the ford so as to render it impassable.<sup>3</sup> Even though the legislature grants the right to flood the ford, it does

powers it to receive them; and the prescriptive rights of the company, by acting under such statutory authority, become merged in it, as such statutory authority is a greater authority than a prescriptive title, and, upon the subsequent repeal of the statute, the prescriptive right is not revived. *New Windsor v. Taylor*, [1899] A. C. 44.

<sup>9</sup>*Townsend v. Blewett*, 5 How. (Miss.) 503.

<sup>10</sup>Thus, neglect to raise a draw in a bridge will not forfeit the franchise where the statute giving authority to maintain the bridge provides only a penalty for such failure. *Com. v. Breed*, 4 Pick. 460.

So, it is no ground for the forfeiture of the charter of a toll-bridge company that it did not in all cases exact the full amount of toll allowed by its charter, but in some cases permitted a commutation of tolls which might have been charged. *Com. v. Allegheny Bridge Co.* 20 Pa. 185.

<sup>11</sup>*State v. Old Town Bridge Corp.* 85 Me. 17, 26 Atl. 947.

<sup>12</sup>*State ex rel. Green v. Lawrence Bridge Co.* 22 Kan. 438; *Central Bridge Co. v. Lowell*, 15 Gray. 106; *State ex rel. Boardman v. Lake*, 8 Nev. 276.

<sup>1</sup>*Hudson v. Guero Land & Emigration Co.* 47 Tex. 56, 26 Am. Rep. 289.

The public will be held to have secured a right to the use of a ford across a river by presumptive dedication and prescription, where it appears that the ford was used by the Indians, and has been used by settlers ever since their settlement, continuously, as a public crossing for more than thirty years, interrupted only by high water. *Compton v. Waco Bridge Co.* 62 Tex. 715.

But if the bed of the river belongs to the state no prescriptive right to the use of a ford across it can be acquired. *Austin v. Hall* (Tex. Civ. App.) 58 S. W. 479.

<sup>2</sup>*Dimmett v. Eskridge*, 6 Munf. 308.

<sup>3</sup>*Austin v. Hall* (Tex. Civ. App.) 58 S. W. 479.

not thereby abandon the public right to it, or restore the rights of the riparian owner.<sup>4</sup> The grant of the right to operate a toll bridge does not destroy the right to use the fords, unless such right is expressly relinquished.<sup>5</sup> And the right to use a ford is not abandoned by the erection of a bridge parallel with it.<sup>6</sup> The words "necessary ford," in the proviso of the statute giving the owner of land on a stream and a highway the right to connect fences with the bridge over such stream provided no necessary ford across such stream shall be permanently obstructed thereby, do not mean a convenient ford, but one that is indispensable to public use. If the bridge affords every facility for crossing the stream the ford cannot be called necessary.<sup>7</sup> A navigation company empowered to make a river navigable, and to take toll, and to alter such bridges or highways as might hinder navigation, leaving them or others as convenient in their stead, is bound to keep in repair a bridge constructed by it in place of a ford across a river which it destroyed by deepening the river.<sup>8</sup> If the ford is within the jurisdiction of a municipal corporation and part of its highway system, it is bound to take due care to maintain it in a safe condition.<sup>9</sup> But a township is not liable for losses arising from the failure of a road overseer to perform his duty to erect and maintain water marks at the fords of streams that at high water become impassable, to indicate the depth of the water at such fords, in the absence of any statute imposing liability therefor.<sup>10</sup>

**351. Sea walls.**— The force developed by the sea under the influence of a raging wind is such that it may be a serious menace to the land along its shore and the property there situated. The main-

<sup>4</sup>*Crump v. Mims*, 64 N. C. 767.

<sup>5</sup>*Wright v. Morris*, 43 Ark. 193.

Where a city has authority, under its charter, to remove nuisances and establish, alter, and abolish streets and keep them in repair, and to provide for regulating the use of a river traversing the city and the banks thereof, it has power to pass an ordinance directing the marshal to remove all obstructions from highways in the city which prevent free access to fords on the river, such obstructions consisting of fences built by a bridge company to prevent access to fords on the river and to compel the public to pass over the company's toll bridge. *Compton v. Waco Bridge Co.* 62 Tex. 715.

<sup>6</sup>*Crump v. Mims*, 64 N. C. 767.

<sup>7</sup>*Old Town v. Dooley*, 81 Ill. 255.

<sup>8</sup>*King v. Kent County*, 13 East, 220, 12 Revised Rep. 330.

<sup>9</sup>Vol. II.—WATERS, 84.

<sup>10</sup>A municipal corporation is liable for the death of a person resulting from injuries received while attempting to cross what had the appearance of being a ford across a canal at a point where a public street within the city limits crosses the canal, but which in fact was not a safe fording place, but contained dangerous holes, by reason of which, without fault on his part, the injuries were received, and which ford the deceased was induced to cross because the bridge over the canal at that point, which it was the duty of the city to maintain and keep in repair, had been negligently allowed to get out of repair so that it could not be used. *Lourey v. Delphi*, 55 Ind. 250.

<sup>11</sup>*Quincy Turp. v. Sheehan*, 48 Kan. 620, 29 Pac. 1084.



tenance of defenses against the sea has, therefore, always been a matter of common interest to all nations whose possessions are touched by it. In England one of the offices of the King was to protect his subjects against the fury of the sea.<sup>1</sup> When the natural formation of the shore is such as to prevent incursions of the sea upon the land, the public has a right to forbid the shore owner to interfere with the natural barrier, or remove it for his own benefit, so as to subject the possession of his neighbors to peril. The owner of the foreshore will not be permitted to remove shingle cast upon the shore where it acts as a natural barrier to the sea, and he may be enjoined from so doing.<sup>2</sup> In *Atty. Gen. v. Tomline*<sup>3</sup> the court held that, although there is no obligation on the part of the owner of the foreshore to construct a wall so as to keep the sea from running over his land and thence onto adjoining lands, yet, where the action of the water has cast upon the foreshore a natural wall of shingle, the owner of the foreshore cannot remove it to the injury of adjoining lands. The court placed its ruling upon the ground that, it being the duty of the Crown to protect land from the inroads of the sea, he could not tear down natural barriers which answered this purpose, and the grantee of the land from the Crown must hold it subject to that duty, and cannot be allowed to use it in such a way as to destroy the natural barrier against the sea. And such acts may be forbidden, either by statute or by municipal ordinance, if the municipal property will be endangered by the removal of the shore.<sup>4</sup> When land is so situated that it forms a natural barrier to rivers or tidal water courses, the owner cannot be justified in removing it to such an extent as to permit the waters to desert their natural channels and overflow, and perhaps inundate fields and villages, render rivers, ports, and harbors shallow, and thereby destroy the valuable rights of other proprietors above in the

<sup>1</sup> See § 170, *ante*.

<sup>2</sup> *Atty. Gen. v. Tomline*, L. R. 14 Ch. Div. 58, 49 L. J. Ch. N. S. 377, 42 L. T. N. S. 880, 28 Week. Rep. 870, 44 J. P. 617, Affirming L. R. 12 Ch. Div. 214.

<sup>3</sup> L. R. 14 Ch. Div. 58, 49 L. J. Ch. N. S. 377, 42 L. T. N. S. 880, 28 Week. Rep. 870, 44 J. P. 617, Affirming L. R. 12 Ch. Div. 214.

<sup>4</sup> *Hodges v. Perine*, 24 Hun, 516; *Claason v. Milwaukee*, 30 Wis. 316; *Com. v. Tewksbury*, 11 Met. 55.

Commissioners of sewers within whose jurisdiction was a beach which had been accumulating for centuries, and which formed a natural protection to the country from the inundations of a tidal riv-

er, may restrain, by injunction, until a hearing, a railroad company from digging up and removing any of such deposit, although the railroad company had purchased the spot in question. *Crossman v. Bristol & S. W. Union R. Co.*, 1 Hem. & M. 351, 11 Week. Rep. 987.

A statute forbidding the taking from the beach of any stones or other materials thrown up by the sea, where such taking would create an increased danger of encroachment by the sea, applies to the taking of shingle below high-water mark. *Pitte v. Kingsbridge Highway Board*, 19 Week. Rep. 884, 25 L. T. N. S. 195.

navigation of the stream and in the contiguous lands.<sup>5</sup> But, to justify public interference, it must appear that the removal of the shore would have a tendency to injure the rights of the public, for, as said in *Clason v. Milwaukee*,<sup>6</sup> if the removal of sand from the beach of a lake would not be attended with any injurious consequences whatever, or tend to destroy the natural barriers against the lake, or endanger the streets or harbor of the city or private property within its limits, an ordinance prohibiting the proprietor from removing the sand would be unreasonable and void. The riparian owner may erect an embankment to protect his land from encroachment of the water so long as he keeps it upon his land, but he cannot encroach with it upon the soil under the water if that belongs to the public.<sup>7</sup> And the rule which forbids the removal of the bank does not apply to artificial structures, unless the duty to maintain them has been imposed upon the shore owner.<sup>8</sup> One who removes a natural embankment is liable for the injuries thereby caused to other landowners.<sup>9</sup>

**352. Duty to construct and maintain artificial walls.**—It being the duty of the Crown to construct and maintain sea walls, the Crown may impose the duty upon local officials, such as the commissioners of drains and sewers, or the officers of a municipal corporation; or he may impose it upon a private individual in consideration of a grant of the land on the shore. When the duty has once been assumed, it cannot be laid aside without consent of the Crown.<sup>1</sup> And a municipal corporation which assumes such duty may be liable to indictment for failure to perform it, or may be liable to an action by a private

<sup>5</sup>*Com. v. Alger*, 7 Cush. 53.

<sup>6</sup>30 Wis. 316.

<sup>7</sup>*Rerell v. People*, 177 Ill. 468, 43 L. R. A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052.

<sup>8</sup>The legislature has no power to forbid the removal of artificial embankments which prevent the flowing of the tide upon the land of third persons protected by them. *Koch v. Delaware, L. & W. R. Co.* 53 N. J. L. 256, 21 Atl. 284.

The naked fact that a landowner has altered a bank or artificial structure on his own land, whereby the water of a creek was caused to flow onto the land of another to its injury, shows of itself no cause of action. *Koch v. Delaware, L. & W. R. Co.* 54 N. J. L. 401, 24 Atl. 442.

<sup>9</sup>*Mears v. Dole*, 135 Mass. 508.

Where a shell embankment along the seashore, which is from 20 to 50 feet wide and from 4 to 5 feet high is a complete protection to the lands and resi-

dence of an adjoining owner against the ordinary encroachments of the tide, and such owner sells to a railroad company "all the shell along the shore . . . that can be spared from the same in safety to the embankment," the company is liable where it cuts through the embankment and lets the water on his land at every rise of tide. *Gulf, C. & S. F. R. Co. v. Jones*, 63 Tex. 524.

Where the injury resulting from the removal of the shingle from the seashore would be irreparable the owner will be entitled to restrain it without first proceeding at law, although his title is purely legal and not clearly made out. *Cloues v. Bick*, 13 Beav. 347, 20 L. J. Ch. N. S. 505.

<sup>1</sup>*Henley v. Lyme Regis*, 3 Moore & P. 278. Affirmed in 3 Barn. & Ad. 77, 5 Bing. 91, which was Affirmed in House of Lords, 1 Scott C. P. 29, 2 Clark & F. 331, 1 Bing. N. C. 222, 8 Bligh N. R. 690.

individual for injuries due to its failure.<sup>2</sup> Since the duty may be imposed as a condition in a grant, it may be imposed by prescription; so that a liability to repair a sea wall, submitted to for a long period of years, will be presumed to have had a legal origin.<sup>3</sup> A person bound by prescription to keep a sea wall in repair is not relieved from repairing an injury to it by the fact that the injury was caused by an extraordinary flood or tempest, where, had the wall been in proper repair at the time of the storm, it would not have been injured by it.<sup>4</sup> But, in the absence of such special circumstances, the prescriptive duty to repair the bank will not extend to the repair of those destroyed by extraordinary storms.<sup>5</sup> The duty to repair the banks cannot be imposed upon the landowner by the acts of his tenants.<sup>6</sup> If the cost of repairing river banks is imposed by statute upon all persons benefited, the fact that landowners adjoining a river are bound by prescription to repair its banks does not justify the commissioners of sewers in taxing them for the entire cost of repairing the river banks.<sup>7</sup> A mortgagor not in actual possession, but in receipt of the rents and profits of land charged with the repair of a sea wall, is liable for failure to repair it.<sup>8</sup> The custom of the country may impose the duty upon the frontagers to keep the banks in repair, and they may be liable for their neglect in that regard;<sup>9</sup> but a frontager

<sup>2</sup>*Lyme Regis v. Henley*, 3 Barn. & Ad. Barn. & C. 477, 2 Dowl. & R. 700, 1 L. 77, 5 Bing. 91, Affirmed in House of Lords, 1 Scott C. P. 29, 2 Clark & F. v. Leigh, 10 Ad. & El. 398, 2 Perry & D. 331, 1 Bing. N. C. 222, 8 Bligh N. R. 690.

An action for nonrepair of a sea wall by which injury is done to adjoining land may be brought in the county where the wall is, although the injured land lies in another county. *Abbe de Stratford's Case*, 7 Hen. IV. p. 8, Case 10.

<sup>3</sup>*London & N. W. R. Co. v. Commissioners of Sewers*, 66 L. J. Q. B. N. S. 127, 75 L. T. N. S. 629.

The fact that one whose land fronted on a creek or arm of the sea had been accustomed to keep in repair a sea wall so as to prevent the sea from flowing onto his land, and that other frontagers had done the same thing, does not establish a prescriptive liability on the part of each frontager to maintain the wall for the protection of the adjoining landowners. *Hudson v. Tabor*, L. R. 2 Q. B. Div. 290, 46 L. J. Q. B. N. S. 463, 36 L. T. N. S. 492, 25 Week. Rep. 740, Affirming L. R. 1 Q. B. Div. 225, 34 L. T. N. S. 249, 45 L. J. Q. B. N. S. 190, 24 Week. Rep. 579.

<sup>4</sup>*King v. Commissioners of Sewers*, 1

<sup>5</sup>*Keighley's Case*, 10 Coke, 139; *Commissioners of Sewers v. Queen*, L. R. 11 App. Cas. 449, 56 L. J. M. C. N. S. 1, 55 L. T. N. S. 493, 34 Week. Rep. 721, 51 J. P. 227.

A landowner adjoining a tidal river is not bound to repair a sea wall destroyed or injured by the concurrence of a storm and high tide, which concurrence was extraordinary, although as far back as the records exist the repairs have always been made by the frontagers, and there is no evidence of repairs by the level, during which time there may have been extraordinary storms. *Commissioners of Sewers v. Queen*, L. R. 11 App. Cas. 449, 56 L. J. M. C. N. S. 1, 55 L. T. N. S. 493, 34 Week. Rep. 721, 51 J. P. 227, Affirming L. R. 14 Q. B. Div. 561.

<sup>6</sup>*Rooke's Case*, 5 Coke, 99b.

<sup>7</sup>*Rooke's Case*, 5 Coke, 99b.

<sup>8</sup>*Reg. v. Baker*, L. R. 2 Q. B. 621, 36 L. J. Q. B. N. S. 242, 15 Week. Rep. 1144.

<sup>9</sup>See § 252a, ante.

cannot be held liable for injuries caused by nonrepair of the bank if he was not in fault.<sup>10</sup> The fact that the state requires the making of repairs at certain times of the year does not prevent the local authorities from requiring them at other times if they are necessary to prevent disaster.<sup>11</sup> A statute providing a summary remedy to compel a municipal corporation to care for a levee does not extend to compelling it to construct a new embankment if one is needed.<sup>12</sup> If a frontager constructs an embankment for his own benefit, he cannot recover the cost from the board of levee commissioners, where his work does not enter into their plans.<sup>13</sup> Under the civil law, there was a right to repair and strengthen the banks of rivers so long as navigation was not impeded.<sup>14</sup> If a corporation acquires rights on the water front, it will be charged with duties which rested on its vendors.<sup>15</sup> And if it makes excavations which in fact make it a frontager, it may be charged with the duties of one.<sup>16</sup> The fact that the corporation is liable to indictment for failure to repair the bank does not deprive the public of the right to proceed by mandamus to compel it to do so.<sup>17</sup> If the embankment constructed was not of the required height, the fact that the injury was done by an extraordinary tide will not absolve the owner from liability if the damage would not have been so great had the duty been complied with.<sup>18</sup> The own-

<sup>10</sup>*Watson v. Ledoux*, 8 La. Ann. 68.

Planters who put their levees in good repair to the satisfaction of the inspector, and who keep hands employed during high water to watch them and close breaks, are not liable to adjacent owners damaged by waters which came through a crevasse, under La. Civil Code, arts. 2204, 2205, rendering one whose levee is broken by his own neglect liable for the damage caused thereby. *Le Blanc v. Pittman*, 16 La. Ann. 430.

<sup>11</sup>*Police Jury v. Hampton*, 5 Mart. N. S. 389.

<sup>12</sup>*State ex rel. New Orleans v. New Orleans & N. E. R. Co.* 42 La. Ann. 138, 7 So. 226.

<sup>13</sup>*Templeton v. Morgan*, 16 La. Ann. 438.

The rule that when one takes a benefit from the result of another's labor he is bound to pay for the same does not render a county liable for the cost of the construction of levees, where the benefit arising from the work is immediately to the adjacent property, and only incidentally to the county at large. *Boro v. Phillips County*, 4 Dill. 216, Fed. Cas. No. 1,663.

<sup>14</sup>Dig. L. 43, Title 15, § 1.

<sup>15</sup>*Savannah, F. & W. R. Co. v. Laulton*, 75 Ga. 192.

<sup>16</sup>A dock company excavating a bay in the channel of a river, and making a cut from the bay into its dock, which is some distance back from the river, and in so doing destroying the existing river wall, become frontagers on the river, and as much liable to maintain a proper river wall as other owners adjoining the river. And this liability is not satisfied by constructing a wall around a curve of the bay, leaving an opening in it for the cut leading to the dock, but such wall must be a continuous one. And, if the lock is open at the junction of the cut and bay, a proper wall must be constructed along the sides of the cut so as to keep back the water from the surrounding land, and the dock company, failing so to do, is liable for flooding adjoining lands. *Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week. Rep. 267.

<sup>17</sup>*Reg. v. Bristol Dock Co.* 2 Railway Cas. 599, 1 Gale & D. 286, 2 Q. B. 64.

<sup>18</sup>*Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co.*

er of land adjoining a river cannot be said to exercise due care in constructing his sea wall, so as to exonerate him from liability for flood to adjoining lands occurring during an extraordinary high tide, where he has constructed the sea wall of a height several inches less than that required by the commissioners of sewers, although he constructed it higher than any tide which had been experienced during the previous forty years.<sup>19</sup>

**352a. Duty of individual.**—As stated in the preceding section, the duty to construct and maintain sea walls may, by custom, prescription, express grant, or otherwise rest upon the owner of the land fronting on the shore. But, the duty to furnish protection from the sea being a public one, the individual is, in the absence of such special circumstances, under no greater obligation to maintain a levee or sea wall for the benefit of others than he is to drain for their benefit. He cannot be required to confine the waters to their bed for the benefit either of his neighbors or of navigation.<sup>1</sup> Formerly the duty was, by statute, imposed upon the frontagers to maintain levees, in Louisiana. This statute seems to have been enforced without question as to its constitutionality.<sup>2</sup> But this statute was subsequently repealed, and since its repeal there has been no authority to require the frontager to construct the levees.<sup>3</sup> Under the law as it formerly existed it was held that one who failed to make repairs upon the levee

L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week Rep. 267. The court, while it found that the defendant was bound by statute to construct a wall of greater height than the one constructed, and was, therefore, liable, held that the great height of the tide might properly be regarded as an act of God, and, in the absence of the statute, would have exonerated the defendant. In so deciding the court said that the fact that a tide of similar height had occurred a year or two previous, but had never been known to have occurred before in the history of the world, does not carry with it, or import, any probability of a recurrence so as to prevent the recurrence from being considered an act of God, as it is enough that the tide was extraordinary and such as could not reasonably have been anticipated.

<sup>19</sup>*Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week Rep. 267.

<sup>1</sup>*Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738.

In *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145, the decision of

the trial court was affirmed by a divided court to the effect that the act of 1821, providing that, for the more perfect security of the basin and harbor of Baltimore, the corporation thereof shall have the power, whenever it may deem the same necessary, to compel owners of property binding on Jones Falls, within the limits of the city, to wall up the same so far as the property shall bind on the falls, in such manner as the corporation, by ordinance, may direct, was unconstitutional because it proposed to carry out at their expense an improvement for the general benefit of the city.

<sup>2</sup>*Barataria & I. Canal Co. v. Field*, 17 La. 421; *Grant v. McDonogh*, 7 La. Ann. 447.

A law requiring landowners on the banks of the Mississippi river to make and keep up levees is not a law imposing a tax, within the meaning of the act of Congress exempting from taxation for five years land purchased of the United States. *Crowley v. Copley*, 2 La. Ann. 320.

<sup>3</sup>*Surge v. Matthews*, 24 La. Ann. 613; *Police Jury v. Tardos*, 22 La. Ann. 58.

in front of his premises was liable for the cost of them, on the ground that he was benefited to that extent for the value of the work performed by the parish, where it was absolutely necessary to preserve his land from inundation which would have exposed the frontager to suits for damages by the neighboring proprietors;<sup>4</sup> and that the right to recover the money expended might be conferred upon the parish after the work was done;<sup>5</sup> but that the landowner was compellable to repair levees only in pursuance of parish regulations, which could not be considered as in force until after promulgation.<sup>6</sup> As seen in the preceding section, the custom is quite general in England to require the owner of the bank to keep it in repair.<sup>7</sup> But this depends upon a special custom or obligation assumed by the landowner, for in *Hudson v. Tabor*<sup>8</sup> it was held that no common-law liability rests upon one whose land fronts upon a creek or arm of the sea to keep in repair a sea wall so as to prevent the sea from flowing onto his land, and thence onto adjoining lands. The riparian owner cannot be required to repair a bank constructed by the state.<sup>9</sup> A city, not being bound by its charter to keep the sea walls in repair, is not liable for failure so to do; it does not become liable by reason of its being a grantee of the Crown. The court said that it did not consider that a subject has any mode of compelling the Crown to repair a sea wall, and hence its grantee would not be liable to do so.<sup>10</sup> Under the former Louisiana law the frontager was bound to exercise his utmost endeavors to maintain the banks in a safe condition, and was liable for injuries because of his failure so to do;<sup>11</sup> but in case a breach occurred without his fault he was not obliged to repair it unaided.<sup>12</sup> Under the present law in that state the frontager is no more compelled to repair the banks than are persons in such situations in other states.<sup>13</sup> Even if the duty to repair the banks rests upon the riparian owner, the state is not deprived of its power to act in the matter.<sup>14</sup> In order to render the frontager liable to refund money ex-

<sup>4</sup>*Police Jury v. McDonogh*, 10 La. Ann. 395.

<sup>5</sup>*Police Jury v. M'Donogh*, 7 Mart. (La.) 8.

<sup>6</sup>*Bouligny v. Dormenon*, 2 Mart. N. S. 155.

<sup>7</sup>Callis, Sewers, 115.

<sup>8</sup>L. R. 2 Q. B. Div. 290, 46 L. J. Q. B. N. S. 463, 36 L. T. N. S. 492, 25 Week. Rep. 740. Affirming L. R. 1 Q. B. Div. 225, 34 L. T. N. S. 249, 45 L. J. Q. B. N. S. 190, 24 Week. Rep. 579.

<sup>9</sup>*Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738.

But when the state has, by her own authority, taken the land between high and

low water lines out of the public use, and in effect appropriated it to the use of the owner of the qualified title by erecting a bank thereon to protect his marsh lands, it is just that he bear the duty of repairing it. *Ibid*.

<sup>10</sup>*Lyme Regis v. Henley*, 3 Barn. & Ad. 89, 5 Bing. 91; *Coram v. St. John*, 12 N. B. 443.

<sup>11</sup>*Watson v. Ledoux*, 6 La. Ann. 796.

<sup>12</sup>*Lepretre v. General Council*, 8 La. Ann. 22.

<sup>13</sup>*New Orleans, Ft. J. & G. I. R. Co. v. Turcan*, 46 La. Ann. 155, 15 So. 187.

<sup>14</sup>*State v. Clinton*, 26 La. Ann. 561.  
A contractor engaged in emergency

pended by the parish it was necessary that he should be given notice to make the repairs.<sup>15</sup> A landowner liable for the cost of constructing a levee in front of his premises, and who bids for the contract of building the work, which he performs, cannot recover the amount of the bid from the parish, since, being both debtor and creditor, the claim is extinguished by confusion.<sup>16</sup>

**353. Levee as public improvement.**— In the United States, where embankments have been used most largely to protect the adjoining land from the river floods, the name of levees has been given to them rather than sea walls. This use of the terms is to be distinguished from its use to designate a public landing.<sup>1</sup> The necessity for the protection of adjacent property from such floods is such, and the necessity for concerted action of the community has been so imperative, that the fact that levees were public improvements for the construction of which the power of eminent domain and taxation might be exercised has been more frequently assumed than stated. It has been a common practice to employ the right of eminent domain to acquire a right of way for them, and the right of taxation to pay for them. Under most of the state constitutions, this was lawful only in case they were public improvements. In England the same theory has been acted on. Most of the levees or sea walls there were constructed before the question of the duty to do so reached the courts, and the decisions therefore deal with the question of repair rather than construction. But it is held that, in the absence of anything to cast the duty on someone else, the duty to maintain the sea walls is on the King.<sup>2</sup> So here, the duty to construct and maintain the levees is primarily a governmental one, to be provided for by the state.<sup>3</sup> Even an embankment to reclaim land from the bed of a river may be a public improvement.<sup>4</sup> The public character of the construction of a public levee located by the state, which has awarded to a contractor the work of constructing it, is not impaired by the fact that third persons have bound themselves to the contractor to supplement the contract price

work upon a levee ordered by the Orleans levee board is authorized to invoke the aid and assistance of policemen present in arresting a person who resists the contractor's entrance upon his property to execute the work, as an illegal invasion of his property rights. *Koerber v. New Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415.

<sup>15</sup>*Police Jury v. Hampton*, 5 Mart. N. S. 389.

<sup>16</sup>*Heresford v. Police Jury*, 4 La. Ann. 172.

<sup>1</sup> See § 145, *ante*.

<sup>2</sup>*Henley v. Lyne*, 5 Bing. 91, 3 Barn. & Ad. 77.

<sup>3</sup>*Bass v. State*, 34 La. Ann. 404; *Morrison v. Morcy*, 146 Mo. 543, 48 S. W. 629.

In *Dubose v. Levee Comrs.* 11 La. Ann. 165, the court treated the right of the public to erect the levee as controlling, and that of the landowner along the bank as subordinate.

<sup>4</sup>*Payne v. Kansas City, St. J. & C. B. R. Co.* 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

by subscriptions of money.<sup>5</sup> And an appropriation for the construction of a levee is not for a private purpose.<sup>6</sup> A levee designed to prevent the overflow of the surplus waters of the Mississippi river is a work of public improvement within the meaning of the Louisiana statute authorizing the construction of a system of levees or other public improvements to provide against floods, although it is to be owned by private persons and serve as a railroad bed; nor is it a grant of the property of the state to a private person in violation of the Constitution.<sup>7</sup> Levees and dikes to restrain the waters of a navigable river are works of internal improvement within the meaning of a constitutional provision prohibiting the state from engaging in such works; and the fact that they might incidentally avert possible peril to life is immaterial.<sup>8</sup>

**354. Location of.**—The power to construct levees being a public one, the state, in the exercise of her police powers, has the exclusive right to determine the propriety, location, and mode of building them within her borders, and, after she has so decided, and has contracted for the public enterprise, a citizen or riparian owner on whose land the levee is about to be built cannot effectually remonstrate and require that it be constructed differently; and, in case of noncompliance with his demand by the board of public officers in charge of the work, and in the event of subsequent damages sustained by him, he cannot hold the state liable, either for compensation as for property taken for public purposes, or for the injury sustained by him in consequence of the destruction of the same.<sup>1</sup> But the discretion is to be exercised for the public good, and at the same time not needlessly to destroy or injure the property of the riparian owner; and, if there is wanton injury to private property, the court will interfere.<sup>2</sup> The levee need not be located exactly on the river bank if the

<sup>5</sup>*Egan v. Hart*, 45 La. Ann. 1358, 14 So. 244.

<sup>6</sup>*State v. Clinton*, 26 La. Ann. 561.

Levees along the Mississippi in Louisiana are not local works; but, even if so considered, the general assembly has power to authorize their construction, and to provide means of payment therefor. *ibid.*

<sup>7</sup>*Louisiana, A. & M. R. Co. v. Levee Comrs.* 31 C. C. A. 121, 58 U. S. App. 281, 87 Fed. 594.

But a statute providing for the construction of levees and the appropriation of lands therefor on the petition of one or more persons owning or occupying land adjacent to the line of the pro-

posed levee, if, in the opinion of the probate judge the same will be conducive to the health, convenience, and welfare of any number of citizens of the county, or is necessary for the protection of the lands of such citizens or any of them from overflow, is unconstitutional as permitting the taking of private property for private purposes. *Smith v. Atlantic & G. W. R. Co.* 25 Ohio St. 91; *Wright v. Thomas*, 26 Ohio St. 346.

<sup>8</sup>*State ex rel. Jones v. Froehlich*, 115 Wis. 32, 58 L. R. A. 757, 91 N. W. 115.

<sup>1</sup>*Bass v. State*, 34 La. Ann. 494.

<sup>2</sup>*Dubose v. Levee Comrs.* 11 La. Ann. 165.



conditions are such as to require its being placed further back.<sup>3</sup> When the discretion of the state has been honestly exercised, private injury resulting from the location is *damnum absque injuria*.<sup>4</sup> The right of way may be obtained by purchase, or by prescription.<sup>5</sup> A riparian owner has the right to call for a jury to decide whether a change in the levee can be safely made or not; and, if it may, the authorities cannot refuse permission because the owner will not surrender a part of his property to the public, or burden it with a servitude to which other lands are not subjected.<sup>6</sup> The right to maintain the levee will not be held to have been abandoned where work on it was done whenever necessary.<sup>7</sup>

**355. Exercise of eminent domain to acquire right of way.**—The construction of a levee along the bank of a river is a public use in aid of which the power of eminent domain may be invoked;<sup>1</sup> and the title to the fee of the land may be acquired.<sup>2</sup> The fact that a private levee is already constructed on the property is immaterial.<sup>3</sup> And,

\*The police jury have the right to construct a levee at a distance of 500 yards from the bank of the river at a point of inundation where such distance is required because of the crumbling nature of the bank, although it will result in great damage to the property owner, who has a large frontage of small depth. *Zenor v. Concordia*, 7 La. Ann. 150.

\**Egan v. Hart*, 45 La. Ann. 1358. 14 So. 244.

It is the duty of lower proprietors to accommodate themselves to a change in the levees required by the public safety, as much so as if the change had been occasioned by the sudden caving of the banks of the river above. *Police Jury v. Rozman*, 11 La. Ann. 94.

The owner of property condemned for a levee cannot recover damages for failure so to place the levee as to protect his adjacent land from the waters in the river, or because the levee may prevent such water from flowing off as it otherwise would and may deepen the water in its overflow on the land between the embankment and the river, but all other damage, which is not too remote, and arises directly from the taking of part of the land for the levee purposes, is recoverable. *Richardson v. Levee Comrs.* 68 Miss. 539, 9 So. 351.

\*A state cannot obtain title by adverse possession where it obtains possession of land, builds a levee by permission of the owner, and keeps control of the same for seven years, possession by permission with no adverse or hostile

act not being sufficient to start the statute of limitations. *Driver v. St. Francis Levee Dist.* 70 Ark. 358, 68 S. W. 26.

The construction of a levee on each side of a river upon the land of one who, after its completion, dedicates the land for a public highway, which dedication is accepted by the board of county commissioners, is not work for the construction of which the board can lawfully agree to pay, in the absence of statutory authority to construct levees, or a showing that its construction is necessary to protect an existing highway or public bridge or other property or public interest of the county. *Gemmell v. Arthur*, 125 Ind. 258, 25 N. E. 283.

\**Henderson v. New Orleans*, 5 La. 416.

\**Driver v. St. Francis Levee Dist.* 70 Ark. 358, 68 S. W. 26.

\**Missouri, K. & T. R. Co. v. Cambern*. 66 Kan. 365, 71 Pac. 809; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332.

\*A statute authorizing a municipal corporation to lay out a public ground for the purpose of maintaining and protecting a sea wall along the shore or margin of a lake authorizes the taking of a fee in the land required for that purpose. *Sweet v. Buffalo*, N. Y. & P. R. Co. 79 N. Y. 293, Affirming 13 Hun, 643.

\*The existence of private levees on part of the lands over which it is necessary to construct embankments for the full reclamation of all the lands within the district will not prevent the acquirement across such lands of a right of

if necessary, the power may be exercised beyond the limits of the territorial subdivision which is seeking to exercise it.<sup>4</sup> To make the proceedings valid, however, the tribunal having jurisdiction of the proceedings must be legally constituted.<sup>5</sup> But the proceeding is not invalidated by the fact that the damages of several landowners were assessed by one jury, which returned but one verdict.<sup>6</sup>

**356. Compensation must be made for land taken.**— Land taken by the state as a foundation for a levee is within the protection of the constitutional provision that property shall not be taken for public use without compensation; and, therefore, the owner of the land is entitled to compensation before the state can acquire a right to maintain a levee upon his property.<sup>1</sup> The owner is not entitled to insist on payment before entry is made on the land if the necessity is pressing and the public faith is pledged to pay the value of the land taken.<sup>2</sup> But an act requiring all claims for damages against a board of levee commissioners to be prosecuted within three months contravenes a constitutional provision that private property shall not be taken for public use except upon due compensation first being made to the owner in a manner to be provided by law, since the right to institute proceedings cannot be lawfully substituted for the constitutional right to due compensation.<sup>3</sup> If, however, the Constitution requires that compensation be made before possession is taken, injunction will lie

way therefor, the value of which is merely increased by the existence thereof,— especially in view of the power given by § 3454 of the California Political Code to do "all other acts and things necessary or required" for the reclamation of the lands embraced in the district. *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038.

<sup>1</sup>*Shawneetown v. Baker*, 85 Ill. 563.

<sup>2</sup>The condemnation of land for levee purposes may be enjoined on the ground that one of the three commissioners appointed to assess levee damages is without right to the office, where such question is determined incidentally to the main question whether the complainant's property is being taken without due process of law. *Hurley v. Mississippi Levee Comrs.* 76 Miss. 141, 23 So. 580.

The provision of the Mississippi act of 1884, § 3, prohibiting the granting of an injunction which interferes with the action of a legally constituted board of levee commissioners, does not prevent the granting of injunctive relief to restrain the condemnation of land for levee purposes by commissioners one of

whom is without right to the office. *Ibid.*

<sup>3</sup>*Levee Comrs. v. Allen*, 60 Miss. 93.

<sup>4</sup>*Horton v. Hoyt*, 11 Iowa, 496; *Hollingsworth v. Texas*, 4 Woods, 280, 17 Fed. 109.

Land of a riparian owner occupied for the construction of levees, so that she is deprived of its possession and beneficial use, is taken or damaged within the meaning of the common-law rule, and such owner is entitled to compensation therefor. *Hollingsworth v. Texas*, 4 Woods, 280, 17 Fed. 109.

<sup>5</sup>*Penrice v. Wallis*, 37 Miss. 172; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

Ejectment will not lie against the levee board for the appropriation of land although compensation did not precede the taking, since the act of February 7, 1894, expressly declares that the remedy therein provided shall be exclusive of all other remedies. *Owens v. Levee Comrs.* 74 Miss. 269, 21 So. 12.

<sup>6</sup>*Levee Comrs. v. Dancy*, 65 Miss. 335, 3 So. 568.

to prevent the taking of possession until compensation is made.<sup>4</sup> The compensation must be in money, and not in the offset of probable benefits.<sup>5</sup> Everyone whose property will be taken or destroyed is entitled to compensation, and this rule includes a lessee if he has property which will be destroyed by the construction of the levee.<sup>6</sup> A grantee of the property is not entitled to complain where the land was taken before he acquired title.<sup>7</sup> The damages must be assessed by the tribunal designated by the statute,<sup>8</sup> and the tribunal must have the attributes of a court of law.<sup>9</sup> The owner is entitled to receive the selling cash value of the land, but not its theoretical value based on the opinion of witnesses.<sup>10</sup> In *Levee Comrs. v. Harkleroads*,<sup>11</sup> the court held that a landowner whose property is taken for levee purposes is entitled to receive as compensation the fair market value of the land actually taken considered as a part of the whole tract and the damage resulting from its intersection by the levee, as well as resulting depreciation in value of land left in such shape as to be incomplete for cultivation, together with the damages suffered by the filling of natural and artificial drains; but he is not entitled to damages arising from the fact that a part of his farm is not protected by the line of levees as located, nor to damages which may result from a

<sup>4</sup>*Penrice v. Wallis*, 37 Miss. 172; *Horton v. Hoyt*, 11 Iowa, 490.

<sup>5</sup>*Penrice v. Wallis*, 37 Miss. 172.

<sup>6</sup>*Levee Comrs. v. Johnson*, 66 Miss. 243, 6 So. 199.

That the landlord has been paid the value of the crops taken upon the construction of a levee affords the party condemning the land no protection against a proceeding by the tenant to collect such damages. *Ibid.*

A statute providing for the erection of a barrier to protect a beach upon making compensation for injury to any person having "any legal title in any part thereof" is sufficient to require compensation to one having a right of common in the beach. *Thomas v. Marshfield*, 10 Pick. 364.

<sup>7</sup>*Miller v. Mississippi Levee Comrs.* 78 Miss. 201, 28 So. 834, 877.

The grantee of one who acquires property on foreclosure sale cannot recover compensation from a levee board for lands taken by it before the foreclosure of the mortgage and for which payment was made to the mortgagor. *Ibid.*

<sup>8</sup>A proceeding to condemn land for levee purposes will be quashed where the record fails to show that the jury who assessed the damages were "freeholders

or householders" as required by the statute. *Levee Comrs. v. Allen*, 60 Miss. 93.

<sup>9</sup>*Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652.

An act authorizing the appropriation of lands for the construction of levees is unconstitutional where the jury provided therein are not authorized to hear the testimony or the arguments of the parties, do not sit in the court, and are not subject to judicial direction, either in the hearing, or in the making up of their findings or report, and hence have none of the attributes of the jury provided by the Constitution to assess compensation in money for private property taken for the use of the public. *Smith v. Atlantic & G. W. R. Co.* 25 Ohio St. 91; *Wright v. Thomas*, 26 Ohio St. 346.

<sup>10</sup>*Levee Comrs. v. Hendricks*, 77 Miss. 483, 21 So. 613.

The owner of land condemned for levee purposes cannot recover the expense of removing houses to the protected side of the levee, rendered necessary by the annual overflow expected, since the injury is consequential. *Richardson v. Levee Comrs.* 68 Miss. 539, 9 So. 351.

<sup>11</sup>62 Miss. 807.

raising of the flood line of the waters of the river by the erection of the levees. General benefits arising from the construction of the levee, and shared in common by all the lands within the district, are not to be considered in estimating the damages to be paid to a particular landowner for the property taken.<sup>12</sup> Before the issuance of a warrant for payment of the compensation can be compelled it must be shown that the levee has been built, is in process of building, or that a contract for its construction has been made.<sup>13</sup> In Louisiana it was held that the necessity for levees is such that the riparian owner holds his land subject to the servitude of the right on the part of the public to construct levees upon it without making compensation to him for the land used; that the land is not appropriated, but merely subject to the public servitude under which it is held.<sup>14</sup> It was further held that the provisions of the Federal Constitution as to due process of law and compensation do not apply to forced contributions for levee purposes.<sup>15</sup> But the owner of buildings on the line of a new levee, which are torn down by order of the authorities, is entitled to compensation therefor. The levee servitude attaches to the soil alone.<sup>16</sup> And land cannot be taken without compensation for levee purposes where the levee was not originally required to protect the owner's land from overflow, but has been rendered necessary by the closing of a bayou in order to reclaim swamp lands.<sup>17</sup> In *Levee Inspectors v. Crittenden*<sup>18</sup> it was held that, even if in the original Louisiana territory there is a servitude upon lands bordering upon the Mississippi river, which justifies the taking of land for a public levee without compensation, the state of Arkansas has never claimed or asserted it, and it cannot be enforced in the Federal court.

**357. Compensation for injuries done.**—The manner in which water attacks and overflows the land is such that the erection of barriers to prevent its overflowing one parcel of land will almost necessarily result in its flowing to a greater extent upon adjoining property. The question then arises, How far can one landowner make a use of his

<sup>12</sup>*Levee Inspectors v. Crittenden*, 36 C. C. A. 418, 94 Fed. 615.

<sup>13</sup>*Ex parte Crisc*, 16 Ark. 193.

<sup>14</sup>*Dubose v. Levee Comrs.* 11 La. Ann. 165; *Peart v. Mecker*, 45 La. Ann. 421, 12 So. 490; *Hart v. Orleans Levee Comrs.* 54 Fed. 559.

Where, by the state law, lands bordering on a river are subject to a servitude whereby such portions of them as may be necessary for the construction of levees may be used without compensa-

tion, such servitude attaches to land the title to which is derived from the United States. *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345.

<sup>15</sup>*Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873.

<sup>16</sup>*Mithoff v. Carrollton*, 12 La. Ann. 185.

<sup>17</sup>*Cash v. Whitmore*, 13 La. Ann. 401, 71 Am. Dec. 515.

<sup>18</sup>36 C. C. A. 418, 94 Fed. 613.

property the inevitable effect of which will cause injury to his neighbor? There are many difficulties in the solution of this problem, but the courts are fairly consistent in their attempts at its solution. In the first place, all efforts at the reclamation of land and its protection from overflow are in the interests of the public welfare, and are to be encouraged so far as possible while keeping the main object in view. Any rule which would prevent the construction of a levee because the effect would be to cast more water onto neighboring property would be in the direction of stagnation and the stifling of enterprise. It retards progress, and should not be adopted unless its adoption is absolutely necessary. There is no rule which can be made applicable in all cases; so that, before determining what the rights and duties are in any case, the particular circumstances of the case must be kept in mind. Beginning with land on the seashore, Lord Tenterden, in *King v. Commissioners of Sewers*,<sup>1</sup> held that the sea was a common enemy to be fought by each individual whose land bordered on it as best he could; and that, therefore, commissioners of sewers, acting bona fide and for the benefit of the level to which they were appointed in erecting certain defenses against the inroads of the sea, are not liable to the owners of adjoining lands not within the level for thereby causing the sea to flow with greater violence against such land to its injury. This must, of necessity, be so because no one is obliged to submit to the encroachment of the sea because his erection of barriers would require his neighbor also to erect them to save his property. The same rule applies to adjoining owners on a river bank. One cannot forbid the erection of embankments by his neighbor to keep the water off his land because that will necessitate their erection by himself also. But in case of rivers, a new element enters into the consideration. The manner in which the water in times of flood leaves the channel is such that the effect of the erection of a bank along one side will be to cast the water directly across the stream, not only onto the land which it formerly flooded, but onto land which it did not formerly reach. This is a direct trespass on such land, and is an act which one landowner has no right to commit. Under such circumstances, steps should be taken for a common improvement, and the individual should not be permitted to act alone to the detriment of all other landowners along the stream.<sup>2</sup> But even here there is an exception to the rule, which is stated in *Lamb v. Reclamation Dist. No. 108*,<sup>3</sup> as follows: A reclamation district is not

<sup>1</sup> 8 Barn. & C. 355; 2 Mann. & R. 468.

<sup>2</sup> 73 Cal. 125, 2 Am. St. Rep. 775, 14

<sup>3</sup> See *post*, § 530.

Pac. 625.

liable for indirect, remote, and consequential damages resulting to land on the opposite side of the river from the overflow thereof by reason of its construction, for the protection from overflow of the lands within the district, of a levee across the mouth of a slough which would otherwise have carried off part of such flood waters. In addition to the casting of water across the stream, the construction of a levee will have a tendency to interfere with drainage and hold water onto the land protected by it in such a way as to be a positive detriment to it. In states where the Constitution provides for the payment of damages for land injured as well as taken, the liability of the land to such injury may form an element of the damages to be awarded to the landowner.<sup>4</sup> And, if no provision whatever is made for damages for the land taken, the construction of a levee which will obstruct the drainage of lands will be enjoined.<sup>5</sup> The various districts having charge of the construction of levees, however, act as the agents of the state, and are not liable, in the absence of constitutional provisions, for injuries caused to private lands, unless made so by statute.<sup>6</sup> The mere fact that the construction of the embank-

<sup>4</sup>*Richardson v. Mississippi Levee Comrs.* 77 Miss. 518, 26 So. 963.

A property owner whose land is taken for levee purposes may recover the necessary expenses of draining his land on either side of the levee from an overflow or seepage of rainwater, but not for the drainage of overflow or seepage water coming from the river. *Richardson v. Levee Comrs.* 68 Miss. 539, 9 So. 351.

A city's liability, if any, for direct or consequential damages to the lands of others by the construction of levees in the exercise of its police power for the protection of life and property, under Cal. Const. art. 1, § 14, which provides that private property shall not be taken or "damaged" for public use without just compensation, being upon its obligation to compensate the damages resulting from the rightful exercise of its power, and not for a tort, a contractor who has merely constructed the work carefully and properly according to the plan is exempt from liability therefor. *De Baker v. Southern California R. Co.* 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

<sup>5</sup>*Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321.

And it is immaterial that the commissioners are acting as agents of the state. *Ibid.*

<sup>6</sup>A city not being liable for damages to the lands of others resulting from

mere errors of judgment in the adoption of plans and location of lines for the construction of levees in the exercise of its police power, one executing the work with due care and according to such plans is equally exempt from liability for any direct or consequential damages. *De Baker v. Southern California R. Co.* 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

To entitle a claimant to maintain an action in the United States court of claims for the overflow of his lands, it must appear that his claim is based on contract, express or implied, and is not merely consequential; so that, when the United States constructs a revetment along the natural channel of a stream to prevent its further erosion it is not liable on a claim based on an allegation that the natural flooding of lower lands is thereby made permanent, whereas the water would otherwise have gradually receded. *Bedford v. United States*, 36 Ct. Cl. 474.

The fact that the damages to the lands of an owner in a drainage district by reason of back water and the filling up of water courses by the construction of a district levee equaled its proportional part of the benefits accruing from the expenditure of a former assessment, does not prove that the expenditure of an additional sum to be raised by a second assessment to raise and strengthen

ments along a stream hastens the flow of the water so that it is more likely to injure the milling property on the stream gives the owner of the mill no cause of complaint.<sup>7</sup> The Mississippi Constitution excludes from the right to compensation land left outside of the levee when it is located.<sup>8</sup> In case of urgent necessity, the levee may be cut to save life and property without liability for the injury thereby inflicted on the property protected by it.<sup>9</sup> In case fruit trees destroyed by the maintenance of a levee are to be paid for, their value is to be estimated by what they are worth on the premises, and not when taken up and removed to another place.<sup>10</sup> If a municipal corporation attempts to exercise its power to construct a levee, and exercises it so negligently that water is forced onto private property to its injury, it may be held liable for the resulting damages. Thus, when a city, acting under legislative authority given for the purpose of preventing injury to highways and private lands, constructs an embankment along a stream whereby waters are confined within its channel which otherwise would flow across the country to another stream, but does not continue the embankment so far as the dictates of common skill would advise, so that in times of freshet the increased volume of water destroys private property below the end of the levee, the city will be liable.<sup>11</sup> A municipal corporation is not relieved from liability for damages to property by flood waters due to its negligent failure to construct in such manner as to protect such property a levee built under legislative authority for the express purpose of protecting it, because the statute does not contain a provision for paying damages of that kind.<sup>12</sup> But no liability attaches to a city by reason

the levee will not benefit such land over and above damages, and the record of the former assessment is not admissible in evidence for that purpose. *Lowell v. Sny Island Levee Drainage Dist.* 159 Ill. 188, 42 N. E. 600.

<sup>7</sup> No recovery can be had by the owner of a mill and dam for injury thereto in times of high water, by the careful construction above them, by county commissioners, of a wall necessary to protect from overflow a public road on the bank of the river,—especially where the erection thereof was rendered necessary by the construction of the dam. *Tyson v. Baltimore County*, 28 Md. 510.

<sup>8</sup> Under this provision no award can be made for the cost of removing buildings from between the old and new levee inside of the new levee, which must have been made shortly in order to save them from the river, since the expense is due

to their being left outside of the levee. *Duncan v. Levee Comrs.* 74 Miss. 125, 20 So. 838.

But the provision does not preclude an award for damages to land between an old levee and a new one constructed inside of the old one, from interference with drainage by the new levee. *Ibid.*

<sup>9</sup> *Newcomb v. Tisdale*, 62 Cal. 575.

<sup>10</sup> *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401.

<sup>11</sup> *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210.

In such case the cost of extending the levee may be recovered as part of the damages. *Ibid.*

<sup>12</sup> *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210.

Damages to property from flood waters are not waived by consent to the construction of and giving the right of way for a levee which was not construct-

of the overflowing of low lands by back water from a river on account of the insufficiency of levees constructed by it along a natural water course or drain tributary to the river, and used by the city for the escape, merely, of surplus water flowing into it from the natural inclination of the ground, under a statute which merely grants the power to acquire sites for levees, which may be exercised or not according to the discretion of the proper municipal authorities, in view of the public considerations by which its exercise might be affected, and which imposes no duty upon it to construct levees for the protection of low lands from such overflow.<sup>13</sup> A municipal corporation which merely assumes the construction and maintenance of a levee is not liable for failure to maintain it in such condition that it will not give way and cause injury to property.<sup>14</sup> So, the board of Mississippi levee commissioners constituting a public corporation to which the construction and repair of levees is intrusted, and for which purpose a fund is raised by special tax, cannot be held liable for damages resulting from the negligence or defective work of their employees in the construction of levees so as to subject such special fund to the payment of the claim.<sup>15</sup> The rules laid down in this and the preceding section require the public to pay for materials which are taken for the construction or repair of the levee.<sup>16</sup>

**358. Construction of levee.**—The construction of levees is no part of the duty of a municipal corporation, and it cannot engage in such

ed far enough to protect the property from the damages complained of, where the owner subsequently refused to give such right of way until the levee should be extended further to protect such property, and notified the municipal authorities that, if they did not so extend it, his property might be flooded and damaged. *Ibid.*

<sup>13</sup>*Hamilton v. Ashbrook*, 62 Ohio St. 511, 57 N. E. 239.

<sup>14</sup>*Spellman v. Caledonia* (Wis.) 94 N. W. 27; *Willson v. Boise City* (Idaho) 55 Pac. 887; *Collins v. Macon*, 69 Ga. 542; *Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448.

A city which, in the execution of a license given by owners along a natural water course or drain, constructs levees or embankments to confine water coming from the area of natural drainage and to protect its streets and neighboring lands from inundation, is not liable for the overflowing of lands by the giving way of the levees on account of back water from a river into which such drain flows, and which, in the natural state of

things, would have backed upon the premises, where the instrument granting the license was not signed by the city, no consideration passed from the signers, and the instrument contained no terms binding the city to the construction of levees of sufficient strength to exclude back water from the river, nor to maintain such levees as it might construct. *Hamilton v. Ashbrook*, 62 Ohio St. 511, 57 N. E. 239.

<sup>15</sup>*Nugent v. Mississippi Levee Comrs.* 58 Miss. 197.

<sup>16</sup>*Levee Inspectors v. Crittenden*, 36 C. C. A. 418, 94 Fed. 613; *Koerber v. New Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415.

A levee board is entitled in an emergency to enter upon private property and excavate earth needed to strengthen the levee at or near that point to prevent a threatened overflow and inundation, but it should thereafter refill the lots at least as full as before. *Koerber v. Orleans Levee Board*, 52 La. Ann. 2110, 28 So. 318.



work without authority from the legislature, unless it is necessary to render its streets or other property which it is obliged to protect safe.<sup>1</sup> To enable a local government to engage in the construction of a levee, the authority must be expressly conferred, and will not be implied from mere authority to drain.<sup>2</sup> If necessary to the protection of its property, a state may, with the consent of another state, construct a levee within the territory of the latter, and the agreement to that effect is not prohibited by the Federal Constitution.<sup>3</sup> The determination of the proper authorities that certain lands can be reclaimed by the construction of a levee, and that it is therefore desirable, is conclusive upon the courts, unless the legislation violates the Constitution.<sup>4</sup> The raising of a street to act as a levee is a new use which entitles the abutting property to additional compensation;<sup>5</sup> and, in case the levee is washed away, the duty of the municipality to repair its streets does not require it to rebuild the sea wall.<sup>6</sup> The statutory requirements as to the construction of levees must be complied with; and, if the statute requires the proceeding to be instituted by petition of the persons to be affected, the authorities cannot proceed without such petition.<sup>7</sup> The supervision of the construction of levees may

<sup>1</sup>The boards of aldermen and councilors of a city, given by its charter the general powers of municipal corporations at common law, may construct a breakwater for the defense of a street, and a contract entered into in pursuance of their directions is binding on the city at large. *Miller v. Milwaukee*, 14 Wis. 643.

<sup>2</sup>*Updike v. Wright*, 81 Ill. 49; *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; *Newport v. Batesville & B. R. Co.* 58 Ark. 271, 24 S. W. 427.

The fact that part of an act of legislature as to the power to construct levees as an independent work unconnected with any drainage system was held unconstitutional as to all those not assenting to the formation of the drainage district or to an assessment of their lands therefor does not render a levee constructed under such act one not constructed "under any law of this state" within the meaning of a subsequent act, under an amendment to the Constitution which authorizes the formation of drainage districts and the levying of assessments "to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this state," since, as to all persons consenting to the construction of the levee, the law is valid;

and furthermore, the amendment to the Constitution authorizing the keeping in repair of levees theretofore constructed must have referred to those constructed under said act, as no other law was in force authorizing the construction of levees over the lands of others. *Blake v. People*, 109 Ill. 504.

<sup>3</sup>*Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882.

A contract made by the commissioners of a levee district in one state with a railroad company to erect a levee and embankment of a certain height in another state which should serve the purpose of a levee as well as a railroad bed will be rescinded as impossible of performance, where the statutes of the latter state prohibit the building of embankments in such manner as to interrupt the natural flow of the water, and their construction is opposed by the levee authorities of such state. *Louisiana, A. & M. R. Co. v. Levee Comrs.* 31 C. C. A. 121, 58 U. S. App. 281, 87 Fed. 594.

<sup>4</sup>*Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475.

<sup>5</sup>*Shaineetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

<sup>6</sup>*Reg. v. Paul*, 2 Moody & R. 307.

<sup>7</sup>*Richman v. Muscatine County*, 70 Iowa, 627, 26 N. W. 24.

be delegated to local authorities,<sup>8</sup> and their action is conclusive as against collateral attack.<sup>9</sup> The officials authorized, in cases of emergency, to build or repair levees need not postpone action until there is an actual break in the levee, or there is absolute certainty that there will be such a break.<sup>10</sup> One who contracts to do the construction work must take the material from the river side, and not from the land side, unless he is expressly authorized so to do.<sup>11</sup> Where the work is to be paid for upon estimates of the engineer, his estimates are conclusive in the absence of fraud, mistake, or other wrong.<sup>12</sup> The washing away, before completion, of a levee will not entitle the builder to credit, for the part built, on rent due from him to the owner of land, where, by the terms of the contract of renting, he had the privilege of paying his rent either in money or in the construction and completion, within the period of the renting, of a good levee, and he failed so to complete it within the time specified, and never completed it.<sup>13</sup> One who seeks to recover from a landowner the expense of constructing a levee in front of his premises, erected under a contract with the parish authorities, must show a strict compliance with all legal formalities and requisites. But the landowner may be liable on a *quantum meruit* if it be shown that the work is necessary and useful to him.<sup>14</sup>

**359. Interference with levee.**— A levee, being for the protection of public life and property, must not be interfered with in such a way as to render it unsafe or insecure. A railroad company which, for the accommodation of its roadbed, attempts to move a levee will be liable in case its structure gives way.<sup>1</sup> But a contractor who opens through an embankment a tunnel established by the drain commissioner is not liable to a landowner in an action for consequential damages, where there is no permanent damage to the freehold which the discontinuance of the flowage would not remove.<sup>2</sup>

**360. Levee districts.**— The character of the work to be done in the construction of a levee is very similar to that to be done by a drainage district, and, in analogy to the rule governing such districts, the legislature may create special governmental agencies or districts to have charge of the improvement. The creation of a levee district by a special act of the legislature, designed to build a levee to reclaim and

<sup>8</sup>*Hunsicker v. Briscoe*, 12 La. Ann. 169.

<sup>10</sup>*Clayton v. McKinney*, 10 Heisk. 72.

<sup>9</sup>*Hanson v. Lafayette*, 18 La. 295.

<sup>11</sup>*O'Connor v. Stewart*, 19 La. Ann.

<sup>12</sup>*Koerber v. New Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415.

127.

<sup>13</sup>*Hotard v. Texas & P. R. Co.* 36 La.

<sup>14</sup>*Watson v. Marshall*, 16 La. Ann. 231.

Ann. 450.

<sup>1</sup>*Edwards v. Louisa County*, 89 Iowa, 499, 56 N. W. 656.

<sup>2</sup>*Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69.

perpetually protect a tract of land from periodical overflow of a river, whereby a considerable community, as well as the state, would be benefited, is within the legislative power, and is not a private corporation, and, therefore, does not fall within the constitutional prohibition that "no corporation shall be created . . . by special law."<sup>1</sup> Such districts are political subdivisions of the state within the meaning of a constitutional provision limiting indebtedness.<sup>2</sup> Their funds cannot be seized and appropriated by creditors for the satisfaction of debts.<sup>3</sup> The provisions of the statute as to the organization of the district must be followed. If it is to be organized by petition by the landowners, the petition must be strictly within the terms of the statute to give jurisdiction to proceed with the organization.<sup>4</sup> A statute providing that, on the petition of persons in possession of more than half the acreage of any specified portion of the county asking to be set apart and erected into a levee district, the board of supervisors "shall at once erect" such territory into a levee district is unconstitutional and void as a delegation of legislative functions to interested individuals, there being no provision for any judicial inquiry as to what lands will be benefited, nor any declaration by the legislature that specified lands will be benefited, nor any provision that such declaration shall be made before any officer or agent of the state or county; and, there being no discretion in the board to reject the petition or modify or change the boundary of the district, or otherwise exercise any judgment with reference to the expediency of fixing the limits of the assessment district where the petition fixes them, the statute practically empowering such petitioners to declare that such part of the county will be benefited by works to be erected at the expense of all the property within it, and set in motion the machinery for the enforcement of a tax and assessment against the owners of the minority of the acreage.<sup>5</sup> But, when supervision of the proceedings is committed to a judicial tribunal, its determination of the facts necessary to be

<sup>1</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>2</sup>*Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629.

In Louisiana it is held that they are state functionaries, and not corporations, within the constitutional prohibition as to loaning or pledging funds of the state. *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882.

<sup>3</sup>*Board of Directors v. Bodkin Bros.* 108 Tenn. 700, 69 S. W. 270.

<sup>4</sup>A petition signed by the majority of the freeholders owning lands along the

stream within a proposed levee district only is necessary to give the supervisors jurisdiction to organize the same under a statute requiring a petition signed by a majority of the freeholders owning lands affected by overflow from any unnavigable stream, and does not require the signature of the owners of lands injuriously affected by overflow throughout the entire course of the stream. *DeBaker v. Batckeller*, 97 Cal. 472, 32 Pac. 512.

<sup>5</sup>*Moulton v. Parks*, 64 Cal. 166, 30

found is conclusive as against collateral attack.<sup>6</sup> The district cannot be organized without notice to the persons interested and opportunity to be heard.<sup>7</sup> The power to levy an assessment cannot be delegated to officials named by the legislature where the Constitution requires them to be levied by the corporate authorities of the district.<sup>8</sup> If the provisions of the statute as to the acquisition of funds are void, the whole act fails.<sup>9</sup> The district may repair levees which it has constructed.<sup>10</sup> A levee district organized under a statute expressly dedicating all its funds to drainage and levee construction, and authorizing it to construct only such levees as are approved by the state board of engineers, to which is given the exclusive authority to locate levees, is not liable for damages in building a levee on the line located by the state engineers, since its funds cannot be appropriated to the payment of such damages.<sup>11</sup> A contract of subscription by landowners in a certain levee drainage district imperfectly protected from overflow, to be used in purchasing lands assessed for the maintenance of the levee at delinquent tax sale, and thus furnish the money to repair and maintain the levee and protect the land, is not against public policy.<sup>12</sup> The district can be sued only in the state of its organization, although the directors have an office and carry on some of its fiscal operations in another state.<sup>13</sup>

<sup>6</sup>The county court being authorized in its division of the county into levee districts to embrace in each district the lands subject to overflow from a common point of danger, the creation of a district by the court amounts to a determination that all lands within the district are liable to overflow from a point of danger common to all, and that all will be benefited by a common levee; and the district directors cannot construct a levee for a part of the district and assess them for the expense, although the landowners in the other portions of the district do not object. *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465.

<sup>7</sup>*Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562.

Failure to give personal service to every person within the limits thereof of a petition to organize a diking district under authority of law does not constitute a taking of private property without due process of law as against the owners of lands sought to be condemned for a right of way for the dike, where ample provision is made for service upon such owners whose lands are to be so taken. *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332.

<sup>8</sup>*Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130.

<sup>9</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>10</sup>The mere fact that a levee was originally constructed without the previous adoption of a plan for the protection of the district, as provided by statute, is not a sufficient reason for the granting of an injunction to restrain the repairing thereof where broken and washed away. *Hoke v. Perdue*, 62 Cal. 545.

The mere opinion of plaintiff that the effect of repairing a levee constructed for the protection of lands in the district will be to dam up the waters and increase the same in volume until it will break and overflow his land and wash away and destroy fences and trees thereon is not ground for an injunction to restrain the making of such repairs. *Ibid.*

<sup>11</sup>*Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490.

<sup>12</sup>*Stillwell v. Glasscock*, 91 Mo. 658, 4 S. W. 438.

<sup>13</sup>*Board of Directors v. Bodkin Bros.* 108 Tenn. 700, 69 S. W. 270.

**361. Bonds and warrants.**— The legislature may authorize the issuance of bonds to provide the funds to carry on the improvement; and, if they are authorized they will be valid obligations of the district when the provisions of the statute are complied with. . Where a municipal corporation is authorized by its charter to issue its bonds for the construction of a levee around the city, but the manner in which the power is to be exercised is left to the discretion of the city council, with general power to act by and through ordinances, an ordinance passed by them, submitting the question as to whether or not such bonds in a certain amount should be issued, is a lawful and proper exercise of such discretion; and bonds issued upon the strength of an affirmative vote upon such ordinance, had prior to the adoption of a new state constitution containing a clause limiting the indebtedness of cities to 5 per cent on the taxable value of the property therein, are legal although their issue increases the indebtedness of such city beyond the 5-per-cent limit, as coming within a proviso to such constitutional clause allowing the issuing of bonds, notwithstanding the creation thereby of an indebtedness exceeding the limit, where the same are issued in compliance with a vote of the people which may have been had prior to the adoption of such constitution in pursuance of any such law providing therefor.<sup>1</sup> A board of commissioners of a levee district created for the purpose of providing means to carry out the recommendations of the board of engineers as to the construction of levees within the district is vested with the power to issue bonds and impose taxation, and is liable on a contract for the construction of a levee providing for the payment thereof out of the first surplus of resources after the liquidation of the then existing indebtedness of the board, when there is money on hand untrammelled as to demands on it sufficient to pay such claim, the amount to become due in the future on bonds not being contemplated as part of the indebtedness.<sup>2</sup> That levee scrip or bonds are made payable by the levee treasurer of the county does not render the county liable to a general judgment thereon where, under the statute, the county is divided into several levee districts, each of which is to pay its own obligations for work done therein.<sup>3</sup> A court of equity will not, in the absence of fraud, declare a lien upon lands benefited by the construction of drains and levees in favor of bondholders, where the law under which the bonds were issued is unconstitutional and the assessments void, although the landowners used

<sup>1</sup>*Mason v. Shawneetown*, 77 Ill. 533.

<sup>2</sup>*Boro v. Phillips County*, 4 Dill. 216,

<sup>3</sup>*Hughes v. Caddo Levee Dist.* 108 La. Fed. Cas. No. 1, 663.  
146, 32 So. 218.

their influence to secure the passage of the law; nor will the court impose a lien upon the ground that certain lands received the benefit of the expenditure.<sup>4</sup> The levying of a tax to pay the bonds may be compelled by mandamus.<sup>5</sup> The issuance of warrants to take up invalid warrants issued by a diking district under an act which was afterwards declared unconstitutional is without consideration where no method for the payment of such invalid warrants has been provided by the legislature.<sup>6</sup>

**362. Right to levy tax for construction of levee.**— The construction of a levee is a public purpose for which the power of taxation may be exercised.<sup>1</sup> A statute providing for the taxation of land for levee purposes is not invalid as a taking of private property for public use without the consent of the owners, and without just compensation, since its object is to raise money to construct the levees, not to take the lands for public use, notwithstanding that property assessed is liable to be sold for unpaid taxes.<sup>2</sup> There is no doubt that the raising of funds by forced contributions from the persons interested is an exercise of the power of taxation. As said in *Reelfoot Lake Levee Dist. v. Dawson*,<sup>3</sup> the levy of a special assessment on lands in a levee district, to erect a levee for the special protection and benefit of the lands situate therein, is the exercise of the taxing power, and not the police power, of the legislature, and is such a tax as is contemplated in the constitutional provisions regulating and restricting the levying of general taxes, and must conform thereto. But the mere fact that the imposition is made under the taxing power does not prevent the

<sup>1</sup>*O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883.

<sup>2</sup>The failure of the county court to discharge this duty does not impose any obligation on the county to pay such obligations. *Boro v. Phillips County*, 4 Dill. 216, Fed. Cas. No. 1,663.

<sup>3</sup>*Abbott v. Gaches*, 20 Wash. 517, 56 Pac. 28.

<sup>4</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 726, 36 S. W. 1041.

To provide means for the payment of indebtedness contracted for the construction of levees it is competent for the legislature to tax the district which was the real debtor, nor is it a valid objection that the creditors could not have recovered at law. *Vasser v. George*, 47 Miss. 713.

If a sea bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any fault in such owners, the commis-

sioners of sewers may award a new one (even in a different form, if necessary), to be erected at the expense of the whole level. *King v. Commissioners of Sewers*, 8 T. R. 312.

An assessment of the cost of a break-water, piers, etc., to prevent the erosion of the land on which a city stands, upon lots in the ward in which the encroachment took place, is not a taking of private property for private or public use without compensation, within the Wisconsin Constitution, but is an exercise of the taxing power for the benefit of the whole city, although private property is thereby protected, as the public is directly interested in the preservation of its streets and grounds. *Soens v. Racine*, 10 Wis. 271.

<sup>5</sup>*Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

<sup>6</sup>97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

legislature from limiting the assessment to the district affected by the improvement. The tax may be limited to the bounds of the district affected by the improvement without violating the constitutional requirements of uniformity; and it may be levied according to benefits, and still be within such requirements. In order to avoid levying the tax by uniform rate on the entire property within the state, it is not necessary to hold that the assessment is not a tax. As said in *Alcorn v. Harner*,<sup>4</sup> an act authorizing the construction of levees will not be declared invalid for alleged inequality and injustice in the distribution and apportionment of the taxes assessed and collected under its directions, since any particular county or district benefited by the public improvement may be taxed for the whole expense in proportion to the supposed benefit received by each, and in this respect no limitation has been placed upon the taxing power vested in the legislature. But in order to uphold the assessment some courts have felt it to be necessary to declare that the assessment was not a tax.<sup>5</sup> The result of these decisions is the same as the others in upholding the tax, but they are based on principles that cannot be maintained, since to uphold the assessment it must be made under the taxing power. There is no other prerogative of government which will uphold it. But the assessment of property within a benefited district either according to area or value, or the assessment of the individual parcels of property according to the benefit conferred upon them, is sufficient to bring the assessment within the rule as to uniformity.<sup>6</sup> And the assessment may be laid upon any property which will be benefited by the improvement.<sup>7</sup> The assessment may be made upon all the property within the district, without reference to the special benefit to the particular tract.<sup>8</sup> The improvement of health or the general benefit to the district different from that realized by the state at large is sufficient to uphold the local tax.<sup>9</sup> The difference in market value which will re-

<sup>4</sup> 38 Miss. 652.

<sup>5</sup> *Boro v. Phillips County*, 4 Dill. 216, Fed. Cas. No. 1,663; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *Levee Comrs. v. Lorio Bros.* 33 La. Ann. 276; *Police Jury v. Mitchell*, 37 La. Ann. 44; *Charnook v. Fardoche & G. T. Special Levee Dist. Co.* 38 La. Ann. 323; *Richardson v. Morgan*, 16 La. Ann. 429; *Wallace v. Shelton*, 14 La. Ann. 503; *Yeatman v. Crandall*, 11 La. Ann. 220; *Brooks v. Planting & Mfg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873.

<sup>6</sup> *Hocns v. Racine*, 10 Wis. 271; *Daily v. Scope*, 47 Miss. 367.

<sup>7</sup> Oysters are benefited by the levees,

as they would be killed by the fresh water in case of crevasses, and therefore the special assessment of them for taxes to maintain the levee system is legal. *Buras Levee Dist. v. Mialegrich*, 52 La. Ann. 1292, 27 So. 790.

<sup>8</sup> *People v. Whyler*, 41 Cal. 351.

<sup>9</sup> *Lovell v. Sny Island Levee Drainage Dist.* 159 Ill. 188, 42 N. E. 600.

Where an act authorizing the construction of a levee provides that a levee tax shall be assessed upon the increased value or betterment estimated to accrue to lands from protection given against flood, the owner of lands will not be relieved of levee taxes by reason of the

sult from the construction of the levee is the valuation upon which the assessment is to be made.<sup>10</sup> A statute defining the persons and property benefited by a proposed public improvement which shall pay the contributions therefor will not be judicially declared invalid without conclusive proof that it has imposed a contribution unsupported by any benefit, or which is out of all proportion to the possible benefit; a mere difference in the benefits being insufficient.<sup>11</sup> If the act under which the assessment is levied is declared unconstitutional, the fact that the owner of land assessed has received benefits from the construction of the embankment does not estop him from setting up the unconstitutionality of the act, to prevent the issuance of new warrants to take up the invalid ones outstanding.<sup>12</sup>

**363. Upon what land may tax be laid.**—The foundation upon which an assessment upon part of the property of a state must rest is that, because the benefit of the expenditure of the tax will result to it alone, it should pay the tax, and not call upon the remainder of the state, which will receive no benefit, to contribute. Therefore, in the levying of the local tax the idea of benefit must be kept in view. Unless the statute expressly so provides, an assessment cannot be laid upon a municipal corporation for the construction or repair of a levee.<sup>1</sup> When the question of benefit arises for consideration, the district or section of the state which will reap the benefit, and, therefore, should pay for it, rather than the particular parcel of land within the district, should be kept in view. If land is located within a district which will be benefited, its owner cannot refuse to contribute towards the improvement merely because it cannot be shown that his land will be especially benefited. It may be impossible in any given case to show direct benefit to a particular parcel, and yet there may be no question that it is benefited by the improved healthfulness or prosperity of the district. A statute may, however, confine an assessment to land which can be shown to be benefited, and in such cases no assessment can be upheld unless the land is shown to have received a special

fact that his lands will not be enhanced in value to him for the purposes for which he is using or intends to use them; but the extent to which the particular use affects the market value of the land may be taken into consideration by the assessor. *Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

The mere fact that lands are shown to be wet from winter and spring rains from six to nine months in a year is not sufficient to show that such lands will not be benefited by the levee. *Memphis*

*Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

<sup>10</sup>*Carson v. St. Francis Levee Dist.* 50 Ark. 513, 27 S. W. 590; *Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

<sup>11</sup>*Minor v. Daspsit*, 43 La. Ann. 337, 9 So. 40.

<sup>12</sup>*Abbott v. Gaches*, 20 Wash. 517, 56 Pac. 28.

<sup>1</sup>*Hetty v. Boyer*, Callis, Sewers, 123.

But it was held that the tax may be laid on a town, in *Conisby v. Mauton*, Callis, Sewers, 128.



benefit.<sup>2</sup> The district upon which the assessment is laid should include all land which will in any way be benefited or affected by the improvement.<sup>3</sup> In *Chambliss v. Johnson*,<sup>4</sup> it is said it is not sufficient for those claiming that their lands are not benefited by a levee to prove that the parts that were assessed were not directly benefited by the improvements. Lands are benefited by improvements which drain swamps and which drain lands in the vicinity, and the means of access to the lands at all times is a material consideration in determining whether a given tract of land should be assessed, and the health and welfare of the public in the vicinity are proper subjects of inquiry in fixing the boundary by the improvement.<sup>5</sup> Even though the land may, in a particular case, be injured if it is properly within the district, it is not relieved from liability to the tax on that account.<sup>6</sup> A legislature cannot, though not in terms prohibited, for a local and private purpose charge riparian lands with the expense of repairing a sea wall or bank, without the investigation or determination of any public officer or tribunal, even quasi-judicial, but by the private act of another.<sup>7</sup> If the lands are included within the district by the proper officials the presumption arises that they will be so far benefited as to be the proper subjects of taxation, although this presumption may be rebutted in a proper proceeding if the legislature has provided therefor.<sup>8</sup> If the statute under which the improvement was made was unconstitutional, the landowner does not estop himself from

<sup>2</sup>*Scoby v. Levee Comrs.* 14 La. Ann. 437.

<sup>3</sup>*Rooke's Case*, 5 Coke, 100.

Where a statute incorporating a levee company for the purpose of reclaiming lands adjacent to a river authorized it to assess the expense incurred on the lands benefited, it has power to assess all such lands although the owner of the particular tract assessed is not a member of the corporation, and never assented to the exercise of such power by it. *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53.

<sup>4</sup>77 Iowa, 611, 42 N. W. 427.

<sup>5</sup>*Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49; *Carson v. St. Francis Levee Dist.* 59 Ark. 513, 27 S. W. 590; *Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

Lands within the area embraced in the levee district by statute are subject to assessment for the construction of the levee although left between the levee and the stream. *George v. Young*, 45 La. Ann. 1232, 14 So. 137.

But in Mississippi lands lying between

the levee and the river are not, under the statutes of Mississippi, within the levee district, or subject to levee taxes. *Owens v. Yazoo & M. Valley R. Co.* 74 Miss. 821, 21 So. 244.

An act providing a uniform taxation for levee purposes upon all lands lying within 10 miles of the river, and a separate uniform tax on all lands in the county subject to taxation lying 10 miles from the river, includes and renders liable to taxation property situated more than 10 miles from the river. *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

Land situated in a county in which there is no levee tax, and subsequently included by an act of the legislature within the boundaries of another county in which there is a levee tax, is subject thereto. *Holder v. Bond* (Miss.) 29 So. 769.

<sup>6</sup>*Smith v. Willis*, 78 Miss. 243, 28 So. 878.

<sup>7</sup>*Philadelphica v. Scott*, 9 Phila. 171.

<sup>8</sup>*McDermott v. Mathis*, 21 Ark. 60.

contesting the validity of the tax by permitting the work to be completed without objection.<sup>9</sup> If the Constitution requires the tax to be uniform within the district, land cannot be exempted from taxation because it is submerged.<sup>10</sup> General tax exemptions do not apply to special assessments for improvements of this character.<sup>11</sup>

**363a. Area assessments.**—When it is once settled that the assessment is to be upon the benefited district, and that the tract belonging to a particular individual is not the unit, the question of the method of apportioning the tax among the property of the district becomes comparatively unimportant so long as some method which will work approximate uniformity is chosen. The tax may be according to individual benefits or according to value, or it may be levied upon the property in proportion to its area.<sup>1</sup> But if the Constitution requires taxes to be levied according to value, it would seem to preclude the right to levy an acreage tax.<sup>2</sup> An assessment of the property in proportion to the benefit received by it might be upheld even under such a provision, on the theory that the exaction is in fact not a tax, but an enforced payment for benefits conferred. But an acreage assessment cannot be upheld on such theory. Some courts have upheld the assessment upon the ground that it was not a tax within the meaning of the constitutional provision.<sup>3</sup> But it is difficult to justify these decisions. If an assessment laid upon property within a large section of a state by the acre is not a tax, what is it? If it is not a tax, on what theory or under what power of government can it be justified? A man may be required to pay for work done for him, but the payment must be in proportion to the value of the work, and when the assessment is merely according to the quantity of land he owns, there is no relation between the value of the work done and his payment, and the exaction

<sup>9</sup>*Wright v. Thomas*, 26 Ohio St. 346.

<sup>10</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041; *Davis v. Gaines*, 48 Ark. 371, 3 S. W. 184.

Where a statute imposing a levee tax provides for the reimbursement to landowners of moneys theretofore contributed by them for levee purposes by allowing them a credit upon their future levee taxes, such statute thereby creates an exemption and is void as requiring others, subject to the tax, and who might be incidentally benefited by the contribution, to refund the money paid by the contributors for their own advantage. *Davis v. Gaines*, 48 Ark. 371, 3 S. W. 184.

<sup>11</sup>Lands donated by the general govern-

ment to the state of Louisiana, and sold by her, are not exempt from levee taxes under the congressional act of February 20, 1811, exempting lands sold by Congress from taxation for the period of five years. *Bishop v. Marks*, 15 La. Ann. 147.

<sup>1</sup>*Wallace v. Shelton*, 14 La. Ann. 503; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475; *Gillespie v. Police Jury*, 5 La. Ann. 403.

<sup>2</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>3</sup>*McGhee v. Mathis*, 21 Ark. 40; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475.

must be justified, if at all, under the taxing power. And if the Constitution requires that power to be exercised according to value, it prevents the laying of a tax according to area.

**364. Who may levy.**—The power of taxation rests in the legislature, and unless its authority is controlled by the Constitution, it has the exclusive right to say in what way the power shall be exercised. It may make the levy itself, or it may delegate the power to a local subdivision of the state. The theory that assessments for levee improvements are not an execution of the taxing power has forced the Louisiana court to hold that they are not within the power of the legislature to levy.<sup>1</sup> But such a holding is entirely indefensible. On the other hand, the Tennessee court has held that the legislature cannot delegate its taxing power to a local district unless expressly authorized to do so by the Constitution.<sup>2</sup> That doctrine is entirely at variance with the theory of our government. The power of the legislature is absolute unless it is restricted by the Constitution, and if the Constitution is silent there is nothing to prevent the legislature from delegating its power at pleasure.<sup>3</sup> But if the Constitution specifies the local boards to which the power can be delegated, it cannot be conferred upon others.<sup>4</sup> Permitting the assessment to be made by a drainage commissioner does not violate a constitutional right of trial by a jury.<sup>5</sup>

**365. Procedure.**—The legislature is the exclusive judge of the propriety of building levees, and of the district upon which the tax shall be laid, and no individual has a right to question the exercise of its

<sup>1</sup>*Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873; *Davis v. Green*, 40 La. Ann. 281, 4 So. 445.

<sup>2</sup>*Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>3</sup>*Gillespie v. Police Jury*, 5 La. Ann. 403; *Carson v. St. Francis Levee Dist.* 59 Ark. 513, 27 S. W. 590.

The legislature may authorize a meadow-bank company, being a quasi corporation, to levy assessments upon benefited property for the repair of the riparian banks thereon, it being so far of a public character as to prevent the statute from infringing on the Constitution. *Garrett v. Green*, 3 Pennyp. 370.

Arkansas act January 7, 1857, authorizing a special levee tax, and which confers on the board of inspectors certain powers, is not in conflict with that clause of the state Constitution which provides that the county court shall have jurisdiction in all matters relating

to county taxes, "and in every other case that may be necessary to the internal improvement and local concerns of the respective counties," as a levee is not an "internal improvement or local concern." Those terms, as there employed, relate to public internal improvements and local concerns for general county purposes,—which appertain to the county at large as a body politic.—and not to improvements for special local purposes, where the funds expended in making the improvement are raised by assessments imposed only on the particular property improved. *McGehee v. Mathis*, 21 Ark. 40.

<sup>4</sup>*Updike v. Wright*, 81 Ill. 49; *O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883.

*Contra, Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332.

<sup>5</sup>*Trigger v. Drainage Dist. No. 1*, 193 Ill. 230, 61 N. E. 1114.

discretion in that regard unless the legislature expressly gives him the right to do so.<sup>1</sup> A statutory provision as to what shall be done to make the improvement and the assessment therefor valid must be complied with; but in the absence of anything to show irregularity, the presumption that officials act legally will prevail, and the proceeding will be upheld.<sup>2</sup> In the absence of a constitutional requirement of uniformity, the assessment need not be made upon all who are liable in the first instance, and those who pay will have a remedy against the others who ought to contribute.<sup>3</sup> One whose property will be subject to the tax must be given notice and opportunity to be heard upon the question whether or not his land is properly within the assessment district, under constitutional provisions as to due process of law.<sup>4</sup> The inclusion of land within a district, and assessments made, are subject to correction by the court for fraud or mistake.<sup>5</sup> It has been said that, in the absence of express legislative authority for an inquiry upon the question whether the lands were properly included within the boundaries of the assessment district, there is no right to such inquiry.<sup>6</sup> The statute gave such right in the case in which that ruling was made, and the statement is a *dictum*, and it can hardly be regarded as correct. Unless the tax is to be uniform throughout the state, it must be laid upon the territory which is specially benefited, and the landowner must be given a right to be heard as to whether or not he is properly within the territory, or his property will be taken without due process of law. If the decision of the county court is made conclusive upon the question, its decision cannot be collaterally attacked by a suit in equity; but if error exists in the judgment, it

<sup>1</sup>*State v. Maginnis*, 26 La. Ann. 558; action on the case by the persons assessed.

*Munson v. Levee Comrs.* 43 La. Ann. 15, 8 So. 906; *Ellis v. Levee Comrs.* 43 La. Ann. 33, 8 So. 914.

<sup>2</sup>*Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

Where a statute provides for the collection of levee taxes on land benefited or which will be benefited by the levee, listing of the lands by the inspectors of a levee district for levee taxation raises the presumption that they are such as would be benefited by the construction of the levees. *Davis v. Gaines*, 48 Ark. 371, 3 S. W. 184.

<sup>3</sup>*Custodes v. Outwell*, Style, 179.

In *Keighley's Case*, 10 Coke, 139, the court said that if the person bound by prescription to repair the river bank fails to do so, by reason of which failure the sewer commissioners assess all whose lands are in danger, he is liable to an

<sup>4</sup>*Hutson v. Woodbridge Protection Dist, No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549; *Police Jury v. Huie*, 2 La. Ann. 887.

<sup>5</sup>*Stansell v. Levee Board*, 13 Fed. 846.

<sup>6</sup>*Chambliss v. Johnson*, 77 Iowa, 611, 42 N. W. 427.

A provision which, after stating what the board of inspectors shall hear and determine, declares that "their decision thereupon shall be final," is to be understood in that sense which makes it final so far only as to conclude further investigation by the ministerial officers acting in the assessment and collection of the tax, and not to debar a party feeling himself aggrieved in the assessment of his land, from the privilege of prosecuting or defending his rights in the courts. *Metlicee v. Mathis*, 21 Ark. 40.

must be corrected by some legal proceeding.<sup>7</sup> The Federal court is not bound by state decisions rendered after the controversy arises.<sup>8</sup> The assessment may be laid for any improvement which will benefit the property assessed.<sup>9</sup> To defeat an assessment the taxpayer must show that it was illegal.<sup>10</sup> The cost of a private levee which was rendered useless by the improvement cannot be set off against the assessment.<sup>11</sup> Nor can loss from injuries caused by defective construction of the work.<sup>12</sup> A county will not lose its right to compel contribution from persons benefited by the erection of a levee along a river by the delay of the commissioners appointed by the legislature to do the work, where the county is required in the first instance to pay for the improvement, and assess the amount upon the persons benefited.<sup>13</sup> The legislature has the power to provide for a reassessment of land within a diking district for the cost of the improvements, where the original assessment was void because the act under which it was levied, and the district organized, was, after the construction of the work, declared unconstitutional; but no such reassessment can be made without legislative authority.<sup>14</sup> A tax imposed upon commodities landed on the beach or otherwise brought into the town, for the purpose of creating a fund for repairing or building works to protect the coast against the encroachment of the sea, is a charitable use, making the commissioners charged with the enforcement of the statute amenable to the jurisdiction of the court of equity; and they may be compelled to render an account in such court of the money levied and expended,

<sup>7</sup>*Clayton v. Lafargue*, 23 Ark. 137.

<sup>8</sup>A decision of the state court construing a statute is not binding upon the Federal court when rendered subsequent to the time the rights involved in the pending suit accrued, and during the pendency of the action, but in exercising its independent judgment thereon it should give effect to the previously established rules of construction, and endeavor to avoid conflict with well considered decisions of the state courts. These considerations have peculiar weight when the question determined relates to the power of levee commissioners to make special assessments on private property. *O'Brien v. Wheelock*, 95 Fed. 883, 37 C. C. A. 309.

<sup>9</sup>A landowner is equally liable for the expense of constructing a side levee as of a front levee, where its object is to unite the front levees. *Police Jury v. Bozman*, 11 La. Ann. 94.

But the owner of a tract of land fronting on a river cannot be made to con-

tribute to the cost of a levee made at right angles to the river on property of another proprietor and necessary to bring it into cultivation, although the levee may benefit both tracts. *Beard v. Morancy*, 2 La. Ann. 347.

Maladministration by a police jury, rendering necessary a special tax for construction of levees, is a question of administration of which the courts cannot take cognizance. *Gillespie v. Police Jury*, 5 La. Ann. 403.

<sup>10</sup>*Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 Ark. 258, 42 S. W. 763.

<sup>11</sup>*Fitzhugh v. Levee Dist.* 54 Ark. 225, 15 S. W. 455.

<sup>12</sup>*Templeton v. Morgan*, 16 La. Ann. 438; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53.

<sup>13</sup>*Re County Comrs.* 143 Mass. 424, 9 N. E. 753.

<sup>14</sup>*Franklin Sav. Bank v. Moran*, 19 Wash. 200, 52 Pac. 858.

and be restrained from making an undue levy, although the acts charged against them may be criminal in their nature, for which they might have been proceeded against by indictment.<sup>15</sup>

**366. Enforcement of tax.**—Wherever the legislature has the right to authorize special assessments to pay for levees, it has the right to determine when and in what manner the assessment shall be paid,—whether presently upon completion of the work, or in instalments,—and it likewise has a right to authorize the issuance of bonds secured by the assessments, and payable exclusively out of the proceeds thereof.<sup>1</sup> A taxpayer who by negligence or fraud has failed within the time limited therefor to discharge a levee tax upon his land in past-due levee bonds and coupons, forfeits his right to do so, and cannot thereafter complain that he is required to pay the sum due in cash.<sup>2</sup> The land may be sold for nonpayment of the assessment.<sup>3</sup> The state is without power to abate a levee tax, or release land from its payment, where such taxes have been, by statute, made a special fund and trust for the payment of debts which the levee commissioners are authorized to contract.<sup>4</sup>

**367. Other public improvements.**—The primary question of the right of the legislature to engage in public improvements is to be determined by the provisions of the Constitution. If that instrument forbids the engagement in internal improvements, no steps can be taken for the improvement of water ways for any purpose. But if the Constitution is silent on that question, then the legislature may enter upon such schemes itself, or delegate the authority to local governmental agencies to do so. The duty to improve the navigation of a stream may be laid upon the inhabitants of a county which will be benefited by the improvement.<sup>1</sup> But the liability of a municipal cor-

<sup>15</sup>*Atty. Gen. ex rel. Izard v. Brown*, 1 Swanst. 265.

<sup>1</sup>*Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629.

<sup>2</sup>*Stannell v. Levee Board*, 13 Fed. 846.

<sup>3</sup>Possession of land for three years under a sale for delinquent levee taxes, after one year from the date of the sale, will make perfect the title, notwithstanding failure to return the assessment roll at the time required by law, or exemption of the property from sale, or defect of power in the collector to sell, under Miss. Code, § 539, declaring actual occupation for such period a bar to a suit for a recovery of the land because of any defect in the sale or any preceding step; and actual payment by the landowner of the tax for which the

sale is made will not serve to defeat the title. *Carlisle v. Yoder*, 69 Miss. 384, 12 So. 255.

<sup>4</sup>*Forsdick v. Mississippi Levee Comrs.* 76 Miss. 859, 26 So. 637; *Woodruff v. State*, 77 Miss. 68, 25 So. 483.

<sup>1</sup>A statute providing that the titheables of a certain county shall pay the expense of improving navigation on a public stream therein is not repealed by implication by a later statute enacted prior to making such payments, organizing other counties from the county before made liable, but not from territory through which the stream flows. *Harrison County Justices v. Holland*, 3 Gratt. 247.

See also *ante*, § 77.

poration will be only what is imposed upon it by the statute.<sup>2</sup> An irrigation canal is a public improvement which may be undertaken by the public authorities.<sup>3</sup> The improvement of a water power for the operation of public mills is a public improvement in which the public may engage if not forbidden by the Constitution to do so.<sup>4</sup> But the improvement of a water power merely for the benefit of the manufacturers of a city is not a public improvement which the state can aid or for which it may exercise the power of eminent domain.<sup>5</sup> A city whose power to assess and collect taxes is limited by the Constitution to corporate purposes has no power to issue its bonds for the purpose of developing and improving the water power on certain streams within and near the city limits. Such contemplated improvement may add wealth and prosperity to the city, but it is not a corporate purpose, but merely a private enterprise, for the aid of which the city has no power to assess and collect taxes.<sup>6</sup> Power to govern a city does not imply power to expend the public money to make the water in the rivers

<sup>2</sup>The corporation of London is not liable on bonds issued by it for the payment of money borrowed in the improvement of the navigation of the Thames, where, by statute, the bonds were payable out of tolls received by the corporation, and of which tolls the corporation were subsequently deprived by an act of Parliament taking from it the conservancy of the river, and vesting it in a newly created body of conservators, to whom the tolls were thereafter payable. *Brown v. London*, 9 C. B. N. S. 726, 30 L. J. C. P. N. S. 225, 7 Jur. N. S. 755, 3 L. T. N. S. 813, 9 Week. Rep. 336.

<sup>3</sup>A canal constructed for the purpose of irrigating lands in the state of Nebraska is an internal improvement, and bonds issued by a county in that state to aid it are sent forth for a public purpose, although its waters are drawn from a river or from other sources without the state. *Perkins County v. Graff*, 52 C. C. A. 243, 114 Fed. 441.

<sup>4</sup>Bonds issued to aid in the improvement of the water power of a river for the purpose of operating public grist mills are issued in aid of a work of internal improvement. *Blair v. Cumming County*, 111 U. S. 363, 28 L. ed. 457, 4 Sup. Ct. Rep. 449.

<sup>5</sup>A state cannot appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. *Kaukauna Water Power Co. v. Green*

*Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

An act authorizing the issue of the bonds of a village to aid in the construction of a dam for the purpose of improving a private water power is unconstitutional, as providing for public taxation for a private purpose: although the piers of the dam are to be used as the foundation of a bridge, and although part of the water power is authorized to be secured for the fire department. *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366.

*Contra, Guernsey v. Burlington Twp.* 4 Dill. 372, Fed. Cas. No. 5,855.

A beet sugar manufactory which does not manufacture for toll is not a work of internal improvement, although it is run by water power, so as to be within the meaning of a statute permitting municipal corporations to issue bonds to aid in the construction of internal improvements. *Getchell v. Benton*, 30 Neb. 870, 47 N. W. 468.

<sup>6</sup>*Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216.

Authority to a municipal corporation to borrow money on the credit of the city, and to issue bonds therefor, does not authorize the issuance of bonds to be donated to a private corporation, to be used in the improvement of a water power, to secure the permanent and practical use of said power to the city and its immediate vicinity. *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361.

available for manufacturing purposes.<sup>7</sup> An act incorporating land-owners into a company for the purpose of building a fence between two rivers above their confluence, thereby inclosing a large tract of land by the two rivers and the fence so as to render it unnecessary for each individual owner of land embraced within such inclosure to rebuild his private fence, periodically washed away by floods of such rivers, and authorizing such company to levy a tax for the cost thereof upon all the owners of land therein in proportion to the number of acres owned by each, and to make by-laws and impose such fines and penalties as it may deem proper to insure the success of the object of the act, is unconstitutional and void as to nonconsenting owners of land within such inclosure, as not being a public undertaking necessary to justify the exercise of the taxing power.<sup>8</sup>

<sup>7</sup>*Ottawa v. Carey*, 168 U. S. 110, 27 L. ed. 609, 2 Sup. Ct. Rep. 361.

<sup>8</sup>*Scuffletown Fence Co. v. McAllister*, 12 Bush, 312.

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## CHAPTER XIV.

### FISHERIES.

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**368. Public right to fish.**— Fish, being *feræ naturæ*, are, while in their natural element, the property of no one, unless they have been brought into an inclosure so that they are completely under the power of the captor, or they can be regarded as the property of the one who owns the water. The consequence is that they may be captured and taken by anyone who can gain access to them, except so far as the water is in private ownership. Following out the contentions of Selden in his attempt to establish the title of the sea in the British sovereign against the claims of the other nations, the subjects of that realm have conceded to their rulers the title to the seas. Such ownership was held to include both bed and water, and, consequently, whatever was in or upon either. Therefore the right to reduce the fish to possession resided in the King. But this right was one which was of little practical value to him, and he had neither the time nor the inclination to interfere with the taking by his subjects of such fish as they chose. This fact, together with the aggressiveness on the part of the subjects to augment their own rights and limit those of the Crown, in the course of time resulted in the formulation of the theory that the Crown held his fishery rights as a sort of trustee, and that the people were the real beneficiaries. Such was not the original idea. It finds no expression at the time of the decision of the case of the *Royal Fishery of the Banne*.<sup>1</sup> There the fishery right is treated as a part of the King's private property, to be dealt with for his own emolument, at his pleasure. It is true that in that case the fishery was in an inland river and was treated as a private right of the Crown, but there is no hint in the case that he held any of his fishery rights for the benefit of his subjects. But the doctrine is firmly established that the ultimate right resides in the people, and that the Crown cannot abridge it. This conclusion has been aided by the necessity of asserting the public rights against the claims of private owners. As long

<sup>1</sup> Davies, 149.

as the Crown regarded the fisheries as his, he used them for his own advantage by making exclusive grants of them to individuals. The King's ownership of the fisheries would seldom inconvenience the rights of his subjects, but a few private grants might exclude the people generally from access to all places where fishing might be successfully practised. This necessitated a holding that the King had no title which he could grant, and Magna Charta is referred to as the instrument by which he parted with his title. There is nothing in that instrument which directly works that result. However, whether the prohibition is found in Magna Charta or not, the general rule now is that in tidal waters all have an equal right to fish, and that this right cannot be abridged by grants to individuals. At the present time, therefore, the public have *prima facie* a common right of fishing in tidal rivers.<sup>2</sup> By the civil law the right of fishery was common in ports and waters.<sup>3</sup> Some of the more modern writers have insisted that the right of the Crown was never exclusive,—that its right was merely that of proprietary dominion as lord of the soil, and that the right of fishing was always common.<sup>4</sup> The fact that the Crown was originally in the habit of granting exclusive rights and of excluding all persons from the common fishery at his pleasure would tend to show that he at least claimed the exclusive right, and that in former times it was conceded

<sup>2</sup>*Reg. v. Stimpson*, 32 L. J. M. C. N. S. 208, 4 Best & S. 307, 9 Cox C. C. 356, 10 Jur. N. S. 41; 16 Vin. Abr. title *Piscary* (B); *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68; Woolrych, Waters, p. 76; Schultes Aquatic Rights, 17; *Hove v. Stowell*, Alcock & N. 348, 358; *Polhemus v. Bateman*, 60 N. J. L. 163, 37 Atl. 1015; *Carter v. Murcot*, 4 Burr. 2164; *Gould v. James*, 6 Cow. 369; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *Rose v. Belyea*, 12 N. B. 109; *Russell v. Stocking*, 8 Conn. 236; *Warren v. Mathews*, 6 Mod. 73; *Com. v. Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Royal Fisheries of the Banne*, Davies, 149; *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178; *Lay v. King*, 5 Day, 72; *Wooley v. Campbell*, 37 N. J. L. 163; *Broune v. Kennedy*, 5 Harr. & J. 203, 9 Am. Dec. 503; *Preble v. Brown*, 47 Me. 284; *Lakeman v. Burnham*, 7 Gray, 440; *Gough v. Bell*, 21 N. J. L. 156; *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678.

While in a private stream it puts the proof upon those that claim *liberam piscariam*, "in case of a river that flows and reflows, and is an arm of the sea," *prima facie* it is common to all, it being a good justification to say that the *locus in quo* is *brachium maris in quo unus quisque subjectus dominus regis habet et habere debet liberam piscariam*. *Fitzwalter's Case*, 1 Mod. 105.

All subjects have a right to take bait and fish in any harbor, river, or public water in Upper Canada (not duly set apart by the governor in council for the natural or artificial propagation of fish), so that in so doing they trespass not on the Crown lands or beaches, or, by their place, time, or mode of fishing contravene any provision of the Canada fisheries act, or regulations thereunder; and this applies not merely to individuals, but equally to all Her Majesty's subjects. *Daragh v. Dunn*, 7 U. C. L. J. 273.

<sup>3</sup>Sandars' Justinian, p. 158.

<sup>4</sup>Woolrych, Waters, p. 437; Schultes, Aquatic Rights, 15.

to him. Where a channel is cut through a sea wall separating a body of brackish water from the sea, and the tide flows and reflows through it, and sea fish and ships pass through, the public right of fishery in such waters attaches.<sup>5</sup> In Scotland the law is in its original form so far as the salmon fisheries are concerned, and has not been subjected to the modifying influence which has prevailed in England.<sup>6</sup> The right of fishery is public in all tidal waters, and all other waters *de facto* navigable, so long as the title to the bed remains in the Crown.<sup>7</sup> The rights of fishery as between subjects of different nations and under the Federal Constitution have been discussed in a prior section.<sup>8</sup> The right formerly belonged to the Crown, not as a trustee for the public, but as a part of its hereditary revenue, and might be granted by it, and might be feudalized.<sup>9</sup>

**368a. Public right in the United States.**— The limitation upon the rights of the Crown in England, and upon its power to grant private rights of fishery, did not extend to the people themselves as represented in Parliament, and that body has always had the power to make such grants. When the American colonies acquired their independence, they acquired with it, not only the powers of the British Crown, but also those of Parliament. In the absence of a constitutional limitation, these powers are vested in the lawmaking representatives of the people of the several states, and there is nothing to prevent them from making private grants. In the absence of such grants, however, the right of fishing in all waters the title to which is in the public belongs to all the people in common.<sup>1</sup> In Massachusetts, by the

<sup>1</sup>*Nash v. Newton*, 30 N. B. 610.

<sup>2</sup>*Gammell v. Woods & Forest Comrs.*

<sup>3</sup> Macq. H. L. Cas. 419; *McDouall v. Lord Advocate*, L. R. 2 H. L. Sc. App. Cas. 431; *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 273.

By that law the Crown is presumed to be entitled to all salmon fisheries to which the vassal cannot affirmatively establish his claim. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 273.

In *Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419, the lord chancellor, in discussing the right of the Crown to salmon fisheries on the coast of Scotland, says that salmon fishings at an early period in the history of Scotland were regarded as possessing a peculiar value over other fishings, and were distinguishable from them in a remarkable manner. They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such user

of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant.

<sup>4</sup>*Re Provincial Fisheries*, 26 Can. S. C. 444; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374; *Robertson v. Steadman*, 16 N. B. 621.

<sup>5</sup> See ante, §§ 2a, 18.

<sup>6</sup>*Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419.

<sup>7</sup>*Legoe v. Chicago Fishing Co.* 24 Wash. 175, 64 Pac. 141; *DeMers v. Sandy Spit Fish Co.* 24 Wash. 582, 64 Pac. 799; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12; *Cerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625; *Coolidge v. Williams*, 4 Mass. 140.

colonial ordinances the right of fishing in tide waters and the great ponds was reserved to the public unless otherwise appropriated by the legislature, or by the towns acting under its authority.<sup>2</sup>

**368b. In nontidal waters.**—In England the King's title to the water depended upon its tidal character, and, since the right to the fish follows the title to the water, his right, and therefore the right of the public, to the fish went no farther than the flow of the tide. The right did not depend upon the navigable character of the water, nor upon its actual navigation, but solely upon the tide. In all tidal waters, or *flumen regale*, the fishery belongs to the King by his prerogative, but in nontidal streams the terre-tenants of either side have an interest in the fishery of common right.<sup>1</sup> Therefore the public has no common right to fish in the waters above the tide, although it is in fact navigable there.<sup>2</sup> It is said, in *Smith v. Andrews*,<sup>3</sup> the idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish. But this idea is not well founded, for no such right exists. As said in the opinion of the commissioners in *Leconfield v. Lonsdale*,<sup>4</sup> the right of catching fish in the navigable and nontidal part of the river belongs exclusively to the riparian owner, who has the same right precisely as to catching fish there as the riparian owners have in the non-navigable part of the river. It is thus clear that the right to catch fish does not depend in any way on the right of public passage. The public right of navigation and the public right of fishing are entirely separate rights. Or, as said in *Queen v. Robertson*,<sup>5</sup> there is no connection whatever be-

<sup>1</sup> In *Yensen v. State*, 7 Ohio N. P. 18, it is said that the business of fishing is itself a lawful one in which anyone has the right to engage. The right of public fishery in the waters of the Great Lakes is one of the time-honored, we might say almost sacred, rights of the people.

<sup>2</sup>*Com. v. Vincent*, 108 Mass. 441; *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101, 11 N. E. 578.

<sup>3</sup>*Selden*, Mare Clausum, lib. 2, chap. 21, 16 Vin. Abr. 576 (B a), (16), (17); *Royal Fishery of the Banne*, Davies, 149.

<sup>4</sup>*Woolrych*, Waters, p. 75; *Blount v. Layard* [1891] 2 Ch. 681, note; *Ashworth v. Broune*, 10 Ir. Ch. Rep. 421, 7 Ir. Jur. O. S. 315; *Reece v. Miller*, L. R. 8 Q. B. Div. 626, 51 L. J. M. C. N. S. 64, 47 J. P. 37; *Pearce v. Scotcher*, L. R. 9 Q. B. Div. 102, 46 L. T. N. S. 342, 46 J. P. 248; *Queen v. Robertson*, 6 Can. S. C. 52; *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175; *Hudson v. MacRae*, 4 Best & S. 585, 9 L. T. N. S. 678,

33 L. J. M. C. N. S. 65, 12 Week. Rep. 80; *Mussett v. Burch*, 35 L. T. N. S. 486; *Steadman v. Robertson*, 18 N. B. 580; *Re Provincial Fisheries*, 26 Can. S. C. 444; *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678; *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273; *Micklethwait v. Vincent*, 67 L. T. N. S. 225.

There is a statement in *Warren v. Matthews*, 1 Salk. 357, 6 Mod. 73, that a subject has a right to fish in all navigable rivers the same as in the sea; but this must be regarded as an inaccurate use of the word "navigable" when "tidal" is meant.

<sup>5</sup> [1891] 2 Ch. 693, 65 L. T. N. S. 175. <sup>6</sup> L. R. 5 C. P. 665, 39 L. J. C. P. N. S. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165.

<sup>6</sup> Can. S. C. 52.

In *Smith v. Andrews* [1891] 2 Ch. 693, 65 L. T. N. S. 175, North, J., in speaking of the Thames at a point above

tween a right of passage and a right of fishing. A right of passage is an easement,—that is, a privilege without profit, as in a common highway. A right to catch fish is a profit à prendre, subject, no doubt, to the free use of the river as a highway, and to the private right of others. The right to the fishery passes with a grant to the soil.<sup>6</sup> A river is not tidal, so as to give a public right of fishery, where it is unaffected by ordinary tides, although upon the occasion of very high tides the rising of salt water in the lower part of the river dams back the fresh water, and causes it, upon those occasions, to rise and fall with the flow and ebb of the tide. Grove, J., says, in order that the river may be tidal at the spot in question, it may not be necessary that the water should be salt, but the spot must be one where the tide in the ordinary and regular course of things flows and reflows. There is no case which shows that, because at exceptionally high tides some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide, that portion of the river can be called tidal.<sup>7</sup> Whoever claims the right to fish in private waters has the burden of showing the foundation of such right.<sup>8</sup> Property rights to a several fishery in non-navigable nontidal waters are not abridged when the waters are made navigable by Parliament by artificial improvements.<sup>9</sup> Where a river runs through a manor the legal presumption is that the right of fishing belongs to those owning land on its side, and extends to the center of the stream. It was argued in *Lamb v. Newbiggin*<sup>10</sup> that where a private river runs through a manor the right to fish along the shore thereof prima facie belongs exclusively to the lord; but the court held that it belonged to those owning the land abutting on the river, and that, if a lord claims a several fishery therein, the burden is upon him to prove it.

The old law of France in regard to the right of fishery in non-navigable streams flowing through private lands is that it does not depend upon the ownership of land adjacent to the stream, but may be conferred by the sovereign upon individuals from whom permission must be obtained in order to enjoy the right.<sup>11</sup>

the action of the tide, and holding that no right of fishery existed there, said: The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it; but, so far as regards nontidal rivers, this is not so. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it.

<sup>6</sup>*Re Provincial Fisheries*, 26 Can. S. C.

444: *Queen v. Robertson*, 6 Can. S. C. 52.

<sup>7</sup>*Ryce v. Miller*, L. R. 8 Q. B. Div. 626, 51 L. J. M. C. N. S. 64, 47 J. P. 37.

<sup>8</sup>*Fitzwalter's Case*, 1 Mod. 105.

<sup>9</sup>*Hargreaves v. Diddams*, 32 L. T. N. S. 600, L. R. 10 Q. B. 582, 44 L. J. M. C. N. S. 178, 23 Week. Rep. 828; *Mussett v. Burch*, 35 L. T. N. S. 496.

<sup>10</sup>1 Car. & K. 549.

<sup>11</sup>*Re Provincial Fisheries*, 26 Can. S. C. 444.

**368c. In nontidal waters in United States.**—The strict rule of the common law as to the ownership of land under nontidal water, and therefore of the fishery, has not been followed in all of the states of the Union. So far as this change was made by the adoption of the original Constitution, it was undoubtedly proper. So far as it was done by the legislature without constitutional authority, it deprived the riparian owner of property without due process of law, or took his property for public use without compensation. For a fishery is property.<sup>1</sup> From the earliest times, fisheries were recognized as part of the estate.<sup>2</sup> When the courts have assumed the power to change the common law with respect to ownership of the water and the right to the fishery, they have deliberately deprived the riparian owner of property to which he was entitled under the time-honored maxims of the common law, which have existed for centuries; and the court can hardly justify such a course, since it has no legislative powers, and is sworn to declare the law, and not to make it; and when it deliberately departs from the law without any adequate excuse, and thereby robs private citizens of valuable rights, it has a very imperfect sense of its obligations. Most of the states have followed the common-law rule without question.<sup>3</sup> The private right extends to fishery in a canal.<sup>4</sup> In most of the cases dealing with this question the courts have followed the inaccurate use of the word "navigable" as being synonymous with "tidal," which originated with chancellor Kent; so that, when they state that the right of fishery in non-navigable streams is private, they intend to follow the common-law rule, and hold that the right is private except in tide waters.<sup>5</sup> But such inaccurate use of the word has led to some departure from the common law. There is no dispute that the right of fishery is private where the river is not navigable in fact.<sup>6</sup> Massachusetts at first followed the common-law

<sup>1</sup>*Tudor v. Cambridge Waterworks*, 1 Allen, 164; *Queen v. Robertson*, 6 Can. S. C. 52.

<sup>2</sup>Maitland's *Domesday*, 330.

<sup>3</sup>*Adams v. Pease*, 2 Conn. 481; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382; *Boach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *State v. Glen*, 52 N. C. (7 Jones L.) 321; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Ingram v. Threadgill*, 14 N. C. (3 Dev. L.) 59.

Under the statutes and interstate agreement with New Jersey, the fisheries in the Delaware river are exclusive, and originally belonged to the owner of the upland, but may be leased, sold, or devised to a person not owning the adjoining shore. *Hart v. Hill*, 1 Whart. 124.

Even in Washington, which has departed as far from the common law of riparian rights as any of the states, it is said that, even in a navigable or public river, the right of fishing remains in the owner of the bank, the public only having an easement over the stream; and the taking of fish therefrom would be a trespass against the riparian proprietor. *Griffith v. Holman*, 23 Wash. 347, 54 L. R. A. 178, 83 Am. St. Rep. 821, 63 Pac. 239.

<sup>4</sup>Woolrych, *Waters*, p. 65.

<sup>5</sup>See *ante*, § 23a.

<sup>6</sup>*Jackson v. Lewis*, Cheves L. 259; *Waters v. Lilley*, 4 Pick. 145 16 Am. Dec. 333.

rule to its full extent.<sup>7</sup> But this rule was changed by statute. How the change could be made, and the right to the fishery be taken from the owner and vested in the public without compensating the owner, in the face of a constitutional provision that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,"—is difficult to understand. It may be that the individual demanded no compensation, for the question of his right to it does not seem to have been presented to the courts. However, by a long course of legislation in Massachusetts the right of fishery, even in private streams, is paramount in the public, to that extent changing the common law. But, as against all others than the public, the riparian owners of fishing privileges have the rights which belong to private property.<sup>8</sup> By reason of the form of the early grants in Pennsylvania, it has been held that the title to the beds of its principal rivers did not pass to the riparian owners, and that they, therefore, have no exclusive right of fishery in the waters.<sup>9</sup> In South Carolina it was held first that the right of fishing in a stream which is navigable in fact and actually used by the public for purposes of navigation is common in equal degree to the whole community.<sup>10</sup> But in *McCullough v. Wall*<sup>11</sup> the court held that the common-law rule giving the common right of fishing in waters in which the tide ebbs and flows does not apply to streams not affected by the tide, but which have been rendered navigable or floatable by artificial means,—at least to that part of a stream above a falls which, in their natural state, obstruct the serviceable use of the river. In Wisconsin the legislature has asserted the public right of fishery in every floatable stream, and the court has upheld the legislation. The court says the public use of a stream navigable in fact for the floatage of logs and small boats includes the right to fish, and such stream is a public water within the

<sup>7</sup>*White v. Whittier*, 2 Dane Abr. 702; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333.

<sup>8</sup>*Cole v. Eastham*, 133 Mass. 65; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

<sup>9</sup>*Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71.

The grantee of a riparian owner's right of fishery "as heretofore conducted" in a public stream cannot recover damages from another fishing therein, but is entitled to damages for a deprivation of an appurtenant easement to draw

nets on and pass over the upland to which the fishery was formerly appurtenant, when such acts are used with the fishery "as heretofore conducted." *Harvey v. Vandegrift*, 1 W. N. C. 629.

<sup>10</sup>*Boatwright v. Bookman*, Rice L. 447.

<sup>11</sup> 4 Rich L. 68, 53 Am. Dec. 715.

And Wardlaw, J., stated that neither the common-law rule relating to the right of fishing in waters affected by the ebb and flow of the tide, nor the one relating to the title to the land under such waters, had been applied in South Carolina to streams not affected by the tide, although they may be navigable or floatable. *Ibid.*



meaning of a statute asserting title to the fish in such waters and permitting any individual to take the fish, although the title to the bed of the stream is in the riparian owner; so that one fishing from a boat in the stream is not guilty of trespassing upon such owner's rights.<sup>12</sup> It is very difficult to see on what ground that decision can be upheld. The court admitted that at common law the public rights of fishery were limited to tide water, and the Wisconsin Constitution adopted the common law, so that the riparian owner has a constitutional right to exclusive fishery in the stream where it passes over his property. The Constitution is usually regarded as the paramount law in the state, and neither the legislature nor the court, nor both combined, has power to disregard its provisions. It may be that the court regarded the riparian right as of too little value to require protection. So far as the injury which would be caused by merely casting a hook into the stream from a boat is concerned, the injury is certainly insignificant; but, if the principle is once established that the public has a right to fish, there is nothing to prevent the use of nets or engines, so far as the law permits their use, to the total destruction of the right of the riparian owner. It may be that the contention might be upheld that the right to fish in the water from boats with hook and line, and to gather ice from the water, were uses which the public good required should be regarded as within the public right to use the water way for purposes of navigation. Such a contention would be a departure from the common-law rules, but in analogy to the new uses to which highways on land are continually being devoted, there is ground for making the contention. The public right of fishery does not extend to streams which are non-navigable in their natural condition.<sup>13</sup>

**369. Right to grant exclusive fishery in tidal water.**— There is no doubt that, under Selden's conception of the rights of the Crown in the seas surrounding the British coast, the right of fishery was a requisite, to be used or disposed of for the benefit of the Crown. This, also, is the idea found in the case of the *Royal Fishery of the Banne*.<sup>1</sup> The doctrine of the Crown's trusteeship does not seem to have been advanced until after the deposition of Charles I., and the time and

<sup>12</sup>*Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273; *Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045.

<sup>13</sup>*Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491.

Boatable waters, within the meaning of a constitutional provision giving the

right to fish in all boatable and other waters, not private property, are waters that are of common passage as highways for business or pleasure, and do not include all waters that may be boatable in fact. *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323.

<sup>1</sup> Davies, 149.

place of its beginning do not clearly appear. Even as late as *Carter v. Murcot*,<sup>2</sup> the court, in speaking of the right of fishery, says that in navigable rivers the proprietors of the land on each side have not the exclusive right of fishery; that navigable rivers or arms of the sea belong to the Crown; and that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea. In modern times the limitation upon the power of the Crown is usually ascribed to *Magna Charta*, but a reference to the provisions of that instrument shows that it contained no specific reference to the right of fishery. The clause mostly relied on for that purpose is known as chapter 23, and is as follows: All weirs from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the seacoasts. The law has always been that the owner of a fishery on a river could not operate it so as to prevent the fish from passing up to fisheries higher on the stream. The placing of weirs and traps near the mouth of such streams as Thames and Medway might completely destroy the possibility of fish reaching the manors of the barons living along the stream, and be a serious interference with their rights. Looking at the words of the statute, and considering them in the light of the surrounding circumstances, it would seem that the object of that section was to prevent the maintenance, by the King's license, of such infringements upon the barons' rights, and not to prevent the granting of exclusive rights of fishery. Another chapter of the charter which is sometimes referred to as affecting the Crown's right to grant several fisheries is 16, which reads as follows: "No river banks shall be guarded (placed in defense,—*defendantur*) from henceforth, but such as were in defense in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time." Some support is given to the contention that that chapter limited the right of the Crown to grant several fisheries by Coke's commentary on it as follows: "That is, that no owner of the banks of rivers shall so appropriate or keep the rivers several to him to defend or barre others, either to have passage or fish there otherwise than they were used in the reign of Henry II."<sup>3</sup> There is little reason to doubt that Lord Coke entirely misconceived the purpose of that chapter. He himself states, on the authority of the Mirror, that the statute is out of use, for "many rivers are now appropriated and placed in defense which used to be common for fishing and use in the time of Henry II." Lord Hale's explanation of this chapter is as follows: "Before the

<sup>2</sup> 4 Burr. 2162.<sup>3</sup> 2 Inst. 30.

statute of Magna Charta, chap. 16, it was frequent for the King to put as well fresh as salt rivers *in defenso* for his recreation; that is, to bar fishing and fowling in a river till the King had taken his pleasure or advantage of the writ *de defensione ripariæ*.”<sup>4</sup> Lord Hale further states that the form of the writ was changed so as to require the placing in defense of such rivers only as were in defense in the time of Henry II. He further states that, as the custom created great trouble to the country and little benefit or addition of pleasure to the King, it “hath long been disused.”

When it is remembered that Magna Charta was intended to check the encroachment of the Crown upon the rights of the barons, and that, according to Lord Hale's interpretation, chapter 16 was immediately put into operation and given its intended effect, while, according to Lord Coke's, it was not in use, the conclusion is irresistible that Lord Coke misapprehended its scope, and that it did not affect the granting of private fisheries. In all probability Magna Charta was not intended to deal with any claim of power to grant exclusive fisheries. In fact, the strongest authority in support of the Crown's right came into existence several centuries after that instrument was established. The fact is, the courts are by no means agreed as to the scope and effect of chapter 23 of the charter. In *Rolle v. Whyte*,<sup>5</sup> the court said, while, in Magna Charta, *kidelli* or weirs generally are mentioned as to be put down, not only in the Thames and Medway, but also *per totam Angliam nisi per coeteram maris*, in the key to this enactment, to be found in 25 Edw. III. St. 4, chap. 4, after citing that the common passage of ships and boats in the great rivers of England be oftentimes disturbed by the levying of weirs, mills, etc., to the great damage of the people, it is provided that “all such weirs, mills, stanks, stakes, and kiddles, which were levied and set up in the time of King Edward, the King's grandfather, and after till now in such [*tielx*] rivers, whereby the said ships and boats be disturbed, shall be put out and utterly pulled down without being renewed.” Hence, such use is not prohibited in municipal corporations in non-navigable waters. And it is further said that the Magna Charta and the succeeding statutes prohibiting the acquisition of a fishing weir in a river, including the act of 12 Edw. IV., relate to navigable rivers only.

If such conclusion is correct, then that chapter was leveled, not at

<sup>4</sup> De Jure Maris, chap. II.

S. 105, 17 L. T. N. S. 560, 16 Week. Rep.

<sup>5</sup> L. R. 3 Q. B. 286, 37 L. J. Q. B. N. 593, 8 Best & S. 116.

interference with fishing rights, but with those of navigation. In *Rogers v. Jones*,<sup>6</sup> Judge Woodworth said that, under the authorities, the Crown may grant an exclusive fishery in tidal waters, and by grant of Charles II. the Duke of York had and could grant same in New York. The court examined fully the contention as to chapter 16 of Magna Charta, and concluded that it did not affect the question. But in *Lowndes v. Dickerson*,<sup>7</sup> while choosing to decide the case on other grounds, the judge noted that the force of Magna Charta upon royal grants of private fisheries as stated in *Rogers v. Jones*, *supra*, was against the weight of authority, and that Judge Woodworth failed to distinguish between grants by the Crown alone, and with concurrence of the legislature. However, in *Brookhaven v. Strong*,<sup>8</sup> the court said that Magna Charta was only intended to restrain the King from granting exclusive rights of fishery disconnected with any rights of soil, in disregard of the rights of the owner of the soil. And following that case, the court, in *Robins v. Ackerly*,<sup>9</sup> held that the King had the right to grant soil under water, and with it, exclusive rights of fishery. It thus appears that there is no agreement as to what weight is to be given to Magna Charta upon this question, and it is very probable that the attempt has been made to compel the charter to do a duty it was never intended to do. A more logical explanation of the curtailment of the power of the Crown is made by Freeman,<sup>10</sup> who says that, at the time of their coronation, the English sovereigns are required to cede to the people certain of the rights which were formerly part of the regalia.

Whatever the cause, the course of decision has been that formerly the Crown had a right to make private grants of fishing rights, but that now he cannot do so. And the present disability is to some extent given a retroactive effect, so that a grant must be an ancient one, to be upheld.<sup>11</sup> Where the provisions of Magna Charta are not in force, the Crown may grant exclusive rights of fishery in tidal water.<sup>12</sup>

There is no question that at first the rule of the civil law as stated by Bracton,<sup>13</sup> that the fishery in rivers and seas was public, was disregarded, and that the Crown could grant a several right of

<sup>6</sup> 1 Wend. 237, 19 Am. Dec. 493.

<sup>7</sup> 34 Barb. 586.

<sup>8</sup> 60 N. Y. 56.

<sup>9</sup> 91 N. Y. 98.

<sup>10</sup> English Const. 2d ed. p. 139.

<sup>11</sup> The question is not free from doubt as to the power of the King, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable

waters of the kingdom, so as to give him an immediate and exclusive right of fishery. But it must be regarded as settled in England that he cannot. *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997.

<sup>12</sup> *Re Provincial Fisheries*, 26 Can. S. C. 444.

<sup>13</sup> Lib. 2, chap. 12.

fishery in tidal water.<sup>14</sup> Such a grant may be established by proof of modern usage.<sup>15</sup> And if the several right was obtained when the Crown had power to grant it, it may be granted at the present time like any other species of property.<sup>16</sup> But the English courts have in modern times refused to recognize a right on the part of the Crown to create several rights of fishery in tide water, and usually refer the time when the Crown lost this right to Magna Charta.<sup>17</sup> In *Malcolmson v. O'Dea*,<sup>18</sup> it was held that the great charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II.; so that, where a fishery has been long treated as of right, distinct and separate property to the exclusion of the public, and there is nothing to show that its origin was modern, it must have been created before legal memory.

**369a. Crown grants in America.**—The above discussion has an important bearing upon certain Crown grants in this country during the colonial period. At the time these grants were made there seems to be no authority to deny the power of the Crown to grant fisheries. Having the power, the question whether or not the rights passed to his grantees is a matter of construction. If the rights were granted, and the proprietaries of the territory granted them into private ownership before the Revolution, there is no reason why the rights of

<sup>14</sup>*Royal Fishery of the Banne*, Davies, 149; *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178; *Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419; *Fitzwalter's Case*, 3 Keble, 242, 459, 555; *O'Neill v. Allen*, 9 Ir. C. L. Rep. 155; *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169.

<sup>15</sup>*O'Neill v. Allen*, 9 Ir. C. L. Rep. 132; *Northumberland v. Houghton*, 39 L. J. Exch. N. S. 66, L. R. 5 Exch. 127, 22 L. T. N. S. 491, 18 Week. Rep. 495.

<sup>16</sup>*Devonshire v. Hodnett*, 1 Hudson & B. 322; *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169; *Northumberland v. Houghton*, 39 L. J. Exch. N. S. 66, L. R. 5 Exch. 127, 22 L. T. N. S. 491, 18 Week. Rep. 495.

Where an exclusive fishery existed before Magna Charta, when it again passes to the Crown it does not become extinct, but is presumed to be "nominally yielded up for the purpose of regrant;" and this is not altered where it was "surrendered." *Saltash v. Goodman*, L. R. 5 C. P. Div. 431.

The legal origin and existence of an ancient fishery will be presumed from uninterrupted enjoyment under a grant from the Crown, which grant, although since Magna Charta, describes the fishery as having previously existed. *Bridges v. Highton*, 11 L. T. N. S. 653.

In *Little v. Wingfield*, 11 Ir. C. L. Rep. 63, Affirming 8 Ir. C. L. Rep. 279, it was held that where a several fishery in a tidal river granted before Magna Charta had reverted in the Crown, and been regranted in fee simple to one through whom the plaintiffs claimed and in whose chain of title there was a break, the possession of the plaintiff and his privies for sixty or seventy years was sufficient to raise a presumption of a grant from the grantee of the Crown.

<sup>17</sup>*Edgar v. English Fisheries*, 23 L. T. N. S. 732; *Carlisle v. Graham*, L. R. 4 Exch. 361, 38 L. J. Exch. N. S. 226, 21 L. T. N. S. 133, 18 Week. Rep. 318; *Somerset v. Fogucll*, 5 Barn. & C. 886, 1 Dowl. & R. 747; *Warren v. Matthews*, 6 Mod. 73, 1 Salk. 357.

<sup>18</sup>10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

such grantees should not be upheld. On the other hand, as to all rights not granted by the King, or which he reassumed, or which had not reached the possession of colonists who espoused the cause of the revolutionists before their independence was secured, the Revolution cut them off, and they passed into the possession of the newly formed states for the common good. Without examining the basis for the doctrine, it has been assumed by the courts that the Crown could not grant private rights of fishery at the time of early grants to proprietors in this country. So far as those grants were made by Charles II. there is nothing to show that he did not possess the right to make such grants, but the court looked to Magna Charta as the source of his disability, and held that he had no such right.<sup>1</sup> In *Martin v. Waddell*,<sup>2</sup> it is said that while there is nothing in the charters to the Duke of York of 1664 and 1674 granting to him lands now included in New Jersey with all the royal prerogatives and interest therein, which appears to have altered in any way the common rights of a public fishery for floating or shell fish in tidal waters, if there was, it was included in the surrender of all such prerogatives to the Crown in 1702. In *Bennett v. Boggs*,<sup>3</sup> it is said that the proprietors of New Jersey acquired no right of fishery in the Delaware to the common use of which they could grant a right to the inhabitants of New Jersey; but the right to the entire bed of the river remained in the Crown till the Revolution, when it accrued to the state in its sovereign capacity. The cases in which these decisions were made did not arise until long after the grants were made, and after the power of the English Crown had been curtailed; and the law existing at the time the cases were brought was applied to a state of facts which arose hundreds of years before, when the law was different, but resulted in some cases in unjustly taking away private rights which had been acquired in good faith, and which should have been protected rather than wrested from their possessors.

### 370. Right of legislature to grant exclusive rights in tide water.—

When the American colonies separated from the mother country and acquired their freedom, they acquired all the powers, not only of the Crown, but of Parliament also, and, unless restricted by the

<sup>1</sup> *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356; *Gough v. Bell*, 21 N. J. L. 156; *Lowndes v. Dickerson*, 34 Barb. 586; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

So that, under grants from the King to the Duke of York, thence to Sir

George Carteret and Lord Berkley, the proprietors of New Jersey took no such title in the soil of navigable waters below low-water mark as to enable them to grant a several fishery. *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356.

<sup>2</sup> 16 Pet. 367, 369, 10 L. ed. 997, 998.  
<sup>3</sup> Baldw. 60, Fed. Cas. No. 1,319.

Constitutions, this power resides in the legislatures. Parliament, in England, always had the right to grant exclusive fishery rights in tide waters.<sup>1</sup> And that power rests in the legislatures, except where it is withdrawn from them by the Constitutions.<sup>2</sup> And when grants to private individuals have been made, they are valid and will be upheld; so that there may be a several fishery in a tidal water.<sup>3</sup> And the legislatures have frequently recognized a several right of fishery in such waters.<sup>4</sup> The grant may be made directly by the legislature, or through a committee or subordinate body which it may appoint to make the grant.<sup>5</sup> The only thing which can interfere with the right of the legislature to make such grant is the right of the riparian owner.<sup>6</sup> The right being a subject of grant may be acquired by prescription.<sup>7</sup> This right on the part of the legislature to make exclusive grants has sometimes been questioned without cause. In *Arnold v. Mundy*,<sup>8</sup> it is said that at the Revolution the commonwealth became the depository of all the royal and parliamentary rights over fisheries in tidal waters, and, while it can make regulations for, and grant private privileges therein to secure their improvement, it cannot con-

<sup>1</sup>*Queen v. Robertson*, 6 Can. S. C. 52.

<sup>2</sup>*Com. v. Weatherhead*, 110 Mass. 175; *Roice v. Smith*, 48 Conn. 444; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. ed. 997, 998; *Den ex dem. Russell v. Jersey Co.* 15 How. 432, 14 L. ed. 760; *Woolley v. Campbell*, 37 N. J. L. 163; *Carter v. Tincum Fishing Co.* 77 Pa. 310; *Shreeves v. Liveson*, 2 N. J. L. 247; *Munson v. Balduin*, 7 Conn. 168; *Walker v. Stone*, 17 Wash. 578, 50 Pac. 489; *Halleck v. Davis*, 22 Wash. 393, 60 Pac. 1116; *Com. v. Hilton*, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362.

Public fisheries may be leased and disposed of by the legislature in any manner so that it does not interfere with or impair the public right of navigation, or the power of the general government to regulate commerce and navigation in bays and harbors. *Gough v. Bell*, 21 N. J. L. 156.

The California act of 1859 gave the owner of land fronting on Eel river the right of exclusive fishing privileges, and the court held that although the streams and shores to high-water mark were in the public the legislature might grant qualified rights therein to individuals so far as they are not inconsistent with the principal use. *Heckman v. Swett*, 99 Cal. 309, 33 Pac. 1009.

A common-law right to a common fish-

ery in the Delaware river is not secured to the inhabitants of New Jersey by either the state or Federal Constitution. *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319.

<sup>3</sup>*Fitzgerald v. Faunce*, 46 N. J. L. 596; *Den ex dem. Bispham v. Rice*, Cited in *Gough v. Bell*, 22 N. J. L. 463.

A flat within a river, cove, or harbor is a place covered with water too shallow for navigation with vessels ordinarily used for commercial purposes within the meaning of a statute securing to any persons who shall first make a weir for catching fish in any flat within a river, cove, or harbor the uninterrupted enjoyment of it. *Stannard v. Hubbard*, 34 Conn. 370.

<sup>4</sup>*Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

<sup>5</sup>*Roice v. Smith*, 48 Conn. 444.

But a statute giving county supervisors power to legislate for the protection and preservation of fish within their counties does not give them power to confer exclusive rights of fishing in tide waters. *Hallock v. Dornay*, 7 Hun. 52. Reversed upon other grounds in 69 N. Y. 238.

<sup>6</sup>*People v. Thompson*, 30 Hun. 457.

<sup>7</sup>*Brookhaven v. Strong*, 60 N. Y. 56;

*Cobb v. Davenport*, 32 N. J. L. 369;

*Proctor v. Wells*, 103 Mass. 216.

<sup>8</sup>6 N. J. L. 4, 10 Am. Dec. 356.

sistently, by direct and absolute grant, divest all citizens of their common right. And in *Slingerland v. International Contracting Co.*<sup>9</sup> it is said that to grant to one person the exclusive right of fishing in any part of the Hudson river would unconstitutionally deprive, without due process of law, every other person of his privilege of fishing there. How that result can be reached by any process of reasoning is difficult to understand. Individuals have no constitutional rights of that kind as part of the general public. Public rights are subject at all times to the control of the legislature. In Canada, the Dominion Parliament has no jurisdiction to enact laws conferring on lessees or licensees of the Dominion a right of fishing in any waters, navigable or non-navigable, the beds and banks of which are assigned to the provinces by statute. Nor to interfere with the right of the owners of beds of non-navigable waters to fish therein, by authorizing the giving of leases or licenses for the right of fishing in such waters. Neither the provinces, except Quebec, nor the Dominion, can, without legislative authority, grant exclusive rights of fishing in tidal waters, except in tidal waters within the limits and jurisdiction of the provinces respectively.<sup>10</sup> If the state has reserved to itself the fishery in nontidal rivers, it may grant a right of fishery in them to the exclusion of the riparian owner.<sup>11</sup>

**371. Fishery is real property.**—In order to determine the method by which a fishery is to be granted, it is necessary to determine its characteristics and the class to which it belongs. So far as its classification is concerned it is real, and not personal, property, for, as said in the case of the *Royal Fishery of the Banne*,<sup>1</sup> it lieth in grant and tenure; by a grant of it the soil passeth; *monstraverunt* and *assize* lie of it; it is demandable by *preceipe*; and it is freehold in itself. A fishery may be defined as a right to employ within a particular stretch of water lawful means for the taking of the fish which may be found there. It is to be distinguished from a fishing place or the right to use a particular shore or beach as a basis for carrying on the business. The latter is always vested in the shore owner, and is entirely distinct from the right to take fish from the water.<sup>2</sup> A

<sup>9</sup> 43 App. Div. 215, 60 N. Y. Supp. 12. out at pleasure. *Greyc's Case*, Owen,

<sup>10</sup> *Re Provincial Fisheries*, 26 Can. S. 20.

C. 444.

<sup>11</sup> *Lunt v. Hunter*, 16 Me. 9.

<sup>1</sup> *Davies*, 149.

So, upon the death of a person placing fish in a pond, they pass to his heirs; otherwise where they have been placed in a trunk or narrow place to be taken

<sup>2</sup> A "place of fishing" in tidal waters is that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land, and not any part of the tide waters in which they are swimming; so that a grant of a fishing place in such waters will not



person fishing by claim of common right can be, in no sense, the owner of a fishery.<sup>3</sup> A fishery, so far as it is exercised upon another's soil, is a profit *à prendre*, therefore it cannot be claimed by way of easement.<sup>4</sup> The questions then arise: Is it inclusive or subordinate? Does a grant of fishery carry the other necessary elements, or is a grant of water or soil requisite to pass a fishery? In answer to this it may be said that, in the first instance, the fishery is a part of the soil, and not an entity having an independent existence. As said by Woolrych:<sup>5</sup> When the soil over which the water runs, and the water itself, belong to the same person, the owner cannot be correctly said to have a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated.

Therefore, the fishery is included in land and water; and since, in the absence of express reservation, land includes water, a grant of land will include both water and fishery.<sup>6</sup> So completely is the fishery identified with the soil that, if the river changes its course so as to flow upon the land of a stranger, a right of fishery in the river is lost.<sup>7</sup> There is an exception to the rule that the fishery follows the

deveat the public of its right to take fish in those waters unless such intention is clearly expressed. *Coolidge v. Williams*, 4 Mass. 140.

The definition of a pool or fishing place, in § 3 of the act of 1808, relating to the Delaware river, to be from the place where seines or nets are usually or may hereafter be thrown into the water to the place where they are taken out, applies only to a place on the shore to which a fishery is annexed, and does not refer to a claim of fishery by common right on such river. *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319.

The "fisheries" of a proprietor of land bounded by a navigable stream as referred to in statutes comprise the exclusive privilege of drawing his seines on the shore. *Skrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463.

But in *Parker v. Thomson*, 21 Or. 523, 28 Pac. 502, it is said that the term "fishing grounds" has never been held applicable to the bank of a tide stream or slough, or the beach of the ocean.

<sup>3</sup>*Bennett v. Boggs*, Baldw. 60, Fed. Case No. 1,319.

<sup>4</sup>*Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

<sup>5</sup>Waters, p. 110.

<sup>6</sup>*Queen v. Robertson*, 6 Can. S. C. 52; *Re Provincial Fisheries*, 26 Can. S. C. 444; *Clarke v. Mercer*, 1 Fost. & F. 492; *Cobb v. Davenport*, 32 N. J. L. 369; *McFarlin v. Essex Co.* 10 Cush. 309.

The right of a riparian owner to fish in the water of a private river is not a riparian right in the nature of an easement, but is strictly a right of property. *Queen v. Robertson*, 6 Can. S. C. 52.

But a royal fishery is a fishery in gross, and will not pass as an appurtenance to the adjoining lands by general words. *Royal Fishery of the Banne*, Davies, 149.

<sup>7</sup>*O'Neill v. M'Erlaine*, 16 Ir. Ch. Rep. 280.

In *Carlisle v. Graham*, L. R. 4 Exch. 361, 38 L. J. Exch. N. S. 226, 21 L. T. N. S. 333, 18 Week. Rep. 318, it is said that the locus of a subject's several fishery in a tidal river does not change with that of the river which has permanently receded from a portion of its course and flows into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject; since the Crown could not have granted a several fishery in the new channel, not having title to the soil thereof, no fishery could have

soil, in case the soil lies under water in which the public has a right of fishery. In such cases, in order to pass the exclusive right of fishery it must be mentioned in the grant; and a mere grant of the soil, without more, will give no right to exclude the public from the enjoyment of its common right.<sup>8</sup> And this exception includes the taking of shell fish from the soil below high-water mark.<sup>9</sup> While the fishery is primarily a part of the soil and will pass with it, both water and fishery may be separated from the soil so as to become a fishery in gross, and the subject of independent conveyance the same as other classes of property.<sup>10</sup> This rule is as ancient as the Year Books,

been created in the *locus in quo*, since, before Magna Charta it was dry land.

Bramwell, B., said that a several fishery must be "capable of ascertainment;" it must have been granted or acquired by metes and bounds, or as extending from one definite point to another, and cannot be changed therefrom with the course of the river onto another's lands. *Ibid.*

But where the channel of a tidal river running through an estuary and being visible when the tide is out, but entirely covered when the tide is in, changes its course, though still flowing through the estuary, by leaving the old channel nearly dry so that salmon can pass up the new channel, a several right of fishery therein, enjoyed by two persons each to the middle of the old channel, passes to the new channel, and each is entitled to the same right of fishery therein as he had in the old one. *Miller v. Little*, Ir. L. R. 4 C. L. 302, Affirming Ir. L. R. 2 C. L. 304.

And where the river has changed its channel gradually, *Carlisle v. Graham* does not apply; and the riparian proprietor on such a stream, who has an appurtenant right of fishery therein, either from ownership of the bed or otherwise, is not deprived thereof by the shifting of the stream, his boundaries being *ipso facto* shifted under the law of accretions. *Foster v. Wright*, L. R. 4 C. P. Div. 438, 49 L. J. C. P. N. S. 97, 44 J. P. 7.

So that where the lord of a manor, having by grant a several fishery in a nontidal stream running through the manor, enfranchised some of his land which was somewhat distant from the river, the owner of the enfranchised land does not gain a right of fishery in the river by its subsequently encroaching upon his land till part of it forms a portion of the bed of the stream, but the

exclusive right of fishery over the entire bed of the river remains in the lord of the manor, notwithstanding its gradual encroachment onto the enfranchised land. *Ibid.* The court said that it was immaterial whether the plaintiff's right of fishery existed as an incident to his ownership of the soil or was independent of it, being a mere exclusive right to fish in the river; as, if it depends on his ownership of the soil, the encroachment inures to him as the owner of the soil; if it is a mere right of fishery, it extends over the entire river, even though it continues gradually to change its course. Lord Coleridge, Ch. J., in concurring, doubted whether the soil of the river belonged to the lord of the manor, though, if it did, the encroachment would inure to his benefit; but held that, even though the lord of the manor had a mere right of fishery, the fishery would follow the slow and gradual flow of the river in its encroachment upon adjoining land.

<sup>8</sup>*Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; Hall, *Sea Shores*, 54, 194; *Gage v. Bates*, 7 U. C. C. P. 116; *Coolidge v. Williams*, 4 Mass. 140; *Brink v. Richtmyer*, 14 Johns. 255; *Polhemus v. Bateman*, 60 N. J. L. 163, 37 Atl. 1015; *Hammond v. Inloes*, 4 Md. 138.

The public has the right to take fish below high-water mark, although the soil belongs to a private individual as within the original lines of his land called for in his patent, but now below high-water mark by reason of the gradual encroachments of the sea. *Bickel v. Polk*, 5 Harr. (Del.) 325.

<sup>9</sup> See *post*, § 403.

<sup>10</sup> Woolrych, *Waters*, p. 112; Schultes, *Aquatic Rights*, 85; *Marshall v. Ulca-water Steam Nav. Co.* 3 Best & S. 732, 32 L. J. Q. B. N. S. 139, 9 Jur. N. S. 988, 8 L. T. N. S. 416, 11 Week. Rep. 480; *Mattheus v. Treat*, 75 Me. 594;

where it is held that one may have a several fishery in another's land.<sup>11</sup> The water includes the fishery, so that a grant of a parcel of water will include the right of fishery in it.<sup>12</sup> North Carolina has not adhered to the rule that a fishery may be separated from the soil, and has held that there can be no several fishery in a navigable stream, as such a right is an incident of the ownership of the soil, a *locus* which cannot be granted in that state.<sup>13</sup> But that doctrine was not extended to land owned by private individuals, for grants by them of the fishery right were recognized.<sup>14</sup>

**372. Public grants of fishery.**—Having seen from the preceding section that a fishery is real estate, and that it is properly a part of the soil over which it exists, and will pass by a grant of the soil or of the water, the questions as to the manner in which the grant shall be made, and the principles of construction which shall be applied to it, are comparatively easy. Being real estate, it must be conveyed by the formalities necessary to pass that class of property. A grant of an exclusive right of fishery in a public water is in derogation of common right, and must be expressly mentioned to vest in the grantee. No such right will pass by implication.<sup>1</sup> And the fixing of the

*Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Warrand v. Mackintosh*, L. R. 15 App. Cas. 52; *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68; *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146.

In the River Severn the soil belongs to the lords on either side, and a special sort of fishing belongs to them, while the common sort of fishing is common to all. The soil of the River Thames is in the King, and it is common to all fishermen; and therefore there is no contradiction between the soil being in one and the river being common to all fishers. *Fitzwalters Case*, 1 Mod. 105.

The fact that the real writs were held to lie for the recovery of a fishery is not conclusive that a several fishery must also be united with the soil, since such might have been the case in the particular instance, while in other cases *quod permittat*, which is not a real writ, should be used. *Woolrych Waters*, p. 118.

<sup>1</sup> 7 Hen. VII. 13, pl. 3.

There may be free fishery in another's land. 18 Edw. IV. 4, pl. 24.

<sup>12</sup> *Royal Fishery of the Banne*, Davies, 149, Co. Litt. 4 b; *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951;

*Saltash v. Goodman*, L. R. 5 C. P. Div. 431.

The grant of a well-defined pool or pond by the absolute owner thereof, without reservation, gives to the grantee the exclusive right to the fishery; but a grant, not only of the pond, but of all adjoining lands, gives title, not only to the water in the pond, but to the land which it covered. *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275.

<sup>13</sup> *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 43 Am. Dec. 155; *Fagan v. Armistead*, 33 N. C. (11 Ired. L.) 433; *Den ex dem. Gilliam v. Bird*, 30 N. C. (8 Ired. L.) 280, 284, 40 Am. Dec. 379.

<sup>14</sup> *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

<sup>1</sup> *Lovecides v. Dickerson*, 34 Barb. 586.

A royal grant of territory adjoining a river, and all fisheries within this territory except three parts of a fishery in a tidal river, will not pass the fourth part for the King's grant passes nothing by implication. *Royal Fishery of the Banne*, Davies, 149.

So, a grant of "white fishings" in certain waters excludes all others, such as salmon. *Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419.

The King had the right to royal fish

limits of the exclusive right will prevent their extension by implication or prescription.<sup>2</sup> A grant from the Crown of a fishery passes a several fishery, although the word "several" is not used, where the grant also includes weirs, as the grant of weirs passes title to the soil, and thereby creates a several fishery.<sup>3</sup> But in the absence of anything to indicate an intention to make the fishery exclusive, a mere right of fishery in public water conferred by the sovereign will not be regarded as exclusive, although the title to the soil is also in the grantee.<sup>4</sup> A special act of the legislature conferring upon a particular person, his heirs and assigns, a certain right of fishing below low-water mark is not repealed by a subsequent general enactment which does not do so in terms, or by inconsistency or repugnancy.<sup>5</sup> A grant of land with the fishings pertaining thereto *prima facie* means the fishings *ex adverso* of them, *ad medium filum aquæ*.<sup>6</sup> Because the words of a grant are sufficient to pass the fishery in the whole river if it had been then vested in the Crown, it is not ineffectual to pass the moiety of those parts of the river in which the Crown had that, and no more, to give.<sup>7</sup> Land adjoining a river conveyed "subject to the right of all parties in respect to the Glen river" will not include a several fishery in the river belonging to a third party.<sup>8</sup> The right of the public to grant the fishery includes the right to lease it.<sup>9</sup>

and no subject could have them without the King's special grant. *Royal Fishery of the Banne*, Davies, 149.

When it is intended to grant an exclusive right of fishery to inhabitants of a city, to the exclusion of the general public and the owner of the previously granted upland, such intention must be clearly expressed, and not left to implication. This rule affords a fair and reasonable construction, and not a strict one which must be relinquished when the grant provides that it shall be interpreted most in favor of the grantee, full effect being given to the grant. *Wilson v. Codyre*, 27 N. B. 320.

A royal grant of salmon fishings described by precise and definite limits constitutes a bounding charter; and the grantee cannot by usage extend his right beyond these limits. *Warrand v. Mackintosh*, L. R. 15 App. Cas. 52.

Half of the salmon fishing *ex adverso* of lands on one side of a river may mean one of two things: (1) A *pro indiviso* right to a moiety of the fishings all along the frontage; or (2) the whole fishing along such part of the frontage as will, having regard to the suitability of the water for fishing purposes, fairly represent a moiety. *Ibid.*

<sup>2</sup>*Hanbury v. Jenkins*, [1901] 1 Ch. 401.

<sup>3</sup>*Mculton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

An exclusive fishery cannot be predicated upon a grant from the state of liberty and license to a riparian proprietor, his heirs and assigns, to use and occupy an ancient fishing place in certain public waters, unrestricted by an act establishing a close season thereon. *Chalker v. Dickinson*, 1 Conn. 510.

<sup>4</sup>*State v. Cleland*, 68 Me. 258.

A statute permitting the flowing of land for the purpose of raising a pond for the cultivation of useful fishes is constitutional. *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048.

<sup>5</sup>*Warrand v. Mackintosh*, L. R. 15 App. Cas. 52.

<sup>6</sup>*Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 109.

<sup>7</sup>*Hamilton v. Muagrove*, Ir. Rep. 6 C. L. 129, 19 Week. Rep. 443.

<sup>8</sup>Under the British North American act, the Dominion can only lease a fishery where a private several fishery does not already exist by law. *Queen v. Robertson*, 6 Can. S. C. 52.

**373. Private grants of fishery.**— Where a fishery is the property of a private individual, either as the owner of the soil over which it is exercised or as the owner of a right in gross which has been separated from the soil, he may convey his right by deed.<sup>1</sup> Or he may make leases or other contracts with regard to it in the same way as he could with reference to other real property. A lease of riparian land will ordinarily pass the fishery in the stream appurtenant to the leased property, unless it is specially reserved.<sup>2</sup> But a grant of the bank which excludes the water will not pass the fishery.<sup>3</sup> The right to take fish from the private waters of another, which is merely personal to the one exercising or owning such right, and not appendant to any estate, is not capable of alienation, either by conveyance or devise.<sup>4</sup> A grant of a several fishery in navigable waters by a riparian owner who could not acquire such a right from the state is merely void, and cannot estop.<sup>5</sup> The attempted reservation, by a grantor of land upon Lake Erie and Sandusky bay, of the exclusive right of fishing in the bay or lake, being a right which he never had, is inoperative; but the reservation to the grantor of the exclusive right to land on either shore to take fish, or to carry to and from the shore seines and fishing tackle, is good, since, being a right which he could grant, it is a right

A lessee from a town of the right of fishing in a brook cannot deny the right of the town to make the lease to avoid payment of the rent unless he is evicted. *Eastham v. Anderson*, 119 Mass. 526.

No notice of an intention to lease a pond lying wholly within one township need be given where the application is made by the town and the lease is made to it. *Com. v. Eliot*, 146 Mass. 5, 15 N. E. 81.

Under the Massachusetts law of 1869 the commissioners of inland fisheries may lease great ponds above 20 acres in area to the riparian proprietor for the "cultivation of useful fishes." *Com. v. Vincent*, 108 Mass. 441.

<sup>1</sup> As the right of fishery in a navigable river is an incorporeal hereditament, the owner cannot grant a term for years in it except by deed. *Somerset v. Fogwell*, 5 Barn. & C. 886, 8 Dowl. & R. 756, 5 L. J. K. B. 49, 29 Revised Rep. 449.

A license to fish in the ponds of the grantor, contained in a demise of a house in writing but not under seal, is void, as it amounts to a demise of an incorporeal hereditament which lies in grant only, and cannot pass by parol. *Bird v. Higginson*, 4 Nev. & M. 505, 2 Ad. & El. 696, 1 H. & W. 61.

A grant of a several fishery may be made by deed and confers a right to enter and kill and carry away fish, and to bring actions against persons who interfere with such rights. *Ecroyd v. Coulthard*, 66 L. J. Ch. N. S. 751 [1897] 2 Ch. 554, 77 L. T. N. S. 357, 46 Week. Rep. 119, 61 J. P. 791.

<sup>2</sup> *Davies v. Jones*, 18 Times L. R. 367. The right of fishing, being an incorporeal hereditament, cannot be the subject of an exception in a lease of the adjoining land to the center of the stream. *Corker v. Payne*, 18 Week. Rep. 436, Ir. Rep. 4 C. L. 380.

<sup>3</sup> A grant of land beginning on the bank of a river and extending from it by various courses until the boundary comes back to the river with all the ponds, pools, water courses, and streams of water and fishing within the limits and bounds aforesaid, does not convey any exclusive right of fishery in the river to the grantee. *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12.

<sup>4</sup> *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349.

<sup>5</sup> *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

which he could reserve.<sup>6</sup> An easement, and not a fee, is granted by an instrument conveying "one half the privilege of the fishing place," where the grantees are given the privilege of fishing only in a specified manner, the implements to be furnished by the grantor, and he to have one half of the catch.<sup>7</sup> If one having a several fishery grant *liberam piscariam* the grantee shall have free fishing with the grantor; but if he grant *piscariam suam* without more, the entire fishery passes.<sup>8</sup> A liberty to fish, granted to one, his heirs and assigns, is an interest or profit *à prendre*, and may be exercised by servants in the absence of the master; and the addition of "with servants or otherwise" does not limit the privilege, and exclude the exercise of it by servants.<sup>9</sup> A grant by the lord of the manor of the exclusive right of fishing in a defined part of a river is not a mere license to fish, but a right to carry away the fish caught, and constitutes an incorporeal hereditament.<sup>10</sup> A grant of one undivided moiety of a certain lot, "and including the salmon fishery contiguous to said land," conveys a half interest in the fishery as well as in the land.<sup>11</sup> A grant of a several fishery is not invalidated by a reservation to the lord of the manor of the right of taking fish for the supply of his own table, or by a reservation of oyster beds, as a partial independent right in another, or a limited liberty, does not derogate from the right of the several fishery, and one may have a several fishery, although another has the right to a particular species of fishing or a limited liberty of fishing.<sup>12</sup> An exclusive right of catching the particular kinds of fish by permanent fixtures attached to the flats is acquired by the grantee of all the right of taking salmon, shad, and alewives, together with all the privileges necessary for carrying on the said fishing.<sup>13</sup> In order to convey an exclusive right of fishery in a pond, all the parties having interests therein must join in the conveyance.<sup>14</sup> The rule of *caveat emptor* applies to the purchaser of a fishing location with full liberty and opportunity to investigate, regarding its boundary.<sup>15</sup> A license to use a rod and line will not include the right to use a night line.<sup>16</sup>

<sup>6</sup>*Sloan v. Biemiller*, 34 Ohio St. 492. *Fishing & Canning Co.* 24 Wash. 630.  
<sup>7</sup>*Butrick v. Tilton*, 155 Mass. 461, 29 64 Pac. 792.

N. E. 1088.

<sup>8</sup>*Alderman v. Hasting*, 2 Sid. 8

<sup>9</sup>*Wickham v. Hawker*, 7 Mees. & W. 63.

<sup>10</sup>*Fitzgerald v. Firbank* [1897] 2 Ch. 76, 66 L. J. Ch. N. S. 529, 76 L. T. N. S. 564.

<sup>11</sup>*Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

<sup>12</sup>*Seymour v. Courtenay*, 5 Burr. 2816.

<sup>13</sup>*Mattheus v. Treat*, 75 Me. 594.

<sup>14</sup>*Com. v. Perley*, 130 Mass. 469.

<sup>15</sup>*Fall & S. Fish Co. v. Point Roberts*

But when a riparian proprietor, in dividing his property between two grantees, conveys in the deed of one the fishery "as it has heretofore been conducted," the other has no notice thereby that the fishery extends further than grantee's shore line, as the grant referred to the manner of conducting the fishing, rather than its extent. *Harvey v. Vandegrift*, 89 Pa. 346.

<sup>16</sup>*Williams v. Long*, 57 J. P. 217.

When a several fishery is appurtenant to a manor, the mere granting of land in such manor will give grantee no right in the fishery.<sup>17</sup> A conveyance of land which fails by reason of want of title in the grantor does not operate as a conveyance of a right to maintain a fishing stand on a piece of such land acquired by the grantor by prescription, as such a right is an incorporeal hereditament, not incident to the particular estate conveyed.<sup>18</sup>

374. How far does grant of fishery carry the soil?—The question as to how far a grant of fishery carries title to the soil has caused the courts some trouble. When the principles at the foundation of the right of fishery and the power to grant it are kept in mind there would seem to be no difficulty. The fishery is regarded as a mere incident to the soil, and as a thing which can be separated from it, and therefore there is no reason for holding that a mere grant of a fishery would carry title to the soil. And the better considered cases agree to this rule whether the grant is of a free,<sup>1</sup> or of a several, fishery.<sup>2</sup> The difficulty seems to have arisen from the fact that the fishery is so intimately connected with the soil that the one having the several fishery is presumed to be the owner of the soil.<sup>3</sup> And so Rolle<sup>4</sup> states that if a man have a fishery in another's soil, he may justify the fixing of poles in the soil, or any other thing done. That contention seems to lose sight of the fundamental distinction of property rights and to make the title really follow the fishery right. In *Hanbury v. Jenkins*,<sup>5</sup> it was held that the title to the bed of a river passes under a grant from the Crown of several fishery, together with the weirs in and upon the waters and rivers mentioned; and where the grant was an ancient one, it passed, not only the soil on which the weirs were constructed, but the soil over which the river runs, and upon which there is a right to construct weirs for the purpose of taking fish, as in ancient times weirs were the means of taking fish by means of putting an obstruction across the stream and intercepting them as

<sup>17</sup>*Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622. Affirming Ir. L. R. 2 C. L. 169.

<sup>18</sup>*Jackson v. Lewis*, Cheves L. 259.

<sup>1</sup>*Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, 91.

<sup>2</sup>Co. Litt. 4 b.

<sup>3</sup>*Hanbury v. Jenkins* [1901] 1 Ch. 401; *Partheriche v. Mason*, 2 Chitty, 658; *Anonymous*, Loft, 364.

In *Hindson v. Ashby* [1896] 2 Ch. 1, 65 L. J. Ch. N. S. 515, 74 L. T. N. S. 327, where the owner of land adjoining a nontidal river

in which another had a several fishery claimed title to lands forming to his land as an accretion, the court, in speaking of the presumption of ownership of the soil arising from a several fishery, says: The presumption of ownership in the defendant's predecessors as owners of the several fisheries displaces the presumption that would otherwise arise in favor of the riparian proprietors being the owners of the bed of the river to the center of the stream.

<sup>4</sup>2 Rolle Abr. 504, pl. 3.

<sup>5</sup>[1901] 1 Ch. 401.

they went up. Blackstone<sup>6</sup> intimates that a several fishery comprehends the soil, but Butler<sup>7</sup> favors Coke's statement that a granting of a right of fishery does not pass title to the soil. In the Year Books it is stated that a plea of freehold to an action of trespass on a several fishery is good.<sup>8</sup> True principle leads to the conclusion that, in the absence of anything to indicate a different intention, a grant of the fishery will not include the soil.<sup>9</sup> The circumstances under which the grant of the fishery was made may be such, however, as to pass the right to the soil with it.<sup>10</sup>

**375. Fishery right of riparian owner.**—An exclusive right of fishery in the water adjacent to property is not one of the rights of the riparian owner. He can claim such right only when he owns the soil under the water, or the right has been expressly conferred upon him.<sup>1</sup> By reason of the location of the riparian owner and his exclusive right to use his land in connection with the fishery, he has certain advantages not common to the public, and in some cases this will

<sup>6</sup> (2 Com. 39).

And the New Jersey court held that a conveyance by an owner of lands adjoining and extending to the Delaware shore of the sole right, use, and enjoyment for all purposes of fishing whatsoever and none other of a strip of land described by courses and distances beginning along an artificial embankment four feet wide on top made to prevent the tide flowing over the lowlands and running out to low-water mark conveys an actual estate, not an easement only, passes the fee of land next the river, and makes the grantee the riparian owner, hence, the riparian commissioners could not grant any one else the state rights in the land under water in front of him. *Fitzgerald v. Faunce*, 46 N. J. L. 536.

<sup>7</sup> Co. Litt. 4b., 122 a, note 181.

<sup>8</sup> 10 Hen. VII., 24, pl. 1.

<sup>9</sup> *Romero v. Fogwell*, 5 Barn. & C. 875, 8 Bow. & R. 747, 5 L. J. K. B. 49, 29 Revised Rep. 449.

A grant by the Crown of a several fishery in a navigable stream conveys no property in the soil, and is not a territorial, but is an incorporeal, franchise. *Ibid.*

<sup>10</sup> *King v. Old Arlesford*, 1 T. R. 358, in determining whether a pauper had a settlement, the court held that where he rented "the fishery of a pond with the spear sedge, flags, and rushes growing in and about the same," the soil passed with it.

A fishery must have been a several

fishery, and presumably includes the soil thereof, when in a feoffment the description of fishery is left uncertain, but is made with livery of seisin duly indorsed, conveyed subject to a free rent to the lord of the manor; the livery not being appropriate in case of an incorporeal hereditament, and a free rent being incapable of being reserved from such an estate by a common person. *Marshall v. Ulleswater Steam Nav. Co.* 3 Best & S. 732, 32 L. J. Q. B. N. S. 139, 9 Jur. N. S. 988, 8 L. T. N. S. 416, 11 Week. Rep. 489.

*Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Skinner v. Hettrick*, 73 N. C. 53; *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

A New Brunswick decision is out of line with the current of authority in holding that the right of fishery does not depend upon the ownership of the bed of a river, but of the bank; it depends upon the lateral, and not the vertical contact of the water of the river. *Steadman v. Robertson*, 18 N. B. 580.

And in *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333, it is said that the legislature, in establishing the right to occupy fresh-water streams not connected with the sea for the use of mills, made no provision in regard to fish, and that the right of fishing in such streams was exclusive in the owner of the banks.



give him a virtual monopoly of the fishery; but the fact that he has the exclusive right to draw a seine on his property does not exclude the public from the right to draw seines if they can do so without trespassing on the shore.<sup>2</sup> Chief Justice Choke said, a long time ago: If I have land adjoining the sea so that the sea ebb and flow upon my land, while it flow everyone may fish in the sea which has flowed upon my land, for then it is parcel of the sea, and in that sea everyone may fish of common right.<sup>3</sup> Riparian ownership does not prevent the granting of exclusive fishery rights in the water in front of the land to a stranger.<sup>4</sup> But a baronial title, even though it contains no express words as to fishing, constitutes a sufficient foundation for a claim to salmon fishing, if the requisite enjoyment and usage are established.<sup>5</sup> Under local statutes or customs the riparian owner may possess an exclusive fishery right adjoining his shore.<sup>6</sup> A several fishery cannot be appurtenant to a several pasture by reason of incongruity,—and especially a fishery for taking all the fish for commercial purposes in distant parts.<sup>7</sup>

**376. Prescriptive rights against public.**—Under the doctrine that the Crown had power to grant exclusive fishery rights, they might be acquired by prescription, and many such rights have been recognized by the courts.<sup>1</sup> And, in *Rogers v. Allen*,<sup>2</sup> it was held that, to prove a

<sup>2</sup>*Lay v. King*, 5 Day, 72; *Mattheus v. Treat*, 75 Me. 594; *Whittaker v. Burhans*, 62 Barb. 237.

A plain distinction between a fishery annexed to the shore and a fishery by common right in a river is made by the Pennsylvania-New Jersey compact of 1783, authorizing the guarding of fisheries on the rivers annexed to the respective shores against interruptions by persons fishing under claim of common right on the River Delaware. *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319.

Persons fishing with pod-nets are made subservient by North Carolina statutes to those fishing with seine drawn from the shore. *Hettrick v. Page*, 82 N. C. 65.

<sup>3</sup> 8 Edw. 4, 18.

<sup>4</sup>*Wilson v. Codyrc*, 27 N. B. 320.

The legislature may give to a town the right to improve a great pond for public fishing without making compensation to a riparian owner of the stream connecting with it, whose fishery rights are destroyed thereby. *Cole v. Eustham*, 133 Mass. 65; *Lunt v. Hunter*, 16 Me. 9.

The fishing privilege on flats may be separated from the title to the adjoining upland, and the occupant of the privi-

lege may maintain trespass against the owner of the upland if he places a weir on said flats. *Wyman v. Oliver*, 75 Me. 421.

But Judge Baldwin held that an entry by description of a fishery by one not a shore owner, but claiming under common-law right, is void. *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319.

<sup>5</sup>*McDouull v. Lord Advocate*, L. R. 2 H. L. Sc. App. Cas. 431.

<sup>6</sup>*Re Delaware Fisheries*, 4 Am. L. Reg. 582; *Fitzgerald v. Faunce*, 46 N. J. L. 536.

<sup>7</sup>*Edgar v. English Fisheries*, 23 L. T. N. S. 732.

<sup>1</sup> Hale, *De Jure Maris*, chap. 5, found in Hargrave, *Law Tracts*, p. 18; also in note to *Mather v. Chapman* (Conn.) 16 Am. Rep. 56; *Orford v. Richardson*, 4 T. R. 437; *Carter v. Murcot*, 4 Burr. 2162; *Gould v. James*, 6 Cow. 369; *Brookhaven v. Strong*, 60 N. Y. 56; *Jackson v. Lewis*, Cheves L. 259; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Rogers v. Jones*, 1 Wend. 259, 19 Am. Dec. 493; *Reg. v. Downing*, 23 L. T. N. S. 398, 11 Cox C. C. 580; *Rolle v. Whyte*, L. R. 3 Q. B. Div. 286, 37 L. J.

prescriptive right of fishery, old licenses on the court rolls granted by owners of the right, in consideration of certain rents, to fish in the *locus in quo*, are evidence, without proof of the rents being paid, in connection with proof that such rents have been paid in modern times or that the claimants have exercised their rights of ownership over the fishery. Whether or not a prescriptive right can be acquired in modern times depends upon whether or not time is held to run against the state. Where, by the terms of the statute of limitations, one can acquire title to real estate by adverse possession or prescription, or where the courts will presume a grant from the state in case of long-continued possession, the right to exclusive fishery can be acquired in that way.<sup>3</sup> Judge Sharswood questioned whether the right could be prescribed for when not pleaded in a *que* estate, but in a man and his ancestors, stating that that kind of a usage for twenty-one years or upwards which may be sufficient to raise the presumption of a grant of a mere easement will not support a claim for an interest in the land itself or its profits, and held that at all events the evidence in that case was not sufficient to establish a right of fishery in gross.<sup>4</sup> In *Pacific Steam Whaling Co. v. Alaska Packers' Assn.*<sup>5</sup> the court held that no prescriptive right of fishery can be acquired in tide water because in its very nature the right of fishing there cannot be exclusive. Its exercise is only the exercise of a public right. One who exercises a right of fishery in the sea does not make himself a trespasser. That decision can hardly be regarded as accurate, however. It is undoubtedly true that the mere exercise of a fishery right in tide water could not become the foundation of a prescriptive right, because it would be presumed to have been merely the exercise of a common right. But if an individual should stake off, or otherwise appropriate, a portion of the sea for his own use, and exclude the public from it, the possession would then become adverse; and there is no reason why a title should not be acquired to the fishery in that place if the possession was long enough continued. In order to obtain such right it must be exercised as an exclusive right, and not as one of the public.<sup>6</sup> *Carter v. Murcot*,<sup>7</sup> was an action

Q. B. N. S. 105, 17 L. T. N. S. 560, 16 Week Rep. 593, 8 Best & S. 116.

The possessor of a *habile* title to a barony may prescribe a right of fishery in a tidal river adjoining it as against the Crown. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 288.

But a several fishery cannot be established in an arm of the sea, or in a navigable river, unless it is by immemorial usage. Schultes. *Aquatic Rights*, 85.

<sup>3</sup> 1 Campb. 309, 10 Revised Rep. 689.

<sup>4</sup> *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250.

<sup>5</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. 36, 100 Am. Dec. 597.

<sup>6</sup> 138 Cal. 632, 72 Pac. 161.

<sup>7</sup> *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 43 Am. Dec. 155; *Fagan v. Armistead*, 33 N. C. (11 Ired. L.) 433; *Moulton v. Libbey*, 37 Me. 472, 50 Am. Dec. 57; *Chalker v. Dickinson*, 1 Conn.

for trespass for breaking and entering the plaintiff's close in the River Severn. Defendant pleaded that it was a navigable river, also that it was an arm of the sea wherein every subject had a right to fish. Plaintiff replied prescribing for a several fishery there, which was found in his favor. Defendant claimed that, although it was so found, yet, on the authority of *Warren v. Mathews*,<sup>8</sup> prescription was not good because everyone has a right to fish in a navigable river, or in an arm of the sea. The court follows the language of *Warren v. Mathews* to the effect that in navigable rivers the fishery is common, but that, since prescription was found to exist in this case, the plaintiff's right was good, Yates, J., saying the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea. In jurisdictions where no right to grant exclusive fisheries is recognized, no such right can be acquired by prescription.<sup>9</sup> A right of fishery in gross cannot be acquired by a family collectively, but only by the individuals.<sup>10</sup> The acquisition of a several fishery in gross by a common-law prescription (immemorial user) is not shown where the acts of user relied upon were done under a misconception as to the effect of a certain deed which, it was thought, passed the freehold of the soil of the bed of the river, and with that soil the exclusive right of fishing. Under such circumstances, the principle prevails that, if the origin of the use is not lost in obscurity, but is explained, and appears to be subsequent to the

384, 6 Am. Dec. 250; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561; *Day v. Day*, 4 Md. 262.

Occasional angling will not be sufficient to establish a prescriptive right of fishery; nor will the use of the rod be of any avail, when practised in certain waters in competition with net and cable fishing. The latter is by far the more destructive method, and, furthermore, seriously interferes with angling. *Warrend v. Mackintosh*, L. R. 15 App. Cas. 52.

The prima facie right of the public is not rebutted by proof of mere interrupted enjoyment of the privilege of fishing for a period requisite to acquire title by prescription, since the mere lawful exercise of a common right for that period has never been considered as conferring an exclusive right. *Sloan v. Biemiller*, 34 Ohio St. 492.

A claim to a fishery by an owner of the soil cannot be proved by the fact that his initials were engraved in a rock in the stream near his boundary line, without any proof when, or by whom, or

for what purpose, they were so engraved. *Melvin v. Whiting*, 13 Pick. 184.

No private right to participate in a fishery can be acquired by an exercise of a public right, though for fifty-five years. *Com. v. Weatherhead*, 110 Mass. 175.

<sup>7</sup> 4 Burr. 2162.

<sup>8</sup> 6 Mod. 73.

<sup>9</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Nickerson v. Brackett*, 10 Mass. 212.

That one for over fifty years has claimed the exclusive right of fishing in navigable waters, and that in the main his neighbors respected the claim, do not constitute adverse possession as against the state, or give rise to a prescriptive right, where the state is not authorized to grant such privilege; nor can it be charged with notice of the necessity of protecting its title since the right of fishing is common to all. *Slangerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12.

<sup>10</sup> *Berins v. Bird*, 12 L. T. N. S. 306.

reign of Richard I., the head of the prescription is cut off, and the prescription at common law cannot be maintained.<sup>11</sup> Where a river constitutes a *unum quid*, the whole fishery is prescribed for or occupied by the suitable and natural mode of using it according to the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests,—a guide which varies according to circumstances.<sup>12</sup> If the right has been once acquired by prescription to a several fishery in navigable water, it may pass as appurtenant to the owner's estate.<sup>13</sup>

**377. Prescriptive rights against individual.**—An exclusive right of fishery may be acquired in private property by prescription.<sup>1</sup> But this extends only to a several fishery, for, while a prescriptive right may be acquired to a free or common fishery, this, from its very nature, is not exclusive.<sup>2</sup> Title to an exclusive fishing privilege given by statute to the owner of land fronting on a river, cannot be acquired by adverse user thereof, where the statute declares such a violation of the owner's rights a trespass punishable by fine or imprisonment, or both, as a misdemeanor.<sup>3</sup> In order to gain a prescriptive right the user must be under a claim of right, and not by mere indulgence of the owner.<sup>4</sup> And the privilege must have been exercised under a

<sup>11</sup>*Warwick v. Gonville & Caius College*, 6 Times L. R. 447, Affirming 5 Times L. R. 461.

<sup>12</sup>*Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169; *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 273.

A river is a *unum quid*, as relates to the fishery therein when the whole fishery is included in one possession and title. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 273.

<sup>13</sup>*Rogers v. Allen*, 1 Campb. 309, 10 Revised Rep. 689.

<sup>1</sup>Co. Litt. 122a; *Melvin v. Whiting*, 10 Pick. 295, 20 Am Dec. 524, 13 Pick. 188; *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951; *Cobb v. Daventry*, 32 N. J. L. 369; *Paley v. Birch*, 8 Best. & S. 336, 16 L. T. N. S. 410.

An enjoyment for sixty years and as far back as living memory extends, of maintaining a coop weir in non-navigable waters, is presumptive of a grant therefor. *Leconfield v. Lonsdale*, L. R. 5 C. P. 657, 23 L. T. N. S. 155, 18 Week. Rep. 1165, 39 L. J. C. P. N. S. 305.

<sup>2</sup>*Chimney v. Fishen*, 2 Rolle, Abr. 267; *White v. Shirland*, 2 Rolle, Abr. 267.

<sup>3</sup>*Heckman v. Sweett*, 99 Cal. 303, 33 Pac. 1099.

A title by prescription to an exclusive fishing privilege, given by statute to the owners of land fronting on a river, can be acquired only by adverse possession of the land to which such right attaches as an appurtenance under the statute, and not by mere user of the right to the exclusion of such owner. *Heckman v. Sweett*, 99 Cal. 303, 33 Pac. 1099.

<sup>4</sup>*Gibbs v. Sweett*, 20 Pa. Super. Ct. 275, Affirming 7 Lack. Legal News, 18; *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *McFarlin v. Essex Co.* 10 Cush. 310.

One prescribing for a fishery in navigable waters, i.e., for the right of drawing his nets on another's shore, must for twenty-one years have enjoyed such an exclusive user as to be adverse and exclusive, and not a mere enjoyment such as was accorded the public generally. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

Long enjoyment of a fishery by leave of the several owners thereof, granted from time to time, cannot become a right to have such license granted. *Mills v. Colchester*, L. R. 2 C. P. 476, 36 L. J. C. P. N. S. 210, 16 L. T. N. S. 626, 15 Week. Rep. 955. Affirmed in L. R. 3 C. P. 575, 37 L. J. C. P. N. S. 278, 16 Week. Rep. 987.

claim of right, and not as a trespasser.<sup>5</sup> A prescriptive right of an adjoining proprietor to fish in another's private fishery will not authorize him to admit the public to the enjoyment of his privilege.<sup>6</sup> The annual temporary occupation of a fishery cannot amount to a disseisin of the true owner.<sup>7</sup> A prescriptive right of fishery in private water cannot be acquired by the unorganized public.<sup>8</sup> Therefore the mere fact that claimant has exercised his right as one of the public will not give him a prescriptive right.<sup>9</sup> When the owner of soil around a pond artificially raises the height of the water, although the title to the bed is in another, when he has been in the actual, exclusive, and uninterrupted possession and occupation of the entire fishery

<sup>5</sup>*Paley v. Birch*, 8 Best & S. 336, 16 L. T. N. S. 410.

<sup>6</sup>*Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 21 Am. St. Rep. 828, 24 N. E. 686.

<sup>7</sup>*Nickerson v. Brackett*, 10 Mass. 212. Using a rock in a river for fishing purposes during two months in each year is not such a continuous possession as will give a title under the statute of limitations. *McCullough v. Wall*, 4 Rich. L. 68, 53 Am. Dec. 715.

<sup>8</sup>*Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951; *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169; *Cobb v. Davenport*, 32 N. J. L. 369; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

The inhabitants of a town acquire no right to the continuance of a public fishery by an enjoyment of sixty years. *Com. v. Weatherhead*, 110 Mass. 175.

The practice of the public of fishing in a nontidal stream will not raise the presumption of a lost grant, as there can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription. *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175.

A prescriptive right cannot be presumed in an indefinite number of persons to enjoy another's private fishery, when its origin must have been within living memory. *Tilbury v. Silva*, L. R. 45 Ch. Div. 98, 63 L. T. N. S. 141.

The case of *Saltash v. Goodman*, L. R. 5 C. P. Div. 431, is an instructive one on the question of acquiring a prescriptive right in a fishery on behalf of the public. In it certain persons were sued in trespass for interfering with plaintiff's

several right of fishery and justified *inter alia* by setting up an immemorial usage on the part of inhabitants of the borough to which they belonged to fish in such water and claimed that the court must presume the grant of a right for them to do so. The court, however, adopted the reasoning that such a right could not exist by custom, prescription, or grant, unless it be a Crown grant which incorporated the inhabitants; that such a grant will not be presumed from proof of usage by the inhabitants, if such presumption is inconsistent with the present or past state of things and cannot be made if there is no evidence of such a corporation having existed at any time. It was also held that proof of usage on the part of the inhabitants generally will not establish a right in favor of the owners of a particular tenement. This case was subsequently reversed in L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 270, the court inventing an ingenious origin for the custom by supposing a grant to a corporation in trust for certain persons, the free inhabitants of the ancient tenements within the borough who were the persons claiming the right of fishery. But in the subsequent case of *Tilbury v. Silva*, L. R. 45 Ch. Div. 98, 63 L. T. N. S. 141, the question again came up and there being no facts in the case upon which the fiction of a grant to a corporation in trust could be rested, the court practically follows the ruling of the common pleas decision in the above case and holds that the right of fishery could not be claimed by prescription on behalf of a large and indefinite class, such as "owners and occupiers."

<sup>9</sup>*Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634.

therein for more than twenty years, claiming it as his own and keeping others away, he has obtained right to an exclusive fishery.<sup>10</sup>

**378. Effect of custom.**—A right to take fish from private water cannot be acquired by custom.<sup>1</sup> As said in *Bland v. Lipscombe*,<sup>2</sup> a custom for the public to go upon private land and fish in a stream is in the nature of a *profit à prendre* in the soil, and void, although no right is claimed to carry away the fish, as the catching of the fish would destroy the fishery. But the common law with respect to the right of fishery in tidal water may be changed by custom of the state, so as to permit an acquisition of an exclusive right of fishery in that manner.<sup>3</sup> A license to fish in a private stream cannot be inferred from a common usage for anyone to enter and do so.<sup>4</sup> The custom may be established by prescription as belonging to an estate, and it must then be pleaded with a *que estate*.<sup>5</sup> The public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow, since the fishery is dependent upon ownership of the soil, and a public right of fishery can only exist in tidal waters the soil of which belongs to the Crown.<sup>6</sup> A custom is not created by the conduct of the owner of a fishery in issuing licenses to all persons of a particular class to fish in the fishery on payment of a fee, as to create a custom the long enjoyment must have been as of right, and not by license or leave.<sup>7</sup> Where a borough corporation was shown to have a prescriptive right to a several fishery in a navigable, tidal river which, as exercised from time immemorial,

<sup>1</sup>*Turner v. Hebron*, 61 Conn. 175, 187, 14 L. R. A. 386, 22 Atl. 951.

<sup>2</sup>*Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *Grimstead v. Marlowe*, 4 T. R. 718, 2 Revised Rep. 512; *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175; *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634; *Lloyd v. Jones*, 6 C. B. 81, 17 L. J. C. P. N. S. 206, 12 Jur. 657; *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678.

An alleged custom in other persons than the owners of the shore, to take mussel between high and low water marks, is unreasonable. *Le Strange v. Roocr*, 4 Fost. & F. 1048.

A custom for all the dwellers in a parish to have common of fishery over the lord's waters in the waste of the manor is unreasonable and void as including too many persons, thereby ruining the property over which it is exercised. *Allgood v. Gibson*, 34 L. T. N. S. 883, 25 Week. Rep. 60.

<sup>3</sup>24 L. J. Q. B. N. S. 155, note, 4 El. & Bl. 713, note.

<sup>4</sup>*Wilson v. Hill*, 40 N. J. Eq. 367, 19 Atl. 1097.

<sup>5</sup>*Winder v. Blake*, 49 N. C. (4 Jones L.) 332.

<sup>6</sup>*Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333; *Cobb v. Davenport*, 32 N. J. L. 369.

<sup>7</sup>"A prescriptive right to fish in respect of an ancient tenement is not established by proof of user, when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally," ancient tenements being shown, and such a general custom being bad in law. *Saltash v. Goodman*, L. R. 5 C. P. Div. 446.

<sup>8</sup>*Mussett v. Burch*, 35 L. T. N. S. 486; *Hudson v. MacLae*, 4 Best. & S. 585, 33 L. J. M. C. N. S. 65, 9 L. T. N. S. 678, 12 Week. Rep. 80.

<sup>9</sup>*Mills v. Colchester*, L. R. 2 C. P. 476, 36 L. J. C. P. N. S. 210, 16 L. T. N. S. 626, 15 Week. Rep. 955.

had been subject to a qualification that the free inhabitants of ancient tenements in the borough had, without interruption, exercised, under claim of right, the privilege of dredging for oysters from Candlemas to Easter eve in each year, the court held that a lawful origin for the usage of such inhabitants ought to be presumed if reasonably possible, and that it must be presumed that the original grant to the corporation of its several fishery was subject to a trust or condition in favor of such free inhabitants to dredge for oysters in accordance with the usage.<sup>8</sup> The above decision reversed the lower court which said: No doubt the courts will go very far in presuming lawful origin of a custom for all inhabitants of a parish to fish in a several fishery, where there has been immemorial user; but where the nature of the thing claimed is itself destructive of the subject-matter, an oyster fishery; and where it is antagonistic to other dominant claims with which it comes in conflict; or where there are other reasons which interfere and show that the immemorial user cannot possibly point to that which alone makes it good in law,—the courts will not presume an alleged lost grant.<sup>9</sup>

**379. Kinds of fishery.**— Much discussion has occurred as to the kinds of fishery which may exist, most of which is merely curious learning at the present time. The principal kinds which have been mentioned are four,—(1) several, (2) free, (3) common fishery, (4) common of fishery. Attempt has been made to distinguish between the last three kinds, but not with marked success. In *Benett v. Costar*,<sup>1</sup> an action for interfering with plaintiff's fishery when the plaintiff declared on the right to a common fishery whereas he should have alleged a common of fishery, the court, in discussing the difference between the two rights, said a common of fishery is a right in common with certain other persons in a particular stream. Though text writers have used the terms *communem piscariam* and *communiam piscaræ*, a common fishery extends to all mankind. Holt, Ch. J., divided fisheries into three classes (1) *separalis*, (2) *libera*, (3) *communis*.<sup>2</sup>

Shultes,<sup>3</sup> after a careful consideration of the question, concluded that there are in fact only two sorts of fishery, free or common of fishery and several fishery, or fishery in gross, though fisheries may

<sup>8</sup>*Goodman v. Saltash*, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276, Reversing L. R. 7 Q. B. Div. 106, 50 L. J. Q. B. N. S. 508, 45 L. T. N. S. 120, 29 Week. Rep. 639, 45 J. P. 844, L. R. 5 C. P. Div. 450.

<sup>9</sup>*Saltash v. Goodman*, L. R. 5 C. P. Div. 431.

<sup>1</sup> 8 Taunt. 183, 2 J. B. Moore, 83.

<sup>2</sup>*Smith v. Kemp*, Holt, 322, 2 Salk. 637.

<sup>3</sup> Schultes, *Aquatic Rights*, 60.

acquire various provincial denominations, and be subject to peculiar and different restraints according to the locality of their situation and the usage of the neighborhood. And in *Johnston v. Bloomfield*,<sup>4</sup> Fitzgerald, B., said that "the most important distinction in fisheries lies in their being exclusive or otherwise. Still, the exclusive right of fishing may be either in the soil of the owner or not." It thus appears that the main division of fishery is into those which are exclusively in an individual and those which are shared in common with others, the latter receiving various names which depend upon the manner in which the right is shared. The distinction between free fishery and several fishery goes back to the Year Books,<sup>5</sup> and lies in the fact that the latter is exclusive, while the former may be in common with others.<sup>6</sup> A free fishery is merely the right to fish in a certain place in common with all others who may have a right to fish there, and is the same as an unlimited common of fishery.<sup>7</sup> Blackstone thought that a free fishery was an exclusive right of fishing through franchise in a public river, and differs from a several fishery in that the latter must be connected with, or derived from ownership of the soil, while the former need not be.<sup>8</sup> But that distinction does not meet the necessities of the case, because it merely defines a several fishery in gross, while the idea carried by the term "free fishery" is that the one possessing it has a right of fishery in a certain place, of which he cannot be deprived, but which is not exclusive.<sup>9</sup> A man may have a free fishery both in a public and private stream, but with this distinction, that in the latter his right must arise by grant, prescription, or usage, and may be transferred from one person to another, whereas in the former it is vested in him of common right whether he exercises it or not, and it is not transferable.<sup>10</sup> "In order to constitute a several fishery, it is requisite that the party

<sup>4</sup> Ir. Rep. 8 C. L. 68.

<sup>5</sup> 17 Edw. IV., 6 pl. 5.

<sup>6</sup> Hall, Sea Shores, 68; *Melvin v. Whiting*, 7 Pick. 79.

*Libera piscaria* cannot be held to refer to an exclusive fishery in case of a large inland sea and without warrant by subsequent usages or the act of the parties. *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68.

<sup>7</sup> Woolrych, Waters, p. 123; *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68; *Yard v. Carman*, 3 N. J. L. 937.

<sup>8</sup> 2 Bl. Com. 39.

<sup>9</sup> The grant by a riparian proprietor of a "free fishery" in a non-navigable stream passes nothing more than the same right of fishery as is claimed by

everyone who has land in the manor along the bank of the river. *Lamb v. Newbiggin*, 1 Car. & K. 549.

"A man may have a free fishery on his own soil, as, for instance, he may have a river in his own manor, and another may have a right of fishing there with him." *Gibbs v. Woolliscott*, 3 Salk, 291, Comb. 433, 464.

See also 16 Vin. Abr. title *Piscary*, (B).

A riparian proprietor has no such property in *libera piscaria* as to be able to call the fish his own and maintain trespass for their taking by another. *Upton v. Dawkin*, 3 Mod. 97.

<sup>10</sup> Schultes, Aquatic Rights, 61.



claiming it should so far have the right of fishing, independent of all others, as that no person should have a coextensive right with him in the subject claimed," although a lesser or "partial independent" right in another does not derogate from the general owner.<sup>11</sup> Common of fishery may be appurtenant to an estate.<sup>12</sup> The only practical distinction at the present time is between a several or exclusive fishery and a common fishery, the former being one in which the owner may exclude all others from enjoying it, and the latter being one which is shared in common by a greater or less number of persons, usually by the public in general.

**380. Regulation of fishery; Crown's right to royal fish.**—Fisheries are of such importance to the public that they are a matter of public regulation. Although a man has an exclusive fishery on his own land, he does not own the fish until he has reduced them to his possession, unless they are so confined that they cannot escape into the property of another person; so that his fishery right amounts to no more than the right to use lawful means upon his land for the capture of the fish. As long as they remain free in the water they are the property of the public of common right, and the public may make regulations for the preservation of its property. The individual has no right to exercise wasteful or destructive methods of fishing, or destroy the fish at a time when they are not fit for food or their preservation is necessary to the multiplication of the species. Of a regulation of any of these matters by the public, he has no ground of complaint. One of the earliest regulations of the right of fishery was the assertion of a claim on the part of the Crown to certain kinds of fish which were regarded as of such a character as properly to be rendered to it in recognition of its prerogative. It is probable that at one time in the English history no claims were made with reference to fishery rights. Burke says,<sup>1</sup> on the authority of Bede, that

<sup>11</sup>*Seymour v. Courtenay*, 5 Burr. 2814; *Preble v. Brown*, 47 Me. 284.

A several fishery may exist either apart from, or as incident to, the ownership of the soil over which the river flows. *Hanbury v. Jenkins* [1901] 1 Ch. 401; *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

Equivalent expressions may be used, and after verdict "a sole and exclusive fishery" is held equivalent to "a several fishery." *Holford v. Bailey*, 13 Q. B. 426, 18 L. J. Q. B. N. S. 109, 13 Jur. 278, Reversing 8 Q. B. 1000, where it was held that a declaration in trespass for entering and disturbing a several

fishery does not properly describe the fishery by referring to it as a sole and exclusive fishery, as the word "several" has acquired a technical meaning, and is the only word having the same and no other meaning than the word *separatis*. found in the old entries.

<sup>12</sup>4 Edw. IV. 29, pl. 7.

In regard to a right of common of fishery in public waters as appurtenant to an estate, it has been held not to exist, the court stating that it would be useless, the same as prescribing for a right of common appurtenant in the King's highway. *Ward v. Cresswell*, Willes, 265.

<sup>1</sup>Works, Vol. 7, p. 242.

because of Druidical superstition, which forbade this class of food, the people, although maritime, did not know how to use fish, and that early in the seventh century, because of a drought, a famine came upon the people, and they were preparing to cast themselves over a precipice into the sea when Bishop Wilfred collected nets and with attendants plunged into the sea and gathered food from that source. The fishing industry soon became established, however, for Maitland says it is by no means impossible that in the seventh and eighth centuries the King had some claim to the nobler kinds of fish.<sup>2</sup> Whenever the custom that the King should have royal fish originated, in Lord Hale's time it was well established, and the royal fish were sturgeon, porpoise, and whale.<sup>3</sup> Whenever these fish were taken within the King's domains they belonged to him.<sup>4</sup> This rule applied, however, only to the domains of the King, for if the fish were taken outside of his domains he had no claim to them.<sup>5</sup> Salmon fishings at an early period of the history of Scotland were regarded as possessing a peculiar value over other fishings, and were distinguished from them in a remarkable manner. They were classed *inter regalia*. They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such a user of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant.<sup>6</sup> The subject may have a right to royal fish by grant or by prescription.<sup>7</sup>

**381. Right to regulate public fisheries.**— The unrestricted exercise of a right which is common to all, speedily results in destruction of the thing which is the subject of the right, if it is limited in quantity. Therefore, to protect the public rights and to preserve the right from

<sup>2</sup> Domesday, 230.

<sup>3</sup> Hale, *De Jure Maris*, chap. 7.

Onslow, in arguing in the *Case of Wimes*, 1 Plowd. 315, that the title to ores of gold and silver were in the King, said that the common law appropriates everything to the persons whom it best suits, excellent things to the person who is the most excellent, the King. And so does it likewise in regard to the water as well as the earth. For the things of value which the sea or water yields are the fishes therein, and of the fishes which are in the sea in England, two are more excellent than the others, viz., sturgeons and whales, and the common law has appropriated them to the King, as appears by *Treatise de Prerogative de Regis*, chap. 11, which says the King shall have whales and sturgeon taken in

the sea, which is not a new law but a declaration of the common law.

<sup>4</sup> *Royal Fishery of the Banne*, Davies, 149, Angell, *Tide Waters*, p. 35, Appx. 1.

Of whales the head belonged to him, and the tail to his consort. *Kelham's Britton*, 97.

<sup>5</sup> Hale, *De Jure Maris*, chap. 7.

Royal fish (whale and sturgeon) are inherently the property of the Crown. Royal fish "found and taken within the precincts, liberties, limits, or jurisdiction of the Cinque Ports, or their members" belong to the Lord warden, under royal grant. *Cinque Ports v. King*, 2 Hugg. Adm. 439.

<sup>6</sup> *Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419.

<sup>7</sup> Hale, *De Jure Maris*, chap. 7.

destruction, it is necessary that the public have the authority to regulate the exercise of the right and to fix limits to the individual appropriation of the commodity to which the right applies. With respect to common fisheries the public regulations began at an early date. Magna Charta<sup>1</sup> provided for the removal of weirs which would permit certain individuals to interfere with the enjoyment by others of the common right. And laws were made at a very early date for the conservation of fish and fry.<sup>2</sup> The rule has never been questioned that the public has a right to regulate the privilege of fishing in waters which belong to it.<sup>3</sup> This right of regulation may be enforced even on the seashore, and against subjects of other nations.<sup>4</sup> Under this rule a state or nation may regulate seal fisheries belonging to it, and forbid their capture within the distance from the shore to which ownership is conceded to it by other nations.<sup>5</sup> In *Ex parte Marsh*<sup>6</sup>

<sup>1</sup> Chap. 23.

<sup>2</sup> Hale, *De Jure Maris*, 23.

"The preservation of the spawn, fry, or brood of fish has been, for centuries, since 13 R. 2, chap. 19, a favorite subject of legislation, and the statutes passed for the purpose are extremely numerous." *Maldon v. Woolvet*, 12 Ad. & El. 13, 4 Perry & D. 96, 9 L. J. Q. B. N. S. 370.

<sup>3</sup> *Morgan v. Com.* 98 Va. 812, 35 S. E. 448; *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319; *State v. Snowman*, 94 Me. 99, 50 L. R. A. 544, 46 Atl. 815; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *Com. v. Essex Co.* 13 Gray, 239; *Fuller v. Spear*, 14 Me. 417; *Spear v. Robinson*, 29 Me. 531; *Skinner v. Hettrick*, 73 N. C. 53; *State ex rel. Alaska Packers' Asso. v. Crawford*, 13 Wash. 633, 43 Pac. 892; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Hart v. Hill*, 1 Whart. 132; *Com. v. Lohman*, 8 Kulp, 485; *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Burnham v. Webster*, 5 Mass. 266; *West Point Water Power & Land Improv. Co. v. State*, 49 Neb. 219, 66 N. W. 6; *Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 745, Affirming 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21, 7 S. E. 649; *Hettrick v. Page*, 82 N. C. 65; *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643; *State v. Woodard*, 123 N. C. 710, 31 S. E. 219.

The state is the owner of the beds of all tide-water rivers within its boundaries, unless they have been granted away,

and has the right to prescribe the mode in which fish may be taken in such waters. *Hughes v. State*, 87 Md. 298, 39 Atl. 747.

Indians on a reservation within a state are bound to obey the laws of the state against killing fish with explosives. *People v. Pieroc*, 18 Misc. 83, 41 N. Y. Supp. 858.

<sup>4</sup> By 46 & 47 Vict. chap. 22, regulations are made for the exclusive fishery limits of the British islands and for British fishing boats outside of such limits, and the jurisdiction of an offense is given to sea-fishery officers, and their jurisdiction is held to be exclusive. *Queen v. Cubitt*, L. R. 22 Q. B. Div. 622, 58 L. J. M. C. N. S. 132, 60 L. T. N. S. 638, 37 Week. Rep. 492, 16 Cox, C. C. 618, 53 J. P. 470.

In *Gammell v. Woods & Forest Comrs.* 3 Macq. H. L. Cas. 419, Lord Wensleydale, in discussing the question of the Crown's rights to salmon fishery on the coast of Scotland, says it would be hardly possible to extend fishing seaward beyond the distance of 3 miles, which by the acknowledged law of nations belongs to the coast of the country,—that is, within the dominion of the country by being within cannon range,—and so capable of being kept in perpetual possession.

For a full discussion of this subject, see *ante*, § 2a.

<sup>5</sup> Section 1956, U. S. Rev. Stat. forbade the killing of seals within the limits of Alaska territory or the waters thereof, except by persons authorized to do so by the government. *The Kodiak*, 53 Fed. 126.

the court said: "We think it may be laid down as a proposition of natural law that, inasmuch as oysters are becoming more and more valuable and necessary every year, with the growth of populations, as human food, any state possessing great and productive oyster deposits owes it as a duty to humanity, no less than to her own citizens engaged in the oyster culture, to protect these deposits from such depredations as destroy their valuable product." In *Smith v. Maryland*<sup>7</sup> the court, speaking of the title of the state to the soil under the navigable waters, says the state holds the propriety of the soil for the conservation of the public rights of fishery therein, and may regulate the mode of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. A public privilege of taking clams along a seashore and of fishing in the waters is enjoyed in subordination to the paramount authority of the legislature to regulate and modify and, to some extent at least, to extinguish.<sup>8</sup> The question whether or not the fisheries are of sufficient importance to warrant the legislature in making regulations with regard to them, as well as the means which shall be employed, is for the legislature to determine, and the courts have no control over its decision.<sup>9</sup> The only limitations upon the power of the legislature are the constitutional provisions as to the method of passing statutes, and

But this statute was superseded by the treaty between the United States and Great Britain. See *ante*, § 2a.

If the government contracts with an individual to permit his killing a certain number of seals each year in its fisheries, the contract will be broken so as to entitle the other party to damages in case of an agreement by the government with a foreign nation to prevent the killing of any seals for a certain time. *United States v. North American Commercial Co.* 74 Fed. 145.

If a lessee of the right to take seals is prohibited during certain years from the right to do so, he is still bound to make a commensurate compensation, where he accepts a partial performance of the contract on the part of the government. *Ibid*.

The seal fishery act of 1891 (54 & 55 Viet. chap. 19) provides that a person belonging to a British ship shall not kill, or take, or hunt, or attempt to kill or take, any seal within Behring sea during the period limited by the order, and places upon a person found within the sea the burden of showing that he was not violating the act. *The Oscar and*

*Hattie v. Queen*, 23 Can. S. C. 396, Affirming 3 Can. Exch. 241.

Under the British act of 1891, relating to the Behring sea seal fisheries, a vessel found within the prohibited limits, in order to escape forfeiture, was bound to show that fishing or shipping implements on board had not been used for illegal sealing during the voyage. *Queen v. The Oscar and Hattie*, 3 Can. Exch. 241.

In *Queen v. The Ainoko*, 4 Can. Exch. 195, it was held that the mere presence of a ship within the zone prohibited by the act regulating the seal fisheries owing to a bona fide mistake in the masters calculations, will not justify a forfeiture of the vessel.

<sup>7</sup> 57 Fed. 719.

<sup>8</sup> 18 How. 71, 15 L. ed. 269.

<sup>9</sup> *Clarke v. Providence*, 16 R. I. 337, 1 L. R. A. 725, 15 Atl. 703.

<sup>10</sup> *Gentile v. State*, 29 Ind. 409, Affirmed in *State v. Boone*, 30 Ind. 225.

Whether a statute (N. H. Laws 1899, chap. 22) forbidding the fishing for trout within the streams and lakes of the state with the intent to dispose of them for gain was a police measure well

as to discriminations between the various sections of the state and the citizens desiring to exercise rights of fishery. If the Constitution requires the passage of laws of general operation, a statute regulating fisheries cannot be made applicable to only certain counties of the state.<sup>10</sup> A statute discriminating between different kinds of fish, and between different localities and waters in regulating fisheries, does not deny to any person the equal protection of the laws.<sup>11</sup> The prohibition of citizens of other counties from fishing in the waters of two counties of the state, without anything to prevent residents of those counties from fishing in the waters of the other counties, is an unlawful discrimination.<sup>12</sup> Either general or special laws, as the legislature may deem proper, can be enacted respecting the preservation of fish, under a Constitution giving power to enact such laws, and adding that they may be enacted or enforced in particular counties or geographical districts designated by the general assembly.<sup>13</sup> But the exclusion of residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state as taxpayers are allowed to do, is in violation of a constitution which guarantees equal rights, and prohibits exclusive, separate public emoluments or privileges, except in consideration of public services.<sup>14</sup> Fish laws are within the meaning of a constitutional provision forbidding the enactment of any local or special law for the protection of game.<sup>15</sup> A power in the legislature to regulate fisheries includes power to prohibit certain kinds of fishing deemed destructive both to the supply of fish and to the equal chance and right of all the inhabitants to engage in fishing, since the public fishery ordained by the Constitution is to be preserved, not

calculated to protect the fisheries of the state, or was a wise means to accomplish the legitimate end, are questions for the decision of the legislature. *State v. Dow*, 70 N. H. 286, 53 L. R. A. 314, 47 Atl. 734.

<sup>10</sup>*French v. Shirley*, 7 Ohio N. P. 28.

And a statute regulating the fisheries throughout the state is not unconstitutional merely because it makes penal the use of nets only in certain counties. *Doughty v. Conover*, 42 N. J. L. 193.

Under Tenn. Const. art. 11, § 13, providing for the enactment of laws for the protection and preservation of game and fish, the legislature has the right to designate the locality in which fish laws shall be applicable, and may limit them to any geographical district, whether a county or less than a county, and whether in one stream or in a number of

streams in the same county. *Sibley v. State*, 107 Tenn. 515, 64 S. W. 703.

The legislature has power to give immediate effect to certain provisions of an act regulating the taking of fish, and to postpone the operation of the remainder of the act until a definite future time. *Osborne v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982.

<sup>11</sup>*Bittenhaus v. Johnston*, 92 Wis. 538, 32 L. R. A. 380, 66 N. W. 805; *Doughty v. Conover*, 42 N. J. L. 193.

<sup>12</sup>*State v. Higgins*, 51 S. C. 51, 38 L. R. A. 561, 28 S. E. 15.

<sup>13</sup>*Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399.

<sup>14</sup>*Gustafson v. State*, 40 Tex. Crim. Rep. 67, 43 L. R. A. 615, 45 S. W. 717, 48 S. W. 518.

<sup>15</sup>*State v. Higgins*, 51 S. C. 51, 38 L. R. A. 561, 28 S. E. 15.

destroyed.<sup>16</sup> A statute providing that it shall not be lawful for "any person" to fish in certain public rivers within certain points "with seines or nets, except from the shore in the usual and customary manner," makes no discrimination in favor of the owners of shores so as to be unconstitutional, but prohibits all persons from fishing except in the mode prescribed, and is a valid exercise of the police power of the state to regulate fisheries.<sup>17</sup> In Massachusetts, and Maine which has adopted its law, the public right has been asserted rather more stringently than elsewhere, and it was there held that the public authorities might make an exclusive lease of a great pond which belongs to the public for the cultivation of food fishes, and prohibit other persons from catching fish therein, even those which are migratory and come in from the sea.<sup>18</sup> Statutes may be passed, in the discretion of the legislature, placing the public fisheries under the care and superintendence of certain persons to make them as valuable or useful as possible, as well as for their preservation.<sup>19</sup> This doctrine is in accord with the rule that the legislature may grant exclusive fishery rights; but such grants have, in other jurisdictions, been exclusive as to territory, and not as to the entire body of water to which they are made to apply. The former classes of grants do not materially interfere with the rights of the public, while the latter result in a total destruction of the public right. Acts for the preservation of the fishery are public acts which will be taken notice of by the courts.<sup>20</sup>

**382. Right to regulate fishery on private property.**—The character of a fishery is such that even though it belongs to a private individual because it is located on his property, yet, if the stream is connected with waters which reach the property of other persons, the individual does not exercise a right which affects himself alone, but his conduct with respect to the fishery may affect all other persons having rightful access to the water in which the fish are found. Therefore, un-

<sup>16</sup>*Drew v. Hilliker*, 56 Vt. 641.

<sup>17</sup>*Hughes v. State*, 87 Md. 298. 39 Atl. 747.

<sup>18</sup>*Com. v. Vincent*, 108 Mass. 447.

The licensee of a great pond for the purpose of cultivating useful fishes under the statute of 1869 has the exclusive right of fishing in the whole pond, although he has not occupied any part of it with inclosures or appliances to carry out the purposes of the lease. *Com. v. Weatherhead*, 110 Mass. 175.

The legislature has power, in the public interest, to determine the mode of using fisheries, even to the granting of exclusive rights of fishing to individu-

als. *Com. v. Hilton*, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362; *Watertown v. White*, 13 Mass. 477.

Where a town was given by statute the right of disposing of the privilege of taking certain kinds of fish in the river within its limits, and a penalty was prescribed for obstructing the passage of fish, it was held that the penalty was merely cumulative, and that a common-law action might be maintained against a person obstructing the passage of the fish. *Barden v. Crocker*, 10 Pick. 383.

<sup>19</sup>*Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

<sup>20</sup>*Com. v. McCurdy*, 5 Mass. 324.

less the fish are in a pond or stream which does not connect with other property the individual cannot claim that he has exclusive and absolute right to enjoy the fishery without regulation by the public of the manner in which he does so. He is in a position to destroy rights which are common to all, although his right with respect to them is exclusive on his own property; therefore, he is bound to submit to regulations which will preserve the common property. He must exercise his right in a manner not prohibited by law.<sup>1</sup> And this is especially true if the private right is under mere permission from the state.<sup>2</sup> As said in *People v. Collison*<sup>3</sup> the state has an undoubted right to regulate the manner in which fish shall be caught, and to protect their migrations, even into private waters, when the ownership of such fish is in the public by reason of their migratory habits, and no individual has any property right in them until he has subjected them to his control. So far as the waters of the state are common passageways for fish, they are of public character and subject to legislative control.<sup>4</sup> In *Vinton v. Welsh*<sup>5</sup> it is said to be the rule of Massachusetts that the legislature, having always exercised the right of regulating fisheries in rivers not navigable, the common-law right of fishery in the riparian proprietors is subject to such regulations as the legislature may make.<sup>6</sup> In *Cottrill v. Myrick*<sup>7</sup> it is said that in Massa-

<sup>1</sup>*Devonshire v. Smith*, 1 Alcock & N. 442; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *People v. Truckee Lumber Co.* 116 Cal. 397, 30 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643; *State v. Weller, Prosecutor, v. Snover*, 42 N. J. L. 341; *Gentile v. State*, 29 Ind. 409; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Com. v. Look*, 108 Mass. 452; *Com. v. Follett*, 164 Mass. 477, 41 N. E. 676; *People v. Dostater*, 75 Hun, 472, 27 N. Y. Supp. 481; *Peables v. Hannaford*, 18 Me. 106; *Vinton v. Welsh*, 9 Pick. 87.

The act of 1871 gave the proprietor of an un-navigable tidal stream where it emptied into salt water, who had inclosed it for the purpose of cultivating fishes, control of the stream within his own premises and around the mouth of the stream. *Eastham v. Anderson*, 119 Mass. 526.

A state may prohibit the taking of fish by means of artificial lights and

spears over a man's own lands, if the water there is connected with other bodies of water through which fish migrate. *People v. Collison*, 85 Mich. 105, 48 N. W. 292.

A person is not illegally deprived of his property by a law which restricts the right of fishing because his land and fishing tackle will be of less value. *People v. Brooks*, 101 Mich. 98, 59 N. W. 444.

A bayou extending back from a public body of water and into which fish have free access from such water, and not wholly on the premises of a private individual, is "waters of the state" within the meaning of a statute prohibiting seines, nets, or traps in waters of the state. *State v. Blount*, 85 Mo. 543.

<sup>7</sup>*Bennett v. Boggs*, Baldw. 60 Fed. Cas. No. 1,319.

<sup>8</sup>85 Mich. 105, 48 N. W. 292.

<sup>4</sup>*State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *State v. Weller, Prosecutor, v. Snover*, 42 N. J. L. 341.

<sup>5</sup>9 Pick. 87.

<sup>6</sup>*Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342.

In Massachusetts and Maine from the earliest times the English common law

chusetta, from its earliest settlement, the common-law rule that fisheries in streams not navigable belong to the riparian proprietors has been modified. It was deemed most conducive to the public good to subject salmon, shad, and alewife fisheries to public control whenever the legislature thought proper to interfere. Under that rule the state retains a right superior to that of any or all riparian proprietors, and may make such regulations of the fisheries as it chooses.<sup>8</sup> The legislature has power over the whole subject of fishery so far as public and common rights are concerned, and may by statute impose penalties upon the taking of fish by anyone except under certain restrictions, even in the waters contiguous to his own land; and it cannot be doubted that it can also abridge the common right in favor of the proprietor when it is satisfied that the interests of the public will be best served by an ampler recognition of the right of private property.<sup>9</sup> No right can be acquired by prescription against the public right of regulation.<sup>10</sup> Even when the body of water which contains the fish is entirely on the land of an individual the state may regulate the times and manner in which he may take the fish therefrom. If he was permitted to take and sell fish at pleasure from his private grounds, such conduct would provide an easy means of evading the laws prohibiting taking them from the more public waters of the state; and, as a police regulation necessary to aid in the enforcement of the general laws upon the subject, laws may be made applicable to such private waters. Such laws are sustained in *People v. Bridges*<sup>11</sup> upon another ground. The court held that the fact that a private individual has the sole and exclusive right to take fish from a certain pond or lake by reason of his ownership of the land under and surrounding the same does not deprive the legislature of the power to control and regulate the exercise of that right; and a statute which has that effect is not void because it is an undue and unwarrantable interference with the property rights of such owner of the land upon

as to fisheries was changed by common consent in that in all conveyances by individuals of lands upon streams through which salmon, shad, and alewives passed, to cast their spawn, it was understood that fishing for such fish should remain in the public, and therefore is always subject to legislative regulation. *Cottrill v. Myrick*, 12 Me. 222.

<sup>8</sup> 12 Me. 222.

<sup>9</sup> *Cottrill v. Myrick*, 12 Me. 222.

The Maine Constitution does not prohibit the interference by the legislature with fisheries in streams not navigable, since such power was reserved by the

legislature of Massachusetts before the separation of Maine from it, and the common-law right of the riparian owner made subject to the public control. And therefore the legislature may give to a stranger a right of fishing in a certain stream to the exclusion of the riparian owner. *Lunt v. Hunter*, 16 Me. 9.

<sup>10</sup> *Barrows v. McDermott*, 73 Me. 441.

<sup>11</sup> *Cottrill v. Myrick*, 12 Me. 222.

<sup>12</sup> 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115. In that case, however, there was a communication between the pond and the public waters of the state at certain times of the year.



which the lake is situate. The right of a riparian owner to take fish does not inhere in the individual, but is a boon or privilege granted by the sovereign. It can hardly be contended that the right to take fish from a private pond is a boon granted by the sovereign. The only right the sovereign has in regard to the matter arises when the public interests are involved, and they are not involved in the taking of fish from private ponds any further than the regulation of such right is necessary for the enforcement of the general laws. The regulation of fishing in private ponds deprives the owner of no constitutional right.<sup>12</sup> The state, however, has a greater right to control the fish when it has stocked the water with game fish at large expense.<sup>13</sup> Private property cannot, however, be taken for the purpose of giving the public a right to fish upon it under the power of eminent domain. And therefore the United States, after taking land without compensation for lighthouse purposes, may make extensions and erect structures to protect it from freshets and ice, but cannot maintain them for the use of the fish commission; and the owner of the premises is entitled to make such use of the extension as is consistent with the maintenance and protection of the lighthouse.<sup>14</sup>

**383. Close seasons.**—To prevent the extinction of any particular species of fish it is necessary that they have ample opportunity for propagation, and the legislature may therefore forbid taking them from the water during the propagating season, or for such further time as is necessary to provide for the increase of the fish.<sup>1</sup> The seasons may be made longer in some counties than others if it seems necessary to do so.<sup>2</sup> And permission may be given to take fish for propagating purposes when they cannot be taken for other purposes.<sup>3</sup> A statute prohibiting the taking of smelt at certain times, but providing that it shall not apply to any person catching smelt while fishing for other kinds of fish, will not prevent a prosecution if the intention was to catch the smelt, although there was also an intention to catch the other fish.<sup>4</sup> A statute making a close time from the 15th of July

<sup>12</sup>*Peters v. State*, 96 Tenn. 682, 33 L. Dec. 493; *People v. O'Neil*, 110 Mich. 324, 33 L. R. A. 606, 68 N. W. 227; *State v. Adams*, 78 Me. 486, 7 Atl. 269; *State v. Smith*, 61 Vt. 346, 17 Atl. 492; *Ex parte Hewlett*, 22 Nev. 333, 40 Pac. 96; *Thompson v. Lewis*, 83 Me. 223, 22 Atl. 104; *Purinton v. Ladd*, 58 N. H. 596; *People v. Reed*, 47 Barb. 235.

One who owns the land surrounding a pond is not entitled to take trout therefrom during the prohibited season, unless the water is so inclosed as to be absolutely within his control, and the free passage of fish to and from it is entirely and rightfully obstructed. *State v. Roberts*, 59 N. H. 484.

<sup>13</sup>*Com. v. Bender*, 7 Pa. Co. Ct. 624.

<sup>14</sup>*Edmondson Island Case*, 42 Fed. 15.

<sup>1</sup>*Rogers v. Jones*, 1 Wend. 237, 19 Am.

<sup>2</sup>*Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982.

<sup>3</sup>*People v. Brooks*, 101 Mich. 98, 59 N. W. 444.

<sup>4</sup>*Com. v. Look*, 108 Mass. 452.

to the 1st of April following does not repeal a prior statute making a close time in each week of four days, from Sunday morning until Thursday night.<sup>5</sup> As a police regulation, fishing on Sunday may be prohibited, although it is not necessary for the preservation of the fish.<sup>6</sup> But fishing on Sunday is not illegal unless prohibited by statute.<sup>7</sup>

**384. Manner of fishing.**— The manner of fishing has as much influence on the destruction of the fish as the taking of them during the propagating season, and therefore the legislature may forbid the use of certain implements in the taking of fish. A single hook and line is the least destructive of all the methods of taking fish, and the legislature may limit fishermen to that means if it chooses to do so.<sup>1</sup> It may forbid set lines,<sup>2</sup> or lines with a number of hooks attached to them.<sup>3</sup> Taking fish with spears may be prohibited.<sup>4</sup> So, also, may the use of nets.<sup>5</sup> The prohibition of the use of nets may either forbid them absolutely or regulate their kind or manner of use. The use

<sup>1</sup>*State v. Thompson*, 70 Me. 196.

<sup>2</sup>*Ruther v. Harris*, L. R. 1 Exch. Div. 97, 45 L. J. M. C. N. S. 103, 33 L. T. N. S. 825.

The New York act of 1815 prohibiting fishing in the Hudson river from sunset on Saturday to sunrise on the following Monday of each week should be equitably construed to effect the object intended. *Sickles v. Sharp*, 13 Johns. 497.

Under a statute forbidding persons to take fish or to impede their passage in weirs from sundown Saturday until sunrise Monday, fish cannot be taken from the weir after sundown Saturday, although they entered before that time, and could not be secured because of the state of the tide. *Baker v. Wentworth*, 17 Me. 347.

<sup>3</sup>*Nelson v. Pyramid Harbor Packing Co.* 4 Wash. 689, 30 Pac. 1096.

<sup>4</sup>*State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76, 61 N. W. 560; *State v. Goodwin*, 62 Vt. 191, 20 Atl. 824; *Com. v. Prescott*, 151 Mass. 60, 23 N. E. 729; *People v. Miller*, 88 Mich. 383, 50 N. W. 296.

A prohibition of catching fish "except with rod, hook, and line" does not preclude the use of reels, fly-hooks, bait, bobs, sinkers, and squids in fishing with rod, hook, and line, as they are included in ordinary and popular use. *Com. v. Wetherill*, 8 Pa. Dist. R. 653.

Taking fish by means of numerous single-baited hooks and lines set in holes

through the ice and tended by one person is a violation of a statute prohibiting the taking of fish in any other manner than by a single-baited hook and line. *State v. Skolfield*, 63 Me. 206.

<sup>5</sup>*State v. Stevens*, 69 Vt. 411, 38 Atl. 80; *State v. Houghton*, 65 Vt. 328, 26 Atl. 112.

But lines with a single hook to each and fastened to an object on the shore are not "set-lines" within the meaning of the Vermont statute imposing a fine for fishing with set lines in the waters of the state. *State v. Stevens*, 69 Vt. 411, 38 Atl. 80.

<sup>2</sup> A statute providing that no one shall place or cause to be placed any trot-line or other obstruction across any of the rivers, creeks, lakes, or ponds in such a manner as to hinder or obstruct the free passage of fish up, down, or through such water course, for the purpose of taking or catching fish, is not violated by the erection of a trot-line when it is not shown that it was set in such a way as to obstruct the passage of the fish. *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa. 216, 50 Am. St. Rep. 367, 64 N. W. 778.

<sup>3</sup>*Stuttsman v. State*, 57 Ind. 119.

<sup>4</sup>*Skinner v. Hettrick*, 73 N. C. 53; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *Com. v. Pease*, 137 Mass. 576; *State v. Hockett*, 29 Ind. 302; *Drew v. Hilliker*, 56 Vt. 641; *Watertown v. Draper*, 4 Pick. 165; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St.

of nets which prevent the passage of fish in the stream may be forbidden.<sup>6</sup> Or the use of a set net may be prohibited, while nets which are operated by persons in charge of them may be permitted.<sup>7</sup> And certain kinds of nets may be permitted and others forbidden.<sup>8</sup> The taking of certain kinds of fish may be excepted from the general provisions of the law.<sup>9</sup> The mere construction of a dam across the stream does not take the stream out of the provisions of a statute forbidding

Rep. 813, 23 N. E. 878; *People ex rel. Huntington v. Crennan*, 141 N. Y. 239, 36 N. E. 187; *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21, 7 S. E. 693; *State v. Tourle*, 80 Me. 349, 14 Atl. 729.

Landing nets are not included in a prohibition of the use of "any seine, drift-net, fyke-net, or net or nets of any other description," as it is not *ejusdem generis*. *Com. v. Wetherill*, 8 Pa. Dist. R. 453.

<sup>6</sup> Under a statute forbidding the placing of anything in a stream which would substantially and materially interfere with the passage of the fish up and down the stream, a net cannot be maintained with wings which reach nearly to the banks on either side. *Summers v. People*, 29 Ill. App. 170.

A person is liable for the acts of his employees if they pursued his general directions and he knew substantially what had been done. *Smith v. People*, 46 Ill. App. 130.

The setting of a temporary net in a river is not within the province law, 8 Anne, chap. 3, for preventing obstructions to the passage of fish in rivers consisting of weirs, hedges, fish-garths, stakes, kiddles, or other disturbance or encumbrance. *Com. v. Ruggles*, 10 Mass. 391.

The acts regulating fishing in the Hackensack river do not prohibit nets during certain seasons of the year provided they do not extend more than one fifth across the stream, nor restrict their employment to the easterly shore. *Budd v. Sip*, 13 N. J. L. 348.

A net is not stretched across a river within the meaning of a statute prohibiting the same, where a space of 10 or 12 yards is left between it and the shore, of sufficient depth to allow fish to pass up the river without obstruction. *Wilson v. Moy Fishery Co.* Ir. L. R. 19 Eq. 270.

<sup>7</sup> Where the statute prohibits the setting of a net except when the owner is actually drawing or dragging a net for fish, a person engaged in dragging for

fish cannot set his net in such a way as to prevent the passage of fish up the river, and keep it set for several hours while he is engaged in dragging another net; but the stationery net and drag net must both be put into the water at the same time. *Hanscomb v. Russell*, 15 Gray, 162.

A seine having one end attached to a boat made fast to a stake on one side of a river and having at the other end a rope which is passed round a stake on the other bank of the river and is held by men and drawn or slackened at pleasure is a placed and set seine. *Watertown v. Draper*, 4 Pick. 165.

The prohibition contained in 10 Car. I. Ir. C. 14, against taking salmon with stop or standing nets, includes Scotch weirs composed of poles stuck into the bed of the river with nets suspended and fastened to the poles. *Devonshire v. Smith*, 1 Alcock & N. 442; *M'Adam v. Halliday*, 1 Alcock & N. 459 note.

<sup>8</sup> A law making it unlawful to construct, etc., any pound net for the purpose of catching food fishes, "at a greater depth than 65 feet at low tide," refers to low tide under normal conditions. *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55.

A statute making it unlawful to fish at certain seasons of the year with nets having a mesh less than a certain size has reference to the size of the mesh of the nets at the time they were manufactured; and a conviction thereunder is not authorized for fishing with a net having meshes of the required size when manufactured, but which have shrunk to less than the required size through use. *People v. Gillingham* (Mich.) 9 Det. L. N. 232, 90 N. W. 1027.

<sup>9</sup> If suckers are excepted from a prohibition of taking fish with nets the court will not strike out the exception because other sections of the statute expressly mention suckers as fish which may be taken with nets in certain specified waters. *People v. Tanner*, 128 N. Y. 416, 28 N. E. 364, Affirming 38 N. Y. S. R. 349, 14 N. Y. Supp. 334.

fishing with nets, if fish still migrate up and down the river past the dam.<sup>10</sup> The rights of riparian owners may be protected by forbidding the use of nets within a certain distance of their shores.<sup>11</sup> A statutory provision allowing those fishing with gill nets of lawful size to retain fish of less than a specified weight, which those using other nets must return to the water, does not discriminate against the latter, since all may use a gill net of lawful size.<sup>12</sup> The principle which permits the prohibition of net fishing permits also the prohibition of weirs or other fixed means of taking fish in such manner as either to destroy the fish<sup>13</sup> or to interfere with the fishing operations of other persons.<sup>14</sup> The repairing of an old weir is a setting of a weir within the meaning of a statute prohibiting such setting with the intention of catching or destroying fish.<sup>15</sup> The operation of fishing milldams, which are a combination of milldam and engine for the destruction of the fish as they attempt to pass the dam, may also be prohibited; and such a dam is an obstruction within the meaning of a statute providing for the removal of all obstructions for the free passage of fish.<sup>16</sup> Other fixed engines or destructive methods of fishing may

<sup>10</sup>*Oliver v. Bailey*, 85 Me. 161, 27 Atl. 90.

<sup>11</sup>*Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017.

The criterion to be applied in determining whether or not a fishing weir is in front of the shore of another, within the meaning of the statute imposing a penalty therefor, is whether or not it is so near, or is so situated in reference to the shore, that it in some way injures or injuriously affects the owner thereof in the enjoyment of his rights as owner. *Dunton v. Parker*, 97 Me. 461, 54 Atl. 1115.

<sup>12</sup>*Oshorn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982.

<sup>13</sup>Under the salmon fisheries act of 1861 (24 & 25 Vict. chap. 109) no weir can be placed more than half way across a non-navigable river without a prescribed opening for the passage of salmon, and all other weirs (fishing dams) are prohibited. *Rolle v. Whyte*, L. R. 3 Q. B. 286, 8 Best. & S. 116, 37 L. J. Q. B. N. S. 105, 17 L. T. N. S. 560, 16 Week. Rep. 593.

If the statute prohibits weirs without openings only in certain portions of the stream a complaint for violation of the statute must show that the weir was in the prohibited portion of the stream in case it alleges absence of an opening. *State v. Turnbull*, 78 Me. 392, 6 Atl. 1.

A statute providing that the one who first makes a weir for catching fish on any flat shall not be interrupted in its enjoyment will apply to pounds when they come into use. *Stannard v. Hubbard*, 34 Conn. 370.

A fishing weir is not one "the materials of which are chiefly removed annually" so as to come within the exception of a statute, when it is constructed of 200 large posts driven 6 feet or more into the ground under the sea by means of a pile driver, with smaller posts between the large ones, and it is only pieces of brush, one row of stay laths, and the tops of the posts which are removed during the winter season, in order that the weir may be injured as little as possible by the floating ice. *Dunton v. Parker*, 97 Me. 461, 54 Atl. 1115.

<sup>14</sup>A Connecticut statute provided that no person should use a bush seine in the Ousatonick river or obstruct the drawing of seines and taking of fish there; and it was held that the statute applied to the whole river, and not to certain parts of it only. *Eastman v. Curtis*, 1 Conn. 323.

<sup>15</sup>*Atwood v. Caswell*, 19 Pick. 493.

<sup>16</sup>*Hodgson v. Little*, 14 C. B. N. S. 111, 32 L. J. M. C. N. S. 220, 10 Jur. N. S. 46, 8 L. T. 358, 11 Week. Rep. 782, 9 Cox C. C. 327.

A mill dam is not a fishing mill dam within the statute requiring the occu-

also be prohibited.<sup>17</sup> The statute may make the possession of implements the use of which is forbidden a misdemeanor.<sup>18</sup>

**385. Destruction of illegal implements.**—The enforcement of the game laws has always been found to be difficult, and to facilitate it there is a necessity for making implements which are used in violation of the law contraband, and authorizing a more or less summary destruction of them. If such implements are found in use the legislature has power to declare them to be a nuisance and authorize its agents to abate them, even by their summary destruction.<sup>1</sup> Such implements cannot be confiscated and destroyed when not found in use without a judicial condemnation of them without illegally depriving the owner of property.<sup>2</sup> And there are cases which hold that even when the implements are found in use they cannot be confiscated without a hearing.<sup>3</sup> Such decisions, however, are in conflict with and overruled by *Lawton v. Steele*. The legislature may provide for the seizure of nets found in use in violation of law, to be disposed

part of the dam to remove obstructions to the free passage of fish, where, although at one time it had been used as a fishing mill dam, the use of it for fishing purposes had been abandoned and all appliances for fishing removed. *Rossiter v. Pike*, L. R. 4 Q. B. Div. 24, 48 L. J. M. C. 81, 39 L. T. N. S. 496, 27 Week. Rep. 339.

A dam built solely for milling purposes is not a fishing mill dam within the salmon fishery act, although it does in fact render it easy to catch fish, and the owners of the mill have occasionally availed themselves of the facility so afforded. *Garnett v. Backhouse*, L. R. 3 Q. B. 30, 8 Beat. & S. 490, 37 L. J. Q. B. N. S. 1, 17 L. T. N. S. 170, 16 Week. Rep. 201.

<sup>1</sup>*Lynch v. State*, 69 Ark. 555, 64 S. W. 950; *Com. v. Vihil*, 4 Pa. Dist. R. 582; *People v. Miller*, 88 Mich. 383, 50 N. W. 296.

The putting down, in violation of a statute, or fixed engines whereby salmon are caught, is sufficient to convict without specific proof of an intention to catch salmon therewith. *Lyne v. Leonard*, L. R. 3 Q. B. 156, 16 Week. Rep. 562, 9 Beat. & S. 65, 18 L. T. N. S. 55.

The taking of salmon in a cage contiguous to a mill dam in violation of the statute is illegal, although the cage be held under an immemorial right. *Moulton v. Wilby*, 9 Jur. N. S. 472, 8 L. T. N. S. 284, 11 Week. Rep. 670, 9 Cox C.

C. 318, 32 L. J. M. C. N. S. 164, 2 Hurlst. & C. 25.

<sup>18</sup>*State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52, 33 N. E. 1024; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675.

<sup>1</sup>*Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, Affirming 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *Shoemaker v. State*, 20 N. J. L. 153; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805.

Under the English salmon fisheries act, any person has the right to take possession of and destroy an engine placed or used for catching salmon contrary to the provisions of the statute. *Williams v. Blackicall*, 2 Hurlst. & C. 33, 32 L. J. Exch. N. S. 174, 9 Jur. N. S. 579, 8 L. T. N. S. 252, 11 Week. Rep. 621.

<sup>2</sup>*Re Fishing Nets Seizure*, 7 Ohio N. P. 666, 5 Ohio S. & C. P. Dec. 553.

<sup>3</sup>*Hey Sing Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115; *Yensen v. State*, 7 Ohio N. P. 18; *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647; *State v. Owen*, 4 Ohio L. D. 163, 3 Ohio N. P. 181.

A fish commissioner and the owner of a tug employed by him in the seizure and confiscation of fish nets under a statute which is unconstitutional as attempting to take property without due process of law are liable to the owners of the nets for their value. *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647.

of as directed by the court before whom the offense is tried.<sup>4</sup> If the officials to whom the execution of the law is committed do not keep within its provisions they will be liable for their wrongful acts.<sup>5</sup> Even vessels which are engaged in illegal fishing may be seized and condemned.<sup>6</sup>

**386. Fishways.**—No riparian owner has a right to place an obstruction in a stream which will interfere with the passage of fish to land of owners living further up.<sup>1</sup> And this rule applies to the erection of dams for the creation of water power. Such dams must contain ways through which the fish can pass.<sup>2</sup> Whether or not the legislature might directly authorize the construction of a dam which would result in cutting off the rights of the upper owner is a question on which there has been some conflict of opinion. As shown by the commissioners in *Leconfield v. Lonsdale*,<sup>3</sup> there is no necessity of erecting a dam

*Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982.

<sup>1</sup>One fishing in his own fishery in the river Thames with nets and bucks, in violation of a statute which fixes a penalty for such methods of fishing, does not thereby commit a nuisance so as to justify a water bailiff in seizing the nets and bucks; but such bailiff must pursue the remedy provided by the statute. *Bulbrook v. Goodere*, 3 Burr. 1768.

If a fish warden takes a net and keeps it for an unlawful time without instituting proceedings for its condemnation, he will be a trespasser *ab initio*. *Russell v. Hanscomb*, 15 Gray, 166.

If the statute creates a board of commissioners to designate the fish sluices in the river, and to protect them by indictment, there will be no authority to destroy a fish trap as a nuisance which is not in a fish sluice. *Boatwright v. Bookman*, Rice L. 447.

<sup>2</sup>*State, Johnson, Prosecutor, v. Loper*, 46 N. J. L. 321.

The legislature may declare the forfeiture of any vessel employed in violating the fishery laws of the state without regard to the guilt or innocence of the owner. *Boggs v. Com.* 76 Va. 989.

A statute providing that a vessel used by those violating fishing laws shall be forfeited to the state is void so far as it fails to provide for a proceeding *in rem* whereby the property rights of innocent owners may be determined. *Ibid.*

A statute authorizing a confiscation "on view" of the implements used in drifting for salmon contrary to the pro-

visions of the statute does not require the net to be seen in the water to justify the confiscation. It is sufficient if the complainant acting "on view" himself sees what, if testified to by him, would be sufficient to convict of the offense charged. So, if complainant upon receiving notice that a boat is going out to drift for salmon goes to the beach when the boat comes in and finds the net, which is a drifting net, wet, and that it has taken fish, and is told by the men that they have been drifting, a seizure may be made. *Mowat v. McFee*, 5 Can. S. C. 66.

<sup>3</sup>*Weld v. Hornby*, 7 East, 195, 3 Smith, 244, 8 Revised Rep. 608; *Murphy v. Ryan*, 1r. Rep. 2 C. L. 143, 16 Week. Rep. 678.

<sup>4</sup>*State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

The court, in *Woollever v. Steuart*, 36 Ohio St. 146, 38 Am. Rep. 569, while declining to determine whether there is an implied limitation upon the right of a riparian owner on non-navigable streams to the center of which he owns, to construct a dam, that he shall keep open a sufficient passageway for fish to the waters above, says that, if there was such an implied obligation, it was for the benefit of the upper owners and for them only, which right could be lost by adverse use for a sufficient period to ripen into an adverse right.

<sup>5</sup>L. R. 5 C. P. 663, 39 L. J. C. P. N. S. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165.

without a fishway. And if there is no necessity for doing so, the legislative sanction of such a proceeding would be a wanton and gratuitous destruction of property. This the legislature has no power to do. Judge Green, in *Crenshaw v. Slate River Co.*<sup>4</sup> in discussing the power of the legislature to yield the public right of navigation to individuals for the sake of securing the public convenience of mills, remarks that they could not justly sacrifice to this object the individual rights in respect to the natural run of fish, and therefore have properly guarded against such obstruction to the passage of fish by imposing as a condition upon the leave to build a dam that the owner should give free passage to them, and seem always to have considered it as a condition implied, even when it was not expressed. Immediately preceding this he says that the right of fishing in fresh-water streams, or within the bounds of any patent, is not public and common to all, but confined to the riparian owners; each of whom is entitled to the natural run of fish of passage upward, as he is to the natural flow of water downward. The right to obstruct the passage may, however, be acquired by eminent domain.<sup>5</sup> And if it is, the remedy of the riparian owner is for compensation under the statute, and he cannot maintain an action in tort.<sup>6</sup> In North Carolina it is held that a mill owner has a right to obstruct the passage of fish.<sup>7</sup> And in Pennsylvania the court, in upholding the right to obstruct their passage in a public river, said that no property right has been taken from the riparian owner.<sup>8</sup> So far as this is limited to a common right of fishery in a public river it is unobjectionable; but the assertion that no property is taken by the prevention of the passage of fish up the river to an upper fishery of a private owner is against the whole current of authority from the Year Books to the present time. The only cases upholding the assertion of the Pennsylvania court are those involving a mere regulation of the fishery.<sup>9</sup> All grants by the

<sup>4</sup> 6 Rand. (Va.) 245.

<sup>5</sup> *Com. v. Essex Co.* 13 Gray, 239.

Property rights of a riparian owner in a fishery in navigable waters under a license from the state must be compensated for so far as disturbed by a corporation taking the land under powers of eminent domain, as the license is not revoked *ipso facto* by the granting of the franchise. *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 761.

<sup>6</sup> *Bristol v. Ousatonio Water Co.* 42 Conn. 403.

<sup>7</sup> *Dunn v. Stone*, 4 N. C. (2 Car. Law Repos.) 261.

<sup>8</sup> *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71.

<sup>9</sup> Regulation is different from destruction. A law regulating the use of a "private" property in a fishery in tidal waters is not a "taking," nor does it impair the obligation of contracts. *Com. v. Bailey*, 13 Allen, 542.

So, a state does not take private property for public use by forbidding a landowner to take fish from a body of water partly upon his land by certain designated means of destruction. *State v. Blount*, 85 Mo. 543.

And a statute for the preservation

legislature of authority to place a dam in a stream contain the implied condition that the passage of fish shall not be interfered with.<sup>10</sup> And therefore the legislature may require the construction of fishways at any time.<sup>11</sup> A statute declaring a dam without a fishway a nuisance is not a violation of the constitutional provision against taking private property without compensation, or of the one against impairing the obligation of a contract, but is a proper exercise of the police power of the state.<sup>12</sup> As said in *Holyoke Water-Power Co. v. Lyman*,<sup>13</sup> rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be, and often are, regarded as public rights subject to legislative control as a source for furnishing a valuable supply of fish suitable for food and sustenance. Fisheries of the kind, even in waters not navigable, are so far public rights that the legislature of the state may ordain and establish regulations to prevent obstructions to the passage of fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners. But dams cannot be required to be cut down when the cutting is not necessary to the protection or preservation of fish.<sup>14</sup> No prescriptive right can be acquired to maintain a dam without a fishway.<sup>15</sup> The legisla-

and protection of fish deprives no one of property, as they are not private property till caught. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399.

<sup>10</sup>*State v. Gilmore*, 141 Mo. 506, 42 S. W. 817; *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247.

<sup>11</sup>*State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138; *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *Fish v. Dam*, 26 Pa. Co. Ct. 214; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Hyde v. Russell*, 2 Cush. 251; *Parker v. People*, 111 Ill. 581, 53 49, 1 S. W. 87.

In *West Point Water Power & Land Improv. Co. v. State*, 49 Neb. 218, 66 N. W. 6, the court held that persons erecting and maintaining dams for milling purposes may be required by mandamus to provide ways for the passage of fish, but that case was reversed on rehearing in 49 Neb. 223, upon the ground that the statute requiring the maintenance of the fisheries was invalid because of defect in its title.

An act of legislature authorizing the owner of a milldam across a stream previously declared by statute to be navigable, to erect his dam to a greater

height, or to erect a new one in that place, which dam as erected is an obstruction both to navigation and the passage of fish, does not create a contract between him and the state so that the passage of a subsequent act requiring the owners of dams on all streams in the state to place therein fishways so as to provide for the free passage of fish would be unconstitutional as impairing the obligation of such contract, but creates a mere license to obstruct such streams, subject to legislative control and revocable by it at will, without impairing the obligation of any contract or depriving the owner of any right of property or privilege protected by the Constitution. *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643.

<sup>12</sup>*State ex rel. Remley v. Meek*, 112 Iowa, 338, 51 L. R. A. 414, 84 Am. St. Rep. 342, 84 N. W. 3.

<sup>13</sup>15 Wall. 500, 21 L. ed. 133.

<sup>14</sup>*Sibley v. State*, 107 Tenn. 515, 64 S. W. 703.

<sup>15</sup>*State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138; *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643.

The mere adverse usage to obstruct a public fishway for migratory fish to and from a large inland lake and the sea, known to have originated without right,



ture may, therefore, require the alteration of existing dams so as to provide for the passage of fish.<sup>16</sup> But if permission is given to erect a dam on condition that compensation be made to the owners of fishery rights which will be injured by it, the legislature cannot, after such compensation has been made and the dam erected with fishways which the commissioners held to be sufficient, require it to be altered at large expense so as to provide for a different fishway through it.<sup>17</sup> The power of a state to require fishways in dams across streams extends to a navigable stream that flows beyond the bounds of the state, so long as intercommunication between the states is not thereby affected.<sup>18</sup> A dam without a fishway cannot be treated as a nuisance unless the statute makes it so, but the remedy provided by the statute for its alteration must be pursued.<sup>19</sup> The duty to provide a fishway involves the duty to keep it open for the passage of fish.<sup>20</sup> If the state has erected an obstruction to the passage of fish, its grantee will not be required to open fishways unless such requirement is provided in the

within the memory of persons still living, will not, of itself, bar the public from asserting its rights. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

But in Ohio it was held that after a dam has been maintained for twenty-one years over a non-navigable stream the legislature cannot require the owner to construct a passway through it for fish without making him compensation. *Woolever v. Stecart*, 36 Ohio St. 146, 38 Am. Rep. 509.

<sup>16</sup>*State v. Gilmore*, 141 Mo. 506, 42 S. W. 517; *Stoughton v. Baker*, 4 Mass. 522.

Where the statute authorized the fish committee to require openings to be made in dams on the river, their decision is conclusive, unless it is shown that they acted corruptly or under unjustifiable motives. *Briggs v. Murdock*, 13 Pick. 306.

A fish committee are not trespassers when, in performing their legal duties, they destroy a sluiceway erected for the passage of fish by the dam owners, and reasonably believed by them to be insufficient, and erect a suitable sluice in its stead. *Fossett v. Bearce*, 27 Me. 117.

A town has no authority, in consideration of the placing of fishways in a dam, to undertake to keep open a water way between two ponds so that the water from one can be utilized as an addition to the water power furnished by the

other to the mill of the other contracting party. *Swift v. Falmouth*, 161 Mass. 115, 45 N. E. 184.

A fishway constructed by the government in a milldam is not a public work within the meaning of 50 & 51 Viet. chap. 16, § 16 (c), so as to render the government liable for the negligence of its servants in constructing it in a manner injurious to the owners of the mill operated by the milldam. *Brown v. Queen*, 3 Can. Exch. 79.

<sup>17</sup>*Com. v. Essex Co.* 13 Gray, 247.

<sup>18</sup>*State ex rel. Remley v. Meek*, 112 Iowa, 338, 51 L. R. A. 414, 84 N. W. 3.

<sup>19</sup>*Criswell v. Clugh*, 3 Watts, 330; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

<sup>20</sup>It is no defense to a complaint against the occupier of a fishing milldam for not lifting or removing the sliding doors of his fishery, that the doing so would in some way affect, but not ruin, his milling power. *Hodgson v. Little*, 16 C. B. N. S. 198, 33 L. J. C. P. N. S. 229, 10 Jur. N. S. 953, 11 L. T. N. S. 136, 12 Week. Rep. 1103.

Under a statute providing that a brook is to be kept open and free for the passage of fish "from the 5th day of May to the 5th day of July in each year," the word "from" being a word of exclusion a mill owner may enjoy the full use of the water on the 5th day of May. *Peables v. Hannaford*, 18 Me. 106.

contract.<sup>21</sup> This doctrine must, however, be limited to the relation between the state and the grantee of the dam, and has no application to the rights of a private owner against the grantee. The state may be secure from suit by a private owner on account of obstructions placed by it in the stream, because there is no provision for a suit against it. But it cannot confer its immunity upon its grantee, and when the latter takes possession of the obstruction it may be liable for its continued maintenance to one who is injured thereby. Even the fact that compensation has been made to the landowners above the dam for the destruction of their fishery rights will not prevent the legislature from requiring the construction of a fishway if its absence prevents the fish from frequenting the water below the dam, to the owners of which no compensation has been made.<sup>22</sup> Where a dam was authorized across a river with the proviso that a fishway should be erected, and, if it should prove inadequate, that compensation should be made to owners of fisheries above the dam, it was held that if the fishway proved inadequate the owner should have an opportunity to make it adequate before suit brought; and if the statute provided a way for assessment of damages, that was exclusive.<sup>23</sup> The reason of the rule laid down in this section applies equally to dams erected on private property if there is land of other persons lying further up the stream. But in *People v. Platt*<sup>24</sup> the court held that the legislature has no power to compel the opening of a passageway for fish in a dam on private property, where the river is not navigable and has passed to private persons. The court says the legislature has no greater right to pass laws directing how the waters of that river shall be used than it would have

<sup>21</sup>*Com. v. Pennsylvania Canal Co.* 66 Pa. 41, 5 Am. Rep. 329; *Re French Creek Dam*, 15 Pa. Super. Ct. 57; *Re Obstruction of French Creek*, 8 Pa. Dist. R. 702.

<sup>22</sup>*Contra, State ex rel. Remley v. Meek*, 112 Iowa, 338, 51 L. R. A. 414, 84 N. W. 3.

<sup>23</sup>*Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247, Affirmed in 15 Wall. 500, 21 L. ed. 133.

<sup>24</sup>*Bristol v. Ousatonie Water Co.* 42 Conn. 410.

<sup>25</sup>17 Johns. 195, 8 Am. Dec. 382.

And, in *People v. Dowdater*, 75 Hun, 472, 27 N. Y. Supp. 481, it is said that the rule of *People v. Platt*, was considered to be consistent with *Hooker v. Cummings*, 20 Johns. 91, 11 Am. Dec.

249, in which it is said the legislature has confessedly the right of regulating the taking of fish in private waters.

In *State v. Glen*, 52 N. C. (7 Jones L.) 321, the court held, on the authority of *People v. Platt*, that after the legislature had granted to a private individual the bed of a river, and he had erected a dam and mills thereon, he could not, without compensation, be compelled to open a passageway for fish through it; and a law to that effect is void under § 12 of the Bill of Rights providing that "no freeman shall be dispossessed of his freehold, or deprived of his life, liberty, or property, but by the law of the land."

And that ruling was followed in *Cornekius v. Glen*, 52 N. C. (7 Jones L.) 512.

to regulate the use of the most inconsiderable stream in the state which has been granted by the state. And the statement in *Shaw v. Crawford*<sup>25</sup> to the contrary was held to be a *dictum*. That decision, however, entirely loses sight of the fact that the right of the legislature to protect fisheries does not arise from the fact that they are located upon public or private property, but upon the fact that they are of such a public character that it may exercise authority over them for the public good, and that no landowner has a right to interfere with the passage of the fish to higher land.

¶ 387. **License.**—As a means of protecting the public in the enjoyment of a public fishery as well as for the purpose of securing a more efficient enforcement of the laws for the preservation of the fish, the legislature may require the acquisition of a license before anyone will be permitted to exercise the privilege.<sup>1</sup> And if the means to be employed in the fishery are capable of taking protected fish, a license may be required, although the intent of the fisherman is to take a species of fish which are not within the protection of the statute.<sup>2</sup> If the public welfare can be better protected by making the license exclusive over a particular body of water the legislature may do so.<sup>3</sup> And so a license may give the exclusive right within certain limits upon a broader strip of water.<sup>4</sup> And other persons may be forbidden to encroach upon the exclusive rights of the licensee.<sup>5</sup> A general license cannot, however, be made exclusive as to a particular locality by the fixing of fishing engines there without the authority of the legislature.<sup>6</sup> Local officials cannot be given exclusive discretion as to

<sup>1</sup> 10 Johns. 236.

<sup>2</sup> *Re Provincial Fisheries*, 26 Can. S. C. 445; *State ex rel. Curry v. Crawford*, 14 Wash. 373, 44 Pac. 876; *Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752.

In *State v. Applegarth*, 81 Md. 293, 28 L. R. A. 812, 31 Atl. 961, the court, in passing on licenses required of packers and canners of oysters for sale and transportation, says that oyster beds are the property of the state, and the legislature, representing the sovereign power of the state, can pass laws determining how the oysters can be taken, can prohibit them from being taken at all, or make such other reasonable regulations concerning them as it may deem best and proper for the interests of the state at large.

<sup>3</sup> *Hill v. George*, 44 J. P. 424; *Short v. Bastard*, 46 J. P. 580.

<sup>4</sup> *Cottrill v. Myrick*, 12 Me. 222.

<sup>5</sup> *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488.

<sup>6</sup> *Elwood v. Dickinson*, 26 Wash. 631, 67 Pac. 370.

While subsequent markings of a fishing location in deep waters may reasonably vary some 10 or 15 feet, a lateral encroachment of 60 to 200 feet is unwarranted. *Fall & S. Fish Co. v. Point Roberts Fishing & Canning Co.* 24 Wash. 630, 64 Pac. 792.

An invalid fishing location, because made upon ground covered by a prior valid fishing location, does not become valid by the expiration of the prior license. *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

But when a fishing location is abandoned, the territory is open to location by others for fishing. *Ibid.*

<sup>25</sup> *State ex rel. Curry v. Crawford*, 14

the granting of licenses.<sup>7</sup> Special provisions as to certain water do not necessarily permit fishing in other water without a license.<sup>8</sup> Licenses will confer no greater authority than is stated in express terms.<sup>9</sup> A license fee may be imposed. This is not a tax, but an exercise of the police power, and therefore the constitutional provisions as to uniform taxation do not apply.<sup>10</sup> Failure to act upon the license will constitute an abandonment of it;<sup>11</sup> as will an attempted transfer of the license without complying with the statutory requirements, which failure is by the statute made a misdemeanor.<sup>12</sup> The issuance of a license to aliens is not forbidden by a constitutional provision forbidding their ownership of real estate.<sup>13</sup> The state license to fish within certain waters for a specified period is a franchise which entitles the holder to maintain an action for injunction for any infringement of the rights thereby secured him.<sup>14</sup> Statutory provisions that persons found dredging for oysters without a license may, upon conviction before a justice of the peace, be fined, and that the vessel used in such violation of the law shall be held until payment of the fine and costs, and be forfeited upon nonpayment, do not contravene a constitutional

Wash. 373, 44 Pac. 876; *Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752.

<sup>7</sup>*French v. Shirley*, 7 Ohio N. P. 26.

<sup>8</sup>*Josh v. Marshall*, 33 App. Div. 77, 53 N. Y. Supp. 419.

<sup>9</sup>A vessel licensed for the cod-fishery is not authorized to engage in the mackerel fishery, but may take mackerel for bait and for consumption by the crew. *United States v. The Parynthia Davis*, 1 Cliff. 532, Fed. Cas. No. 16,003; *The Nymph*, 1 Ware, 257, Fed. Cas. No. 10,389. Affirmed in 1 Sumn. 516, Fed. Cas. No. 10,388.

No registered vessel can, under the act of 1793, chap. 52, while she remains registered, engage in the whale fishery, but she must surrender her registry and be enrolled and licensed for the fisheries. *United States v. Rogers*, 3 Sumn. 342, Fed. Cas. No. 16,189.

Under the English act of 1878, forbidding the fishing for trout with rod and line without a license, a person licensed to fish with rod and line will be subject to the penalty if he attempts to use three rods and lines at the same time, while having only one license. *Combridge v. Harrison*, 64 L. J. M. C. N. S. 175, 15 Reports, 327, 72 L. T. N. S. 592, 59 J. P. 198.

<sup>14</sup>*State, Johnson, Prosecutor, v. Loper*, 46 N. J. L. 321; *Morgan v. Com.* 98 Va. 812, 35 S. E. 448.

A statute is equal and uniform which divides those fishing in public waters into three classes, according to the depth of water in which they fish, and grades the taxes accordingly, those in each class being taxed alike. *Ibid.*

But a statute which imposes the same license fee on pound nets and fyke or trap nets, although the value of the former is many times that of the latter, and which practically imposes a license fee of \$2 for each gill net fished from a rowboat, and enables persons using tugs, steamboats, or sailboats to fish gill nets under a license of a lump sum per boat, which makes the amount for each net much less than \$2 per net, practically driving the smaller fishermen out of business,—is unconstitutional as imposing unequal burdens upon men engaged in the same occupation, and as tending to create a monopoly in favor of men of means sufficient to engage in fishing with boats on a large scale. *Yensen v. State*, 7 Ohio N. P. 18.

<sup>11</sup>*Legoe v. Chicago Fishing Co.* 24 Wash. 175, 64 Pac. 141; *DeMers v. Sandy Spit Fish Co.* 24 Wash. 582, 64 Pac. 799.

<sup>12</sup>*Gerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625.

<sup>13</sup>*Hastings v. Anacortes Packing Co.* 29 Wash. 224, 69 Pac. 776.

<sup>14</sup>*Walker v. Stone*, 17 Wash. 578, 50 Pac. 488.

provision entitling every man to trial by jury in a criminal prosecution.<sup>15</sup>

**388. Pollution of stream.**—The power to preserve the fish entitles the legislature to forbid the casting into streams or water ways of substances which will destroy them or drive them from the stream.<sup>1</sup> To violate a game law prohibiting the casting of refuse or deleterious substance into streams, the refuse must be such in quantity as to have the effect of destroying the lives of fish or of disturbing in some degree their habits.<sup>2</sup> A declaration under a statute imposing a penalty for permitting the refuse from the manufacture of gas or oil from white fish or other substance deleterious to fish to flow into any water of the state need not allege that the substance is deleterious to fish if the substance is alleged to be refuse from the manufacture of oil and manure of fish, since the statute implies that such substances are deleterious.<sup>3</sup>

**389. Specific regulations.**—The state may prescribe the places, as well as the times, in which fish may be taken.<sup>1</sup> The legislature may require the liberation of all undersized fish which are taken in lawful fishing operations as well as fish accidentally taken in an illegal manner.<sup>2</sup> It may also prohibit the sale of fish within a state during the closed season, and such provisions may be made to apply with regard to fish taken from private ponds.<sup>3</sup> And it may forbid the fishing for certain kinds of fish with intent to sell them.<sup>4</sup> The legis-

<sup>15</sup>*The Ann.* 5 Hughes, 292, 8 Fed. 923.

<sup>1</sup>*Cartwright v. Canandaigua Gaslight Co.* 32 Hun, 403; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 876.

A corporation is liable to indictment under the fish and game law of 1886 for discharging any kind of acid, in quantities sufficient to kill fish, into waters inhabited by them. *State v. American Forcite Powder Mfg. Co.* 50 N. J. L. 75, 11 Atl. 127.

<sup>2</sup>*Cartwright v. Canandaigua Gaslight Co.* 32 Hun, 403.

<sup>3</sup>*Blydenburgh v. Miles*, 39 Conn. 484.

<sup>4</sup>*Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

<sup>5</sup>*State v. Bennett*, 79 Me. 55, 7 Atl. 903; *State v. Trefethen* (Me.) 3 New Eng. Rep. 842, 8 Atl. 547; *Thompson v. Smith*, 79 Me. 160, 8 Atl. 687.

Under a statute making it unlawful to be knowingly possessed of fish taken in a net, a person fishing with a troll line which becomes entangled in a net which he takes into the boat, finding fish caught in it, and rows 100 yards to the shore without releasing the fish, is

guilty. *People v. McMasters*, 74 Hun, 226, 26 N. Y. Supp. 221.

<sup>1</sup>*Re Water Rights*, 5 Det. L. N. No. 14; *Com. v. Penn Forest Brook Trout Co.* 26 Pa. Co. Ct. 163.

In *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454, the court says such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. All property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community.

<sup>2</sup>*State v. Dow*, 70 N. H. 286, 53 L. R. A. 314, 47 Atl. 734.

Such a statute is not unconstitutional as operating to give wealthy sportsmen more than their just and equal share of the fish. *Ibid.*

The serving by an innkeeper of trout on the regular bill of fare during the close time is a sale within the meaning of a statute prohibiting sales within such times. *State v. Beal*, 75 Me. 289.

lature may even forbid the having in possession of certain kinds of fish during the closed season, and this will apply to fish caught outside of the state.<sup>5</sup> From the facts that the public have no title to fish in a private pond, and that the regulation of fishing there is merely for the better enforcement of the game laws of the state, the legislature may make an exception of such places and permit the owners of the fish to deal with them at their pleasure.<sup>6</sup> The law will not be construed as applying to a private pond if by its terms it is evident that it was not intended to be so applied.<sup>7</sup> The exception of lakes having an area of 15 square miles and over, and subject to overflow and backwater from the Mississippi river, which is made in a statute prohibiting the taking of fish except by rod or line, is not an arbitrary and unnatural exception, but rests upon the idea that such lakes, being periodically replenished from the river, are not liable to suffer a material waste or destruction of their stock of fish as lesser lakes or streams would.<sup>8</sup> When the owner of a private pond is excepted from the provisions of the statute, he may permit others to fish in his pond.<sup>9</sup> The state may also except from its fishery laws certain waters of the state, if they are of such a character that it is not necessary to make the rules apply to them.<sup>10</sup> But exceptions will be strictly construed, and, to avoid the penalty for fishing contrary to the provisions of the

<sup>5</sup>*Com. v. Barber*, 143 Mass. 560, 10 N. E. 330; *Com. v. Young*, 165 Mass. 306, 43 N. E. 118; *State v. Craig*, 80 Me. 85, 13 Atl. 129; *Staples v. Peabody*, 83 Me. 207, 22 Atl. 113; *State v. Swett*, 87 Me. 99, 29 L. R. A. 714, 47 Am. St. Rep. 306, 32 Atl. 806; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468.

But it has been held not a violation of the fish laws of Oregon to have in possession during the close season, fish caught outside the state. *State v. McGuire*, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666.

<sup>6</sup>*State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Bennett v. Boggs*, Baldw. 40, Fed. Cas. No. 1,319; *Maney v. State*, 6 Lea, 218; *People v. Conrad*, 125 Mich. 1, 83 N. W. 1012.

Whether or not a pond or lake is a "private pond" within a statutory exemption of such from the general fish laws is determined by whether or not it is entirely owned by one person. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399.

<sup>7</sup>*Bridges v. People*, 39 Ill. App. 658; *People v. Hazen*, 121 N. Y. 313, 24 N. E. 484, Reversing 52 Hun, 370, 5 N. Y. Supp. 337.

Where during an overflow the water of a lake spread over adjoining fields which were separated from the lake by a highway, forming a single body of water, the land covered did not become a part of the lake; and an indictment charging a person with illegally fishing in the lake was not sustained by proof that he fished in such fields. *State v. Weeks*, 88 Mo. App. 263.

<sup>8</sup>*Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399.

<sup>9</sup>*Maney v. State*, 6 Lea, 218.

The act of 41 & 42 Vict. chap. 39, forbade any person fishing for any freshwater fish between certain days, but made an exception of persons fishing in a private fishery with the leave of the owner, and it was held that to be within the exception the fishing must be with leave of the owner, and not merely the occupier of the land. *Swanwick v. Varney*, 45 L. T. N. S. 716, 30 Week. Rep. 79, 46 J. P. 613.

<sup>10</sup>*Gentile v. State*, 29 Ind. 409, Affirmed in *State v. Boone*, 30 Ind. 225; *State v. Sturgess*, 9 Or. 537.

statute, the fisherman must bring himself strictly within the terms of the exception.<sup>11</sup>

**390. Local application of regulations.**— If a statute forbids fishing in public waters it will be construed so as to carry out its intent; and all waters will be held to be within the terms of the statute where it is reasonable to suppose the public good requires the regulation of the fishery. The statute applying to bays on the sea coast whose headlands are less than a certain distance apart will apply to small inlets or bays within a large bay.<sup>1</sup> So, an inlet in a bay which flows into a navigable river, wide and deep enough to permit the passage of a steamer although not used for the purpose of navigation, but which, having a permanent connection with the river, rises and falls with it, is a body of water within the purview of a statute prohibiting the obstruction of any of the rivers, creeks, streams, or other water courses wholly within, or running through, the state so as to prevent the free passage of fish, although such inlet is on land wholly owned by one riparian owner.<sup>2</sup> And all waters which may be regarded as part of a body named will be included within a statute, although bearing an independent name.<sup>3</sup> A reservoir constructed for mercantile purposes by a water company is not a tributary of a river within the meaning of the salmon fishery acts under which a fishery district is formed, consisting of the river and its tributaries, although the reservoir is formed by water taken from a former tributary of the river, and its surplus water is cast into the river, and the young of salmon pass

<sup>11</sup>*People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *State v. Lewis*, 73 Mo. App. 619.

But setting nets for turtles does not violate the provisions of a statute making it unlawful to take fish in any waters by means of nets, although fish become entangled in the net, if they are returned to the water as far as possible. *People v. Deremo*, 106 Mich. 621, 64 N. W. 489.

<sup>1</sup>*State v. Thompson*, 85 Me. 189, 27 Atl. 97; *State v. Murray*, 84 Me. 135, 24 Atl. 789.

The test of the width of the entrance is not from headland to headland at the extremities of the bay, but from island to island lying between the headlands. *McClellan v. Tillson*, 82 Me. 281, 19 Atl. 457.

<sup>2</sup>*Smith v. People*, 46 Ill. App. 130; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115, Reversing 39 Ill. App. 656.

A river may be a tributary of another

river so as to be within a fishery district consisting of such other river and its tributaries, although its waters do not flow directly into the main river, but flow into it by first discharging into another river, and thence from that river into the main one. *Hall v. Reid*, L. R. 10 Q. B. Div. 134, note, 48 L. T. N. S. 221, note.

<sup>3</sup>*State ex rel. Alaska Packers' Asso. v. Crawford*, 13 Wash. 633, 43 Pac. 892.

Conversely, in *Cleveland v. Norton*, 6 Cush. 380, it was held that the act of 1783, chap. 5, which imposed a penalty on a person who should, without liberty from the proper authorities, use any net or engine in any part of the creeks or ponds adjacent to a great pond where fish usually cast their spawn so as to take and obstruct the fish that pass up and down the creeks, did not apply to the taking of fish by such means in the arms, coves, or bays in the great pond itself.

from the river up the tributary from which the water is taken for supplying the reservoir and thence into the reservoir.<sup>4</sup> A general statute will not apply to waters covered by special regulations.<sup>5</sup> A statute for the protection of fish in artificial ponds has no application to coves of a navigable river.<sup>6</sup> The American waters of the Niagara river below Niagara Falls are "fresh waters of this state" within a statute regulating fishing in such waters.<sup>7</sup>

**391. How should regulations be made?**—The legislature may specify the regulations which it deems necessary in the statute, or it may delegate supervision over the matter to subordinate officials or boards. A municipal corporation may be given authority to regulate the fisheries within its borders.<sup>1</sup> Or authority over the matter may be committed to fish and game commissioners.<sup>2</sup> Or to a local committee.<sup>3</sup> If the legislature takes the matter into its own hands it excludes the power of local officials.<sup>4</sup> And local officials must, in every instance, follow the provisions of the statute so far as they are applicable to the matters before them.<sup>5</sup>

**392. Violation of regulations.**—Violations of fish and game laws

*Harbottle v. Terry*, L. R. 10 Q. B. 43 L. R. A. 200, 67 Am. St. Rep. 695, 41 Div. 131, 137, 52 L. J. M. C. N. S. 31, 48 L. T. N. S. 219, 31 Week. Rep. 289, 47 J. P. 186.

*State v. Sturgess*, 9 Or. 537.

*Rollers v. Rollers*, 77 Md. 148, 20 L. R. A. 94, 39 Am. St. Rep. 404, 26 Atl. 188.

*People v. Gillette*, 33 N. Y. S. R. 352, 11 N. Y. Supp. 461.

*State v. Decker*, 46 Conn. 241; *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184.

By the statute of 1806, the fisheries of Orrington were placed under control of a committee to be chosen by the town, but it was held that a subsequent act of 1813, which prohibited the taking of fish on certain days of each week was applicable to that town. *Com. v. Wentworth*, 15 Mass. 188.

The Vermont statutes authorizing the fish and game commissioners, on stocking a pond or stream, to prohibit, for three years, fishing therein; and providing that waters thus stocked shall be treated as public waters, subject to the right of the owner of the land on which they are, to make them a private preserve or "posted waters" at the end of five years, on meeting certain requirements,—are not unconstitutional as a taking of private property for public use, but a valid exercise of the police power. *State v. Theriault*, 70 Vt. 617,

The power of the fish and game commissioners to stock waters and prohibit fishing therein for three years is not exhausted as to any given location by a single exercise of it, but the same waters may be again stocked, and fishing therein again prohibited for another three years. *State v. Eldredge*, 71 Vt. 374, 45 Atl. 753.

*Bearce v. Fossett*, 34 Me. 575.

By the Maine act of March 4, 1826, to regulate the alewife fishery in Bristol, so long as the fish committee act within the sphere of their duty they are not trespassers, and no one has a right to oppose them in the performance of their duties. *Fossett v. Bearce*, 27 Me. 117.

*People v. Fish*, 89 Hun, 163, 34 N. Y. Supp. 1013.

Under the act of 36 & 37 Vict. chap. 71, power was given to the conservators to make by-laws for the protection of the salmon fisheries, but it was held that under that act they had no power to make a by-law which prohibited the use of nets for catching other fish within the salmon grounds if they could be used without damage to the salmon fishery. *Pidler v. Berry*, 59 L. T. N. S. 230, 53 J. P. 6.

Under the Canadian act of 31 Vict. chap. 60, §§ 2 and 19, giving the minis-



belong to the class of acts of which intent is not necessary to constitute a part of the offense. The doing of a certain act is forbidden by the statute, and it is enough that one has committed such acts to render him subject to the penalty, although he did not know that he was violating the law and had no intention of doing so. So, a person may be convicted for violating the law, although he was advised by the fish commissioner and a lawyer that his intended act would be lawful.<sup>1</sup> If the statute provides a penalty for each fish illegally taken, to be recovered by a *qui tam* action in case several persons join in the fishing, a recovery of the penalty against one will bar an action against the others.<sup>2</sup> If one half the penalty is to go to the town and the other half to the person who shall prosecute, the informer may maintain a suit in his own name without alleging that he was authorized to do so by the town.<sup>3</sup> The fact that no maximum fine is fixed by a statute prohibiting the taking of fish with nets or seines does not render it void under a constitutional provision forbidding excessive fines.<sup>4</sup> The attorney general may proceed, without the intervention of a private relator, to enjoin the unlawful destruction of fish.<sup>5</sup> A complaint is not sufficient which does not show that the attempted catching of fish was within the prohibited space.<sup>6</sup> Notice of time when passageways must be open for the running of fish must be given before an action can be maintained for the penalty for refusing to keep the stream open.<sup>7</sup>

**393. Right to fish is subordinate to right of navigation.**—The manner of exercising the right of fishery is such that there will ordinarily be no loss occasioned by a change from place to place, and one time is as good as another under ordinary circumstances; so that, when the right of fishery conflicts with other rights to use the stream which require a more permanent occupation of the space, or cannot await

ter of marine and fisheries the right to issue licenses when the exclusive right of fishing does not already exist, and to forbid fishing except under authority of license, there is no right to forbid salmon fishing on private property without a license. No statute should be construed to give a right to license the right of fishing on private property unless the power is given in clear and unequivocal language or irresistible inference. *Venning v. Steadman*, 9 Can. S. C. 206.

Where a statute provides for the appointment by each of three counties of a fish warden who shall see to the preservation of fish, and provides that upon failure in appointment or refusal of oth-

ers to act one may do so, there will be no presumption of nonappointment or refusal to act, but one who attempts to act alone must show that he has authority to do so. *Hancock County v. Eastern River Lock & Sluice Co.* 20 Me. 72.

<sup>1</sup>*State v. Huff*, 89 Me. 521, 36 Atl. 1000.

<sup>2</sup>*Boutelle v. Nourse*, 4 Mass. 431.

<sup>3</sup>*Nye v. Lamphere*, 2 Gray. 295.

<sup>4</sup>*Re Yell*, 107 Mich. 228, 65 N. W. 97.

<sup>5</sup>*People v. Truckee Lumber Co.* 116 Cal. 307, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

<sup>6</sup>*State v. Cottle*, 70 Me. 198.

<sup>7</sup>*Hancock County v. Eastern River Lock & Sluice Co.* 16 Me. 303.

times and seasons, the fishery right must give way. It is subordinate to the right of navigation.<sup>1</sup> But the right of navigation, though superior, does not take away the right of fishery. It only limits it so far as it interferes with its own fair, useful, and legitimate exercise.<sup>2</sup> The result of this is that vessels may take their course and need not look out for fishermen as long as they do not act maliciously or with wantonness.<sup>3</sup> The fishery right, on the other hand, cannot be unnecessarily impeded by the right of navigation. Both rights are entitled to the use of the water, and each must be exercised so as not to interfere with the other, always bearing in mind that the navigation right is paramount and the fishery right subordinate.<sup>4</sup> So, the fishery right yields to the permanent improvement of the land on which the waters rest.<sup>5</sup> And it must give way to the right of the riparian owner to erect mills.<sup>6</sup> But, as has already been seen,<sup>7</sup> the right to erect mills does not include the right to prevent the passage of fish up and down the stream. One exercising the public right to take ice from public waters, occupying a part thereof for increasing the thickness of the ice by artificial means, has no complaint against one who enters thereon for the lawful purpose of fishing, and fishes in a reasonable manner through the ice, at a time when the actual operation of gathering the ice has been suspended for a day and two nights.<sup>8</sup> The legislature may provide that fixed engines shall be located so as not to interfere with navigation,<sup>9</sup> and that sufficient space shall be left between them to permit the free passage of vessels.<sup>10</sup>

<sup>1</sup> Woolrych. Waters, p. 165; Hale, De Jure Maris, chap. 5.

<sup>2</sup> *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

<sup>3</sup> *Lewis v. Keeling*, 46 N. C. (1 Jones L.) 299.

<sup>4</sup> *Cobb v. Bennett*, 75 Pa. 326, 15 Am. Rep. 752; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

Since the right of navigation is paramount to the right of fishing in a public river, a license by commissioners appointed by the state to determine where weirs may be erected without injury to the rights of navigation will confer no estate which did not previously exist, but only determine where and by whom the previously existing right may be used consistently with public interest. *Van Auken v. Decker*, 2 N. J. L. 108.

<sup>5</sup> *Hogg v. Beerman*, 41 Ohio St. 81, 52 Am. Rep. 71; *Hugg v. Fath*, 37 N. J. Eq. 46; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

The owner of a fishery in a navigable river with the privilege of drawing his

seine on the shore cannot recover for any injury he may suffer from the erection of a stone wall along the shore by a meadows company chartered thereto by the state without liability for such damages, or after the statute of limitations has run, if erected by a private person. *Tinicum Fishing Co. v. Carter*, 90 Pa. 85, 35 Am. Rep. 632.

<sup>6</sup> Vattel, Book 1, chap. 22.

<sup>7</sup> See ante, § 386.

<sup>8</sup> *Rowell v. Doyle*, 131 Mass. 474.

<sup>9</sup> *McGowan v. Larsen*, 14 C. C. A. 178, 29 U. S. App. 554, 66 Fed. 910.

<sup>10</sup> *Fidalgo Island Canning Co. v. Womer*, 29 Wash. 503, 69 Pac. 1121.

Under provisions for an end passageway between pound nets of at least 600 feet, and that a pound net may extend 2,500 feet, two nets may not be constructed with a passageway of less than 600 feet, on the ground that their combined length would be less than 2,500 feet. *Ibid.*

A statute providing that there shall be an end passageway of at least 600

**394. Exercise of fishing rights.**— Even in the absence of statutory regulations as to the manner of enjoying fishery rights, the character of the right is such that everyone has an equal right to it, and no one has an exclusive right. Therefore, the right to use a fishery at the proper time depends upon priority of possession, and lasts only so long as the possession is maintained. The fishery must be used for the purpose for which it was designed, and so as to further the welfare of the one seeking to enjoy the right without injuring other persons having equal rights.<sup>1</sup> One seeking to make use of a public fishery must confine himself to the exercise of the public rights, and cannot trespass upon the rights or property of private owners. He can make no use of the shore.<sup>2</sup> When the right has been obtained by user to take fish by drawing a seine onto the beach by hand, it will not authorize the erection of a capstan and reel with which to draw the seine.<sup>3</sup> The fact that it is convenient to draw seines onto the private beach will not give a right to do so.<sup>4</sup> The public has a right to fish in public water, even in front of riparian property, if such property is not molested.<sup>5</sup> In a grant of flats with the fishery rights thereon, a reservation to the public of the liberty of fishing and drying the nets and fish on the shore will not be held to be restricted to the taking of such fish as may be and are usually dried on the shore.<sup>6</sup> Every individual has a right to enjoy the public right, and, since no two individuals can enjoy precisely the same right at the same time, some rule must be observed as to the order of time in which the rights shall be exercised. In some instances this is regulated by custom. No person can acquire a right of fishing in a public fishery superior to any other,

feet, and a lateral passageway of at least 2,400 feet, between all pound nets constructed in the waters of Puget sound, and specifying the manner of determining such distances, is complied with where a locator, after ascertaining the general course the trap would point, ascertained where a line would intersect the shore if projected along that course from the trap to the shore; then, after ascertaining the general direction of the shore for half a mile on each side of the point of intersection, drew a line parallel with the general direction of the shore, causing such line to intersect the outer end of the next adjoining trap; and, next, measured at a right angle from the last-mentioned line to the nearest point of the trap location and found the distance to be 610 feet. *Point Roberts Fishing Co. v. George & B. Co.* 28 Wash. 200, 68 Pac. 438.

<sup>1</sup> Woolrych, *Waters*, p. 165.

<sup>2</sup> *Matthews v. Treat*, 75 Me. 594; *Com. v. Shaw*, 14 Serg. & R. 9; *Parker v. Elliott*, 1 U. C. C. P. 470; *Duncan v. Sylvestor*, 24 Me. 482, 41 Am. Dec. 400.

<sup>3</sup> *Hart v. Chalker*, 5 Conn. 311.

A landowner may, after notice to one who has placed a seine reel on his land to remove it, cut it down and shove it into the water, although the result is that it floats away and is lost. *Almy v. Grinnell*, 12 Met. 53, 45 Am. Dec. 238.

<sup>4</sup> *Brink v. Richtmyer*, 14 Johns. 255; *Sloan v. Biemiller*, 34 Ohio St. 492.

<sup>5</sup> *Skinner v. Hettrick*, 73 N. C. 53.

The owner of an exclusive fishing privilege on flats cannot recover for damages sustained because of another's weir erected below low-water line. *Matthews v. Treat*, 75 Me. 594.

<sup>6</sup> *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

unless he has gone into the common waters, and set up and established his pounds and stakes, and taken possession of the line which those pounds and stakes included, with which a stranger cannot directly interfere.<sup>7</sup> The court was of opinion that no damages could be recovered in case such stranger established his lines clear around that first established, and thereby impaired its usefulness. When labor is necessary to fit a certain place for profitable fishing, the one bestowing that labor is entitled to protection in its enjoyment as long as he continues in possession and occupation.<sup>8</sup> But if the possession is not such as to be exclusive, the one making a clearing has no ground upon which he can exclude the public; and a custom among fishermen to recognize each other's right to such places is void for uncertainty and unreasonableness.<sup>9</sup> Even the riparian owner, by merely removing obstructions from the bottom adjoining his shore so as to facilitate the drawing of seines, has no right to exclude the public from the use of the facilities so offered.<sup>10</sup> But he may be permitted by the legislature to erect structures in the water for fishing purposes and exclude the public from their use.<sup>11</sup> Under a statute providing that when any person shall have been at the expense of clearing a fishing place in a river, and has used the right to take fish there in the season thereof, he shall have the right of enjoyment of the fishing place, the right cannot be assigned to another person.<sup>12</sup> Any method of fishing may be employed which is not prohibited by statute.<sup>13</sup>

**394a. Whale fisheries.**— There is scarcely another occupation which is exercised so completely out of the jurisdiction of any government, and so outside the reach of any law, as the whale fishery. Therefore, in order to prevent the operation in every case of the rule that might makes right, and so place the entire business at the mercy of the one who should simply take what he chooses wherever he finds it, it has been necessary to agree upon some rules for the purpose of determining when title to particular fish accrues, and what is necessary to preserve the property right in it. These were established by custom, but

<sup>7</sup>*Dwelle v. Wilson*, 14 Ohio C. C. 551.

<sup>8</sup>*Pittkin v. Olmstead*, 1 Root, 217; *Lay v. King*, 5 Day, 72.

<sup>9</sup>*Freary v. Cooke*, 14 Mass. 488; *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 42 Am. Dec. 155; *Westfall v. Van Auker*, 12 Johns. 425.

<sup>10</sup>*Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 42 Am. Dec. 155; *Fagan v. Armistead*, 33 N. C. (11 Ired. L.) 433.

<sup>11</sup>*Locke v. Motley*, 2 Gray, 265; *Mathews v. Treat*, 75 Me. 594.

<sup>12</sup>*Munson v. Baldwin*, 7 Conn. 168.

<sup>13</sup>*Kintore v. Forbes*, 4 Bligh N. R.

485.

Stakes driven for the purpose of trap-net fishing in deep water cannot be wantonly removed by the owner of a neighboring island situated more than a mile from shore, within which distance the riparian owner's right is preserved by statute, where the stakes did not hinder navigation and the owner does not suffer special damage on account of them. *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103.

have attained the force of law, and are applied by the courts in determining rights arising out of such fisheries. A custom that one who strikes a whale in such a way as to kill it, and leaves a mark on it by which he can identify it, can maintain his property in it, although for a time he permits it to go out of his possession, is reasonable and will be enforced.<sup>1</sup> A usage that a whale belongs to the vessel whose iron first remained in it, provided claim is made before any crew has taken possession of and cut in the animal, will be upheld in favor of a vessel which made fast to a whale, which escaped dragging the iron and line and was captured by the crew of another vessel, who did not know of the first attack and pursuit, but yielded the whale in conformity to such usage to the first pursuers, who came up before cutting in.<sup>2</sup> In *Littledale v. Scaith*,<sup>3</sup> an action of trover for a whale, the counsel on both sides agreed the law to be, both by the custom of Greenland and as settled by former determinations at Guildhall, as follows: While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the

<sup>1</sup>*Bartlett v. Budd*, 1 Low. Dec. 223. Fed. Cas. No. 1,075; *Taber v. Jenny*, 1 Sprague, 315, Fed. Cas. No. 13,720.

A usage that whales shot in Massachusetts bay with bomb lances, and which when killed sink to the bottom and float in from one to three days thereafter, belong to the person killing them, is reasonable and valid, and entitles such person to recover the value of a whale so killed by him and appropriated by another. *Ghen v. Rich*, 8 Fed. 159.

<sup>2</sup>*Swift v. Gifford*, 2 Low. Dec. 110, Fed. Cas. No. 13,696; *Bourne v. Ashley*, Fed. Cas. No. 1,698.

<sup>3</sup>1 Taunt. 243, note; Approved in *Fennings v. Grenville*, 1 Taunt. 241.

In *Hogarth v. Jackson*, Moody & M. 58, 2 Car. & P. 595, the plaintiff gave evidence of the custom of the Greenland fishery varying from that stated in *Littledale v. Scaith*, and contended that the custom was that the whale continued the property of the first striker, not merely while the harpoon continued in the fish, and the line attached to it, but although it came out of the fish, or had been detached from the line, if the fish were entangled in the line, and the line continued in the power or management of the striker. This custom was to a

certain extent proved in evidence and admitted on the part of the defendants.

In *Skinner v. Chapman*, Moody & M. 58, note, tried at York at the Lent assizes, 1827, which was an action of trover for a whale, it appeared that while the fish was unquestionably fast the boat of the defendants came and the crew struck the fish with a lance, then afterwards struck it with a harpoon, and finally secured it. The blow with the lance was of no service towards securing the fish, but made it struggle violently, and in the struggle the harpoon of the plaintiffs was disengaged, but it did not clearly appear whether this took place before or after the harpoon was struck by the crew of the defendants. Bayley, J., left it to the jury to say whether the harpoon of the plaintiffs was fast when the harpoon of the defendants was struck; and, if they thought it was not, whether the plaintiffs could have secured the fish if the lance of the defendants had not been struck: saying that he was clearly of opinion that when one party has struck an animal, if another comes unsolicited, does an act which prevents the first striker from killing it, and then kills it himself, he does so, not for his own benefit, but for that of the first striker.

second harpoon is called a friendly harpoon, and the fish is the property of the first striker. But if the first harpoon is not in the power of the striker the fish is a loose fish, and will become the property of any other person who strikes and obtains it. In a later case it is said: "There has prevailed in the northern whale fishery for a considerable period of time — probably ever since the time when these fisheries came into the possession of this country — the rule that the person who first harpoons a fish and retains his hold of that fish until it is finally captured is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons." This is technically known as the "fast and loose" rule, *prima facie* applicable in all that fishery, and was held to apply to a case where the harpooner fastened an inflated sealskin as a "drag" to the line when the whale had sunk so deep as to involve either the cutting of the line or the sinking of the boat, the whale being held to be still in his possession.<sup>4</sup>

**395. Interference with another's exercise of public right.**—From the amplitude of the space in which public fishery rights are usually exercised, there is little reason for anyone interfering with the rights of others. There is usually room for all; and if anyone interferes with another it is cogent evidence of ill-will and intent to foment a quarrel. When, however, the rights exist with respect to a river or other confined locality where the space is limited, a conflict cannot so easily be avoided. With respect to such places some matters have been definitely settled by the courts, so that they are no longer in doubt. As long ago as the reign of Edward III. in England<sup>1</sup> there is a writ on behalf of the Abbot of Bukfast against Robert, Dean of the Church of the Blessed Peter, for erecting a weir which prevented fish from coming to the Abbot's weir. And there never seems to have been a doubt that a lower proprietor had no right to interfere with the passage of fish to an upper one from that time to the present.<sup>2</sup> One having a license to fish in the upper waters of a tidal river may main-

<sup>1</sup>*Aberdeen Arctic Co. v. Sutter*, 4 Rep. 2 C. L. 143, 16 Week. Rep. 678; *Macq. H. L. Cas.* 355, 6 L. T. N. S. 229, *State v. Theriault*, 70 Vt. 617, 43 L. R. A. 290, 67 Am. St. Rep. 695, 41 Atl. 1030; *Griffith v. Holman*, 23 Wash. 347, 10 Week. Rep. 516.

<sup>2</sup>46 Ass. 306, pl. 9.

<sup>3</sup>*Hamilton v. Donegall*, 3 Ridgeway, 54 L. R. A. 178, 83 Am. St. Rep. 821, 63 267, 324; *Holyoke Water-Power Co. v. Pac.* 239; *State v. Glen*, 52 N. C. (7 *Lyman*, 15 Wall. 500, 21 L. ed. 133; *Jones I.*) 321.

*Barker v. Faulkner*, 79 L. T. N. S. 24; A grant of a right to maintain a weir *Com. v. Chapin*, 5 Pick. 109, 16 Am. Dec. across a river for the purposes of a fish- 386; *Parker v. People*, 111 Ill. 588, 53 ery does not include the right to exclude 4m. Rep. 643; *Murphy v. Ryan*, Ir. all fish from passing above the weir so

tain an action against a person who, by unlawfully fishing in the lower waters of the river, caused damage to the plaintiff in the exercise of his right to fish, by intercepting and taking large quantities of fish that would otherwise have gone into the upper waters.<sup>3</sup> But the upper proprietor has no greater right than the lower one, and he cannot, therefore, forbid the lower one to exercise his fishery right; and he has no right of action against one who merely erects another weir in such a position as to prevent him from securing as many fish as he might have done.<sup>4</sup> The lower owner cannot destroy fish he does not take.<sup>5</sup> In *Edgar v. English Fisheries*,<sup>6</sup> Willes, J., raised the point, which he was inclined to deny, whether one having a several fishery as appurtenant to a house or parcel of land could use it for taking all the fish in the river, for purposes of barter in distant parts. The erection of a weir or fishing machine in a nontidal river is not a public nuisance the right to maintain which cannot be acquired by prescription. This question has occasioned much discussion, but appears to be settled as stated. The fish commissioners in the opinion rendered in the case of *Leconfield v. Lonsdale*,<sup>7</sup> after a most thorough examination of the statutes, held that such erection is forbidden by Magna

as to exempt the owner from the operation of a legislative resolution requiring fishways in dams. *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

The construction and maintenance of a brushwood weir across a stream for a long period of time, through which it was possible for fish to escape into the upper part of the river, will not justify the construction of a stone weir entirely stopping the passage of fish up the stream except in flood times, when the fish might overleap it. *Weld v. Hornby*, 7 East, 199, 3 Smith, 244.

<sup>3</sup>*Whelan v. Hewson*, Ir. Rep. 6 C. L. 283; *Hamilton v. Donagall*, 3 Ridgeway, 267.

Any unlawful interruption of the passage of fish up a stream to an upper fishery is a violation of the common-law rights of the owner of the upper fishery entitling him to an action at law, and it is immaterial that the particular mode of interrupting the passage of the fish was made unlawful by an act of Parliament which provided a remedy for such unlawful interruption. *Massy v. Cassidy*, Ir. L. R. 13 Eq. 97.

<sup>4</sup>*Chcney v. Gupthill*, 13 N. B. 379.

A net stretched partially across a river by the proprietor of a lower fishery is not a nuisance to the upper fishery, where a space of 10 or 12 yards is left

between it and the shore of sufficient depth to allow fish to pass up the river without obstruction. *Wilson v. Moy Fishery Co.* Ir. L. R. 19 Eq. 270.

<sup>5</sup>*People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

<sup>6</sup>23 L. T. N. S. 732.

<sup>7</sup>L. R. 5 C. P. 663, 39 L. J. C. P. N. S. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165, Affirming *Rolle v. Whyte*, L. R. 3 Q. B. 286, 37 L. J. Q. B. N. S. 105, 17 L. T. N. S. 560, 16 Week. Rep. 593, 8 Best & S. 116.

In *Weld v. Hornby*, 7 East, 199, 3 Smith, 244, an action by the owner of a fishery against a lower proprietor for constructing a stone weir so as to prevent the passage of fish up the stream, Lord Ellenborough, Ch. J., said the erection of weirs across rivers was prohibited in the earliest periods of law. They were considered as public nuisances. The words of Magna Charta, chap. 23, are that "all weirs from henceforth shall be utterly pulled down on the Thames and Medway, and through all England." And this was followed by subsequent acts, treating them as public nuisances, forbidding the erection of new ones, and the enhancing, strengthening, or enlarging of those which had aforesaid existed.

Charta. But the court did not agree with them, and held that the provisions of Magna Charta and the statutes prohibiting the construction of weirs apply only to tidal rivers. So that a coop wier which entirely prevents fish from passing it is not a public nuisance when not in a tidal river. To obtain a prescriptive right, the adverse enjoyment must be continued for twenty years.<sup>8</sup> Traps and engines must be so placed as not to interfere with other rights of fishery. A fishing trap which interferes with the common right of fishery as regulated by the laws is a public nuisance, and a private nuisance to one whose lawful location is injured and damaged thereby.<sup>9</sup> But the fact that a weir may be as purpresture as against the Crown gives a citizen no right to trespass upon it.<sup>10</sup> The statutes may subordinate one kind of fishery to another.<sup>11</sup> A private individual who with others was engaged in fishing in a river by means of trap or gill nets can maintain an action in behalf of himself and others similarly situated to enjoin the construction and maintenance of a permanent fish trap in such river creating a public nuisance which would render it impossible to drift nets through the channel on either side of the trap, as such individuals suffer special injury in which the general public do not share, and the fact that others would suffer in the same way if similarly engaged constitutes no bar to the maintenance of the action.<sup>12</sup> But one is not liable for placing stakes in his tidal flats in such a way as to obstruct another's right of taking fish there.<sup>13</sup> Where the injury is caused in one county and results in another, the action may be brought in either; and in case the action extends into more than one county, it may be brought in either.<sup>14</sup>

**396. Conflict between private rights.**—The rights of the owner of a stream extends up and down as far as his land extends, and if he owns soil on one shore of the stream his rights extend to the center.<sup>1</sup>

<sup>1</sup>*Weld v. Hornby*, 7 East, 195, 3 Smith, 244.

<sup>2</sup>*Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55.

But where immemorial custom and legislative regulation recognize the erection of fish traps in navigable waters as a reasonable use, so long as they do not obstruct navigation they are not indictable as a public nuisance. *Boatwright v. Bookman*, Rice L. 447.

<sup>3</sup>*Wilson v. Codyre*, 27 N. B. 320.

<sup>4</sup>By the North Carolina statutes fishing with pod-nets is made subservient to fishing with seine drawn from the shore. *Hettrick v. Page*, 82 N. C. 65; *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21, 7 S. E. 640.

<sup>5</sup>*Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752.

<sup>6</sup>*Locke v. Motley*, 2 Gray, 265.

<sup>7</sup>*Borden v. Crocker*, 10 Pick. 383; *Hamilton v. Donegall*, 3 Ridgeway, 267, 324.

<sup>8</sup>*Royal Fishery of the Banne*, Davies, 149; *Zetland v. Glover Incorporation of Perth*, L. R. 2 H. L. Sc. App. Cas. 70.

A riparian proprietor *ad medium filum* of a private stream has a several fishery in the waters over his own land, and not a common fishery in the stream. *Snape v. Dobbs*, 1 Bing. 202, 8 J. B. Moore, 23. The common-law presumption is that, where land is possessed by different parties on either side of a river, the right of fishing in the river belongs to



The possessor of a prima facie right to fish for salmon on one side of a river has the right of challenging a claim to fish from the opposite side of the river.<sup>2</sup> Where a sand bank has formed in a tidal river, in which the opposite proprietors have a salmon fishery extending to the center of the river, and such sand bank divides the river at low water into two equal streams, a line drawn down the middle of the river at low water, taking the two channels together, is to be regarded as the limit or dividing line between the respective fisheries.<sup>3</sup> The right of fishery possessed by opposite owners on a fresh-water stream, being in the nature of a tenancy in common, the act of either in spreading his nets across the river and using the whole fishery, coupled with nonuser of the opposite tenant, is not sufficient to raise a presumption of a grant from the nonusing tenant to the other, as such acts are consistent with the nature of the tenancy in the absence of an actual ouster.<sup>4</sup> When, in disposing of its eminent domain, the state grants a private fishery as appurtenant to property on one side of a stream, those who subsequently accept deeds of land on the other side can claim no interest therein.<sup>5</sup> Private rights of fishery may be modified by contract.<sup>6</sup> A mere license to fish in water in front of his property will not prevent the riparian owner from proceeding to erect a wharf.<sup>7</sup> The consideration for an exclusive right of fishery fails if the grantor subsequently grants rights to another.<sup>8</sup> A lessee of oyster ground from a town cannot, in the absence of a statute authorizing it, recover against the town damages sustained by his alleged eviction due to the construction of a bridge across the leased land with the consent of the town, which assumed the management and control of the structure, since the erection of the bridge is an act of sovereign power.<sup>9</sup> No

each *ad medium filum aquae*, and, if the lord of the manor has that right, it must be shown. *Lamb v. Newbiggin*, 1 Car. & K. 549.

<sup>2</sup>*Stuart v. McBarnet*, L. R. 1 H. L. Sc. App. Cas. 387.

<sup>3</sup>*Wadderburn v. Paterson*, 2 Sc. Sess. Cas. 3d series, 902.

<sup>4</sup>*Bauman v. Kinsella*, 8 Ir. C. L. Rep. 299, Affirmed in 11 Ir. C. L. Rep. 249, as far as this point was involved; but the judgment was reversed on the ground that the court, in setting aside the verdict found for the plaintiff at the trial, and directing a verdict to be entered for the defendant, erred in so directing the verdict, and should have granted a new trial, which was accordingly done.

<sup>5</sup>*Nickerson v. Brackett*, 10 Mass. 212.

<sup>6</sup>An heir who contracts with a widow for her dower right in a fishery which has been set off without specifying the days upon which she can fish is estopped to deny her right to the fishery to avoid compliance with his contract. *Russell v. Russell*, 15 Gray, 159.

A condition that the vendors of a fishing plant will not become interested in a similar business "upon, along, or off the Atlantic seaboard" refers to all the waters adjacent to the eastern coast of the United States, including all the indentations along the coast. *American Fisheries Co. v. Lennan*, 118 Fed. 869.

<sup>7</sup>*Tinicum Fishing Co. v. Carter*, 61 Pa. 29, 100 Am. Dec. 597.

<sup>8</sup>*Taunton v. Caswell*, 4 Pick. 275.

<sup>9</sup>*Hall v. Oyster Bay*, 61 App. Div. 508, 70 N. Y. Supp. 710.

tenant in common can deprive his cotenant of the enjoyment of the fishery,<sup>10</sup> and one can maintain an action against the other only for permanent injury to the fishery.<sup>11</sup> If a grant of land is made to certain persons as trustees for settlers on it who have a right to take fish in the adjoining waters, the fishery is common to all the settlers, and cannot be exclusively claimed by the trustees; and regulations may be made for the taking of fish which will exclude the trustees, although they have the title to the land bordering on the fishing place.<sup>12</sup> The grantee of a riparian owner's several fishery has the right to use the adjoining shore above low-water mark only so far as necessary and as it has been used in the fishery; and the grantor may make any use thereof which does not injure or impede the use of the fishery.<sup>13</sup> When the owner of a manor and fishery grants the former without an express reservation of the right of drawing his nets on the shore, the notorious, continued exercise of that privilege for more than twenty years will raise a presumption of such reservation grant.<sup>14</sup> Salmon fishings being *inter regalia* of the Crown (Scottish), a prior grant of the shore does not preclude a grant of the said fishery in favor of one having no interest in any adjoining shore; and such subsequent grantee may draw his nets on the banks of the prior grantee's grounds without his consent, that being a pertinent right to the fishery.<sup>15</sup>

**397. Interference with captured fish.**— In *State v. Shaw*<sup>1</sup> the doctrine with reference to captured fish is carried a little further than it has before been carried. In it the fish had not been secured beyond a possibility of escape, which point has been emphasized in most of the other cases. But in it also was an element which does not appear in the other cases. That element consisted in the fact that a private net

<sup>10</sup>*Mott v. Underwood*, 148 N. Y. 463, 32 L. R. A. 270, 51 Am. St. Rep. 711, 42 N. E. 1048, Affirming 73 Hun, 509, 26 N. Y. Supp. 307.

<sup>11</sup>Hence, he cannot maintain such action against the other for digging a deposit of marl out of a small strip of land on the river bank attached to the fishery, but which did not injure it, his proper remedy being to compel such cotenant to account. *Smith v. Sharpe*, 44 N. C. (Busbee L.) 91.

<sup>12</sup>*Vickerson v. Brackett*, 10 Mass. 212.

<sup>13</sup>*Hart v. Hill*, 1 Whart. 124.

A right to take fish is a profit *à prendre* in *alieno solo*. It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes as capstans for the purpose of drawing the seine, and the occupancy of the bank at high tide

as well as the space between high and low water marks as far as may be necessary and usual. The grantee, in the nature of things, must have exclusive possession for the time he is fishing and for that purpose; the grantor for all other times and for all other purposes. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

The grant of a salmon fishery in Maine waters refers to the privilege of making grapplings for the weir or the permanent structures fast to the shore. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

<sup>14</sup>*Gray v. Bond*, 2 Brod. & B. 667, 5 J. B. Moore, 527.

<sup>15</sup>*Gammell v. Woods & Forest Comrs.* 3 Macq. II. L. Cas. 419.

<sup>16</sup>Ohio St. 167, 60 L. R. A. 481, 65 N. E. 875.

or trap which already contained the fish was made use of by defendants to secure them. So far as defendants were concerned, therefore, the means of escape were in fact cut off, and defendants were justly held liable for taking the fish from the trap. The court held that when fish are inclosed in a net or any other inclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or inclosure, the taking of them therefrom by a stranger with felonious intent will be larceny. This decision implies that if the fish are fast in a trap from which they cannot escape they are the property of the owner of the trap, although it may be located in a public water.<sup>2</sup> There is no liability, however, for frightening fish which another is endeavoring to take, by reason of which they are not secured.<sup>3</sup> Nor is there any liability for merely anticipating the capture of fish.<sup>4</sup> There can be no property in the fish before they are caught.<sup>5</sup> And it is immaterial that one claiming the fish owns the land over which they are swimming.<sup>6</sup> Plaintiff was not in possession of a shoal of fish so as to entitle him to maintain trespass against another for taking them, where at the time of the taking he had cast a seine nearly around them, but had left a small space which the seine did not fill up, although he placed his fishermen around the opening and splashed and disturbed the water so that the fish could not escape, and through which opening the defendant's boats were rowed, they casting another seine and taking the fish.<sup>7</sup> The construction of a wire fence across the mouth of a cove does not give one such possession of fish caught and placed in the water therein that he can retain title to them after they are thus restored to their natural element.<sup>8</sup>

**397a. Interference with private fishery.**— Even in a private fishery, if the water therein is connected with that of other property the owner of the fishery has no title to the fish, and in case of interference with the fishery the remedy is trespass, and not a possessory action for the fish.<sup>1</sup> It has, however, been held that the owner of a fishery has a

<sup>2</sup>*Treat v. Parsons*, 84 Me. 520, 24 Atl. 946.

<sup>3</sup>*Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12.

<sup>4</sup>*Stevens v. Jeacocke*, 11 Q. B. 731, 17 L. J. Q. B. N. S. 163, 12 Jur. 477.

<sup>5</sup>*Yard v. Carman*, 3 N. J. L. 937; *Mathews v. Treat*, 75 Me. 594.

<sup>6</sup>*People v. Doxtater*, 75 Hun, 472, 27 N. Y. Supp. 481.

<sup>7</sup>*Young v. Hichens*, Davison & M. 592, 6 Q. B. 606.

<sup>8</sup>*Sollers v. Sollers*, 77 Md. 148, 20 L. R. A. 94, 39 Am. St. Rep. 404, 26 Atl. 188.

<sup>1</sup>Bracton, De Legibus, Lib. II., F. 9.

The owner of the land covered by and surrounding a pond or small lake has the exclusive right of taking fish therefrom, but his title to the fish is no different or greater because such pond has no regular outlet but connects with a stream only during periods of high water, at which times the fish are at liberty to pass from or into such pond from

property in the fish and may bring trover against one taking them without right.<sup>2</sup> This doctrine must, however, be limited to waters which have no connection with those on other property so that they are exclusively private. If the fish are confined in ponds on private property in such a way that they cannot escape therefrom, the title is in the owner of the pond and the public acquires no right to the fish, although the ponds are stocked at public expense.<sup>3</sup> A private fish pond is an exclusively private affair and may be constructed without authority from the Crown.<sup>4</sup> The breaking of the barriers by which fish are confined in a private pond is waste on the part of a tenant.<sup>5</sup> Statutes for the protection of fish in private waters refer to those only which are confined exclusively to water on the land of one person.<sup>6</sup> A notice adjacent to a private pond or stream forbidding trespassers of every kind in the waters and upon the shores of said pond or stream is not sufficient to give notice that the waters are private and used for the propagation of fish, and which will bring one within a statute punishing a trespasser in such private preserves.<sup>7</sup> The legislature may give the owner of a stream the right to inclose it for the cultivation of fish, and forbid other persons from interfering with the fish contained therein.<sup>8</sup>

**398. Right to fish in lakes.**— Since the right to fish follows the title to the soil, there is no public right of fishery in a lake the title to the bed of which is in private ownership. In England, the title to inland lakes is not in the Crown but in the riparian owners, and therefore there is no public right of fishery there.<sup>1</sup> But in this country the title to the beds of the large lakes is in the public.<sup>2</sup> And, therefore, with respect to such lakes the public have a right of fishery.<sup>3</sup>

the stream. His title is the same as if by different persons, although they are the pond or lake was a bayou having un- inclosed on every side except on that interrupted connection with the stream. towards the river. *Lisle v. Brown*, 1 *People v. Bridges*, 142 Ill. 30, 16 L. R. Marsh, 127, 5 Taunt. 440.

*A. 684. 31 N. E. 115.*

<sup>2</sup>*Smith v. Kemp*, 2 Salk. 637, Holt, 322.

<sup>3</sup>*Beach v. Morgan*, 67 N. H. 520, 68 Am. St. Rep. 692, 41 Atl. 349; *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 81 Am. St. Rep. 504, 45 Atl. 634.

<sup>4</sup>*Anonymous*, 6 Mod. 183.

<sup>5</sup>*Moyle v. Mayle*, Owen, 66.

<sup>6</sup>*Reynolds v. Com.* 93 Pa. 458; *Ben-scooter v. Long*, 157 Pa. 208, 27 Atl. 674.

A stream of water is not within inclosed lands within the meaning of a statute prescribing a penalty for fishing in inclosed grounds where the stream passes between parcels of land owned

<sup>7</sup>*Com. ex rel. Glenburn Fish & Game Protective Asso. v. Singer*, 3 Lack. Legal News, 230.

<sup>8</sup>*Eastham v. Anderson*, 119 Mass. 526.

<sup>1</sup>*Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Johnston v. Bloomfield, Jr.* Rep. 8 C. L. 68; *Pery v. Thornton, Jr.* L. R. 23 Eq. 402.

<sup>2</sup>See ante, § 58.

<sup>3</sup>*Kuchn v. Milwaukee*, 83 Wis. 583, 18 L. R. A. 553, 53 N. W. 912; *Dwelle v. Wilson*, 14 Ohio C. C. 551; *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 48 N. E. 944; *Sloan v. Biemiller*, 34 Ohio St. 492, 8 Rep. 566.

The court said that it is obviously

So, where the title to smaller lakes and ponds has been retained by the public, the right of fishery is also retained.<sup>4</sup> But where waters are private property, although superficially larger than what are known in the New England states as great ponds, the fishery therein is private, and the owner may maintain trespass against one who enters and takes fish therein which the owner propagates.<sup>5</sup> But the right may be taken by the state under its power of eminent domain upon the making of compensation.<sup>6</sup> A private lake or pond or waters within the Michigan statute relating to fishing rights of owners of such waters are those which are not navigable, and where the soil under and on their borders is owned exclusively by persons who claim the waters as their private property, and which have no connection with other streams of waters which are public and through which fish may pass.<sup>7</sup> Ownership of the soil on the shore of a pond will give no right to fish in it if the title to the pond is in another.<sup>8</sup> A pond the bed of which is held in trust for the public use, situated wholly within land conveyed by a governmental grant of township lots, is not "wholly within the control" of the littoral proprietor within the terms of the statute forbidding the taking of fish from waters "wholly within the control of the owner of the land around it."<sup>9</sup> Where it has always been a public custom to take fish from a pond, trespass will not lie against one who, in the absence of any notification to the contrary, may understand that he is licensed thereto, although the pond is in fact private.<sup>10</sup> Each of the owners of adjoining tracts of land over which a reservoir was constructed has only a several right of fishery in the water over his land, and upon the drawing off of the water they do not become tenants in common in the fish, under a statute authorizing them to take the water out of the

just that the fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters, and alike subject to control by public authority. The reason for regarding the right as public is as great there as in the seas, and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide. *Sloan v. Biemiller*, 34 Ohio St. 492, 8 Rep. 566.

<sup>4</sup>*Barrows v. McDermott*, 73 Me. 441; *West Roxbury v. Stoddard*, 7 Allen, 158.

An owner of a governmental grant of land surrounding a large pond cannot obtain an injunction to restrain an individual from fishing therein. *Percy Summer Club v. Welch*, 66 N. H. 180,

28 Atl. 22; *Ne-pes-nauk Club v. Wilson*, 96 Wis. 200, 71 N. W. 661.

<sup>5</sup>*New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Re Provincial Fisheries*, 26 Can. S. C. 444; *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 21 Am. St. Rep. 828, 24 N. E. 686.

<sup>6</sup>*State, Albright, Prosecutor, v. Sussex County Lake & Park Commission*, 68 N. J. L. 523, 53 Atl. 612.

<sup>7</sup>*Re Water Rights*, 5 Det. L. N. No. 14.

<sup>8</sup>*Baylor v. Decker*, 133 Pa. 168, 19 Atl. 351.

<sup>9</sup>*State v. Welch*, 66 N. H. 178, 28 Atl. 21.

<sup>10</sup>*Marsh v. Colby*, 39 Mich. 626, 23 Am. Rep. 439.

reservoir once in seven years for the purpose of taking the fish therein, but each is entitled to the fish left on his soil.<sup>11</sup> Where the only connection between what would, otherwise, have been two separate bodies of water is a narrow and very shallow channel, over which a causeway has existed for forty years, they do not constitute one body or lake so as to bring adjoining proprietors within the rule that proprietors of land on a single body of water may exercise their rights of fishery therein in common, and the riparian proprietors on these lakes are limited to the particular body of water which the lands adjoin.<sup>12</sup>

**399. Rights in mill ponds.**—A mill pond belongs to the class of waters in which the fishery is private.<sup>1</sup> And there is no right to fish there without the consent of the owner; but the right of fishery may be granted to another while reserving title to the pond.<sup>2</sup> The owner of the land, and not of the pond, owns the water, and therefore if the owner of the mill has merely a flowage right the owner of the land will control the fishery.<sup>3</sup> But a release and discharge by the owner of a part of the land covered by an artificial pond created by the owner of the remaining land, of all claims, easements, privileges, and rights except the use of the water for milling purposes, releases his right to fish in the water over his own land as well as that of the other owner, secured by a former agreement between them conferring upon the person executing the release the use of the water for fishing and boating purposes.<sup>4</sup> A reservation in a grant of a mill and the necessary power, of "the right and privilege of fishing in the waters of said mill," reserves the sole fishery and not an easement.<sup>5</sup>

**400. Rights under fish-culture acts.**—As has already been seen,<sup>1</sup> where the state owns the water in which a fishery exists, its power of

<sup>11</sup>*Snape v. Dobbs*, 8 J. B. Moore, 23, 1 Bing. 202.

<sup>12</sup>*Mackenzie v. Banks*, L. R. 3 App. Cas. 1324.

<sup>1</sup>*Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333.

<sup>2</sup>*Ricaux v. Fauch*, 34 Assize, pl. 11.

<sup>3</sup>*Paine v. Woods*, 108 Mass. 160.

An exclusive fishery in non-navigable waters has its source in ownership of the soil, and is not divested by a legislative act condemning the land to the use of another for mill purposes. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

But in one case it was held that a lease conveying all the land which might be flowed from a certain dam passes the water and the fish therein as incidents

to the principal grant. *Smith v. Miller*, 5 Mason, 191, Fed. Cas. No. 13,080.

<sup>4</sup>*Sidwell v. Greig*, 17 Misc. 165, 40 N. Y. Supp. 968.

<sup>5</sup>*Paget v. Milles*, 3 Dougl. 43.

<sup>1</sup>See *ante*, § 381.

Under § 9, Mass. act 1869, to encourage the cultivation of useful fishes, the whole of a great pond may be leased subject to the restrictions that the appliances and inclosures for the purpose shall not occupy more than one tenth of the pond, and shall be so placed as not to debar reasonable ingress to and egress from it, and that any public right in the pond, other than the right of fishing, shall not be affected. *Com. v. Vincent*, 108 Mass. 441.

And it is illegal to fish in a great pond

regulation includes the right to make the fishery in it exclusive for the purpose of cultivating food fishes. And for this purpose it may make leases to private individuals of the right to control the water and take the fish therefrom. The rights of the lessee will depend upon compliance with the terms of the statute. The lessee has an exclusive fishery when he has occupied the pond effectively, although not in the manner, nor by the appliances, expected by the legislature, unless the manner of occupation is specified so as to be a condition to the exercise of his rights.<sup>2</sup> Closing the outlet to the pond with a wire screen establishes a sufficient occupation.<sup>3</sup> But absolute ownership of the fish exists only while they are kept under the control of the owner.<sup>4</sup> If the ponds have been leased for fish cultivation, no fishing can be done in the pond, although only common, migratory fish are taken.<sup>5</sup> The legislature may provide for the creation of fish-culture ponds on private property, and prohibit strangers from interfering with them under a penalty.<sup>6</sup> If the statute provides for the creation of such ponds on private property the water must be of such a character that the fish can be confined wholly on the property of the owner of the pond.<sup>7</sup> But the mere fact that one who cultivates fish in a pond does not own the whole pond, and there is nothing to prevent the fish from going over land of another person, will not give strangers a right to fish over the land of the one cultivating the fish, without his permission.<sup>8</sup> To entitle a landowner to the protection of the fish-culture acts, he must make reasonable efforts to protect and propagate the fish; and it is not sufficient for him merely to put a few fish into the water for propagation, without any further effort to secure the end in view.<sup>9</sup> Public waters lawfully assigned therefor under the Massachusetts law of 1869 for the cultivation of fish, until abandoned, are "a place in which fishes are lawfully artificially cultivated or maintained" within the statute, the question whether any particular means should be taken to carry out that purpose being for the commissioners to determine in framing the lease.<sup>10</sup> The

leased by the commonwealth for the cultivation of useful fishes, though the fishing be for other fish than the useful fish alleged to be cultivated in the pond. *Com. v. Richardson*, 142 Mass. 71, 7 N. E. 26.

<sup>2</sup>*Com. v. Weatherhead*, 110 Mass. 175.

<sup>3</sup>*Com. v. Weatherhead*, 110 Mass. 175.

<sup>4</sup>*Com. v. Perley*, 130 Mass. 469.

<sup>5</sup>*Com. v. Vincent*, 108 Mass. 441.

<sup>6</sup>*Com. ex rel. Glenburn Fish & Game Protective Assn. v. Singer*, 19 Pa. Co. Ct. 627; *State v. Welch*, 66 N. H. 173, 28 Atl. 21.

<sup>7</sup>*Reynolds v. Com.* 93 Pa. 458; *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

In *People v. Hall*, 8 App. Div. 15, 40 N. Y. Supp. 183, the question was raised, but not decided, whether a pond could be protected as a private propagating ground, which was not wholly on the land of the one claiming it.

<sup>8</sup>*Com. v. Skatt*, 162 Mass. 219, 38 N. E. 499.

<sup>9</sup>*Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

<sup>10</sup>*Com. v. Vincent*, 108 Mass. 441.

owner of premises used for fish culture, having stood by and seen large expenditures made in the construction of a meadow stream on adjoining premises for the purpose of fish culture, is not entitled to an injunction restraining diversion on such premises of water from a natural water course into the meadow stream, where the water is restored to its natural channel on such adjoining premises in substantially the same condition as to quantity and quality as before such diversion.<sup>11</sup> In the statute providing that "the fish and game warden of the state may take from any of the public waters of the state at any time and in any manner any fish for the purpose of propagating or restocking other waters," other waters means public waters, and not private ponds.<sup>12</sup> A provision that the lessee of a privilege of cultivating fish in a part of a public pond may occupy the whole of the part so assigned, with appliances and inclosures "for the taking" as well as the cultivation of the fish, is valid under a provision of the law authorizing the taking from such waters when and where said lessee pleases.<sup>13</sup>

**401. Right of municipal corporation.**— The legislature has the right to confer upon a municipal corporation the power to regulate the fisheries within its limits.<sup>1</sup> But except in private waters of which the municipality has the title, it has, in the absence of statute or custom,<sup>2</sup> no title to, or exclusive control over, the fisheries within its limits. Grants to municipal corporations have the same effect as those to private individuals, so that in case of a grant of land under tide waters no exclusive title to the fishery will pass unless it is expressly mentioned.<sup>3</sup> The power of the legislature to grant exclusive rights of fishery includes the power to vest such rights in municipalities.<sup>4</sup> And the legislature may divide the fisheries of a municipal

<sup>1</sup>*Castalia Trout Club Co. v. Castalia Sporting Club*, 8 Ohio C. C. 194.

<sup>2</sup>*State v. Sears*, 115 Iowa, 28, 87 N. W. 735.

<sup>3</sup>*Com. v. Vincent*, 108 Mass. 441.

<sup>4</sup>See *ante*, § 381; *Stephenson v. Gooch*, 7 Me. 152.

A statute giving a town the right to regulate the times and manner of taking fish within its limits, and to sell the right of taking them, applies only to shore used for that purpose, and not to the tidal water adjacent to the shore, although it may be within the limits of the town. *Coolidge v. Williams*, 4 Mass. 140.

<sup>1</sup>By the common law of Massachusetts a municipal corporation may appropriate the fish in tidal waters within its

limits if they have not been appropriated by the legislature. *Coolidge v. Williams*, 4 Mass. 140.

<sup>2</sup>*Proctor v. Wells*, 103 Mass. 216.

But a town owning land covered by tide water may regulate the fisheries therein, although the state has also made regulations applicable to the place. *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493.

<sup>3</sup>*Wilson v. Codyre*, 27 N. B. 320.

A grant by the sovereign to the inhabitants of a town of a tract of land including the waters of a tidal bay, "together with all rivers, waters, beaches, creeks, harbors, fishing, and all other franchises to said tract appertaining," will give such inhabitants the exclusive right to the oyster fisheries within the



corporation as it chooses, upon the subsequent division of the municipality.<sup>5</sup> By long-continued use and control of a fishery the municipality may establish title by prescription or presumption of grant.<sup>6</sup> The municipality may make necessary regulations for the control of fisheries in water the soil of which belongs to it, in addition to those established by the legislature, unless it is prohibited from so doing.<sup>7</sup> But it cannot make regulations in conflict with those of the legislature, and, in case the legislature attempts to regulate the entire fishery, it will deprive the municipality of the power to make regulations.<sup>8</sup> A state may grant to a town bordering on tide water the power to grant exclusive privileges to individuals to plant and remove oysters from the waters.<sup>9</sup> If a town has title to a fishery, it may lease the same.<sup>10</sup> But it has no right to make exclusive grants of such right.<sup>11</sup> No notice to the city or town within which a pond

limits of the grant. *Brookhaven v. Martha Anne, Olcott*, 18 Fed. Cas. No. 9,146; *Rogers v. Jones*, 1 Wend. 237.

The statute of 1855, chap. 401, regulating fisheries in Taunton great river and dividing the whole fishery into shares that belong to the towns so far as they were valuable to sell at auction, was not affected by the statute of 1856, chap. 50, giving the proper authorities of a city lying on tide water the right to license weirs in the water within its limits so far as they would not encroach upon the rights of others, since the taking of fish by weirs would, of necessity, encroach upon the rights of proprietors under the prior act. *Hathaway v. Thomas*, 16 Gray, 290.

<sup>5</sup> Where a town holds fisheries in trust for the use of its inhabitants, the legislature, upon dividing the territory, may provide that the original town shall continue to hold the fishery in trust for the inhabitants of both towns. *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

A provision in a statute separating certain territory from a town and creating it into a separate township, that it shall pay its proportion of the debts of the former town and be entitled to its share of the property of said town, does not give it a right to share in the profits of a fishery in the former town. This is upon the ground that the right of fishery is not property. *Randolph v. Braintree*, 4 Mass. 315.

<sup>6</sup> *Mannall v. Fisher*, 5 Jur. N. S. 389, 5 C. B. N. S. 856.

<sup>7</sup> *Hayden v. Noyes*, 5 Conn. 391; *The*

A law authorizing a municipal corporation to direct the use and management, and the times and manner of using, its common lands and meadows and the other commons will support an ordinance restricting the fishery to the inhabitants of the town, and then only during a certain open season. *Rogers v. Jones*, 1 Wend. 237.

But the power of a town to regulate fisheries within its limits does not authorize it to prohibit all persons, except its inhabitants, from taking shell fish in a navigable river. *Hayden v. Noyes*, 5 Conn. 391.

A municipal corporation can only assume to regulate a fishery in tidal waters when it can show a right of property to the lands below low-water mark, and such a title can only be supported by grant or long possession to support a presumption of grant; but the fact that such waters are included within its bounds for the purpose of jurisdiction will afford no such presumption. *Palmer v. Hicks*, 6 Johns. 133.

<sup>8</sup> *Southport v. Ogden*, 23 Conn. 128.

<sup>9</sup> *People v. Thompson*, 30 Hun, 457.

<sup>10</sup> *Hand v. Newton*, 92 N. Y. 88; *Abrams v. Hempstead*, 45 Hun, 272.

A vote of a township authorizing the staking out of oyster grounds in a designated river includes a cove that is mainly formed by the tide waters of the river. *Gallup v. Tracy*, 25 Conn. 10.

<sup>11</sup> *Dill v. Wareham*, 7 Met. 438.

wholly lies, of an intention to lease the pond, need be given where the application is made by the town and the lease is made to it.<sup>12</sup>

**402. Public right in shell fisheries.**—For the most part, the shell fisheries exist on land the title to which is in the public, and the public has, therefore, a prima facie right to enjoy them. This right is subject to regulation by the public itself, or to grants from the public which have placed the title to the beds in private ownership.<sup>1</sup> Primarily, the title to oyster and clam beds and the shell fish therein in tide water is absolutely in the people of the state, and they may regulate and dispose of the same as of other property.<sup>2</sup> So long as no regulations have been made for the enjoyment of the right, it is common to be enjoyed by everyone who wishes to make use of it.<sup>3</sup> This right of fishery does not pass to the grantee of the tide lands unless it is expressly mentioned in the grant.<sup>4</sup> The public right is not lost during the reflux of the tide.<sup>5</sup> The shell fisheries may, however, be granted to private individuals so as to exclude the public right of fishery there.<sup>6</sup> The right to enjoy the fishery as one of the public confers no private right.<sup>7</sup> The right of the public to take shell fish from the shore does not include the right to take the soil or dead shell fish imbedded therein.<sup>8</sup>

**402a. Regulation of shell fishery.**—The fact that the right to take shell fish is common to all requires some regulations of the fisheries to prevent their obstruction and to protect them for the public welfare. Therefore, the legislature has a right to make such regulations in that respect as may be necessary.<sup>1</sup> The rights of the public to

<sup>12</sup>*Com. v. Eliot*, 146 Mass. 5, 15 N. E. 81.

<sup>1</sup>*Peck v. Lockwood*, 5 Day, 22; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Parker v. Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Bagott v. Orr*, 2 Bos. & P. 472; *Paul v. Hazleton*, 37 N. J. L. 106; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

<sup>2</sup>*State v. Harrub*, 95 Ala. 176, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 36 Am. St. Rep. 195, 10 So. 752; *Brown v. DeGross*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219.

<sup>3</sup>*Brown v. DeGross*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219; *Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497, 61 Am. St. Rep. 738, 32 Atl. 166; *Caswell v. Johnson*, 58 Me. 164; *Com. v. Bailey*, 13 Allen, 542; *Lakeman v. Burnham*, 7 Gray, 437; *Paul v. Hazleton*, 37 N. J. L. 106.

<sup>4</sup>*Proctor v. Wells*, 103 Mass. 216.

<sup>5</sup>*Peck v. Lockwood*, 5 Day, 28; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

<sup>6</sup>*Com. v. Manimon*, 136 Mass. 456.

<sup>7</sup>*Com. v. Manimon*, 136 Mass. 456.

<sup>8</sup>*Porter v. Shehan*, 7 Gray, 435.

<sup>1</sup>*Kean v. Rice*, 12 Serg. & R. 203; *Com. v. Bailey*, 13 Allen, 541; *State v. Conner*, 107 N. C. 931, 11 S. C. 992; *Smith v. Levinus*, 8 N. Y. 472.

The act entitled "An Act for the Preservation of Oysters and Other Shell Fish," which provides that no oysters shall be taken from the common fisheries between specified dates, and no person shall take from a public oyster bed more than 3 bushels in twenty-four hours, nor shall plant on a private bed oysters taken from a public bed, and prohibits the use of dredges in taking oysters; and which also provides for the appointment of commissioners for the leasing of land covered by public waters

natural oyster beds in tidal waters cannot be destroyed under guise of regulating and encouraging fisheries, without right of hearing and appeal.<sup>2</sup> The power to make regulations may be conferred by the legislature upon municipal corporations, with respect to the fisheries lying within their limits or adjacent to them.<sup>3</sup> A statute protecting the rights of persons who have planted oysters upon state land between certain specified dates is not a general law.<sup>4</sup> Oysters taken by one in the exercise of his common right of free fishery thereby become the property of the taker; and the legislature uses a reasonable discretion when it grants a license to use portions of the state lands covered by navigable waters as places of deposit, where the title and possession of the property thus acquired may be continued and protected, the public right of fishery suffering no derogation thereby.<sup>5</sup>

**402b. Licenses.**— The public interest in shell fisheries is not limited to the right to take fish, but extends to the maintenance of an ample supply to meet all the needs of the citizens of the state. The latter interest is paramount to, and to some extent in conflict with, the right to take the fish from the water. Unlimited fishing on the part of everyone who can gain access to the fish is, of necessity, destructive, while the public interests require that the fish shall be cultivated and

for private oyster beds,—is not repugnant to a constitutional provision that “the people shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore to which they have been heretofore entitled under the charter and the usages of this state.” The object of this law is not to benefit the lessees of oyster beds, but, by holding out motives to them and encouraging them in the cultivation of oysters, to secure to the public a more abundant supply. *State v. Cossens*, 2 R. I. 561.

A statute prohibiting persons from wilfully taking, destroying, or spoiling a spawn, fry, or brood of sea fish in any weir or other engine or device whatsoever, seems not to comprehend shell fish; and, if it does, it means a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. *Bridger v. Richardson*, 2 Maule & S. 568.

In *State v. Insley*, 64 Md. 28, 20 Atl. 1031, the court, in refusing to pass on the constitutionality of a statute for the protection of oysters, said: We have no doubt whatever of the right and power of a state to pass a law that, if properly executed, would perfectly protect our oyster interest. In framing such a law,

however, care should be taken that no part of it interfere with the paramount right of navigation and interstate commerce, as control over those subjects has been delegated to the general government.

<sup>2</sup>*Averill v. Hull*, 37 Conn. 320.

<sup>3</sup> Where a statute authorizing a town to designate places within its limits for oyster planting refers to a line between the navigable waters of two towns as a line running southerly, it is to be taken as meaning due south, in the absence of word or monument deflecting the line either east or west. *Rouse v. Smith*, 48 Conn. 444.

Where a statute gave exclusive control of all shell fisheries lying south of high-water mark in Long Island sound to the state commissioners of shell fisheries, another section of the same statute providing for the appointment of a committee to designate natural oyster beds in a town did not empower the committee to designate beds in waters lying south of high-water mark. *Re Davies Oyster Ground Committee*, 52 Conn. 61.

<sup>4</sup>*State v. Post*, 55 N. J. L. 264, 26 Atl. 683.

<sup>5</sup>*Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654.

the productiveness of the fishery increased. Experience has shown that this result can be best achieved by placing some parcels of ground in the possession of individuals who shall be protected in the exclusive enjoyment of them, and who may take the most approved means to further the propagation of the fish and remove them from the water only in the manner which will result in the largest return to them, and therefore in the largest supply to the public. These considerations empower the legislature to provide for the leasing of parcels of fishing ground to individuals or to grant exclusive licenses to take the fish from certain waters. It is said in *Phipps v. State*<sup>1</sup> that a statute authorizing the location and appropriation within the waters of the state of limited areas for the purpose of depositing and bedding oysters is a mere license to use the state lands covered by navigable waters as places of deposit for the protection of private property in oysters taken in the exercise of the common right of free fishery; and, although several and exclusive privileges are thereby contemplated, is not unconstitutional as conferring such privileges in derogation of the common right of free fishery. Such licenses are generally held to be valid, and the lessees or licensees are entitled to the protection of their exclusive rights.<sup>2</sup> The only exception to the rule appears to be in the state of Texas, where it is held that the right to take shell fish belongs to all citizens and the legislature cannot limit their rights.<sup>3</sup> The exclusive rights, however, depend entirely upon the provisions of the statute, and they must be followed in good faith; and no attempt to evade them will be upheld by the courts.<sup>4</sup>

<sup>1</sup> 22 Md. 380, 85 Am. Dec. 654.

<sup>2</sup> *Griffith v. Savary*, 181 Mass. 227, 63 N. E. 426.

The purpose of a statute which provides that the oysters planted or growing on any private oyster grounds under lease shall, during the continuance of the lease, be the private personal property of the lessee, is to make it clear that the oysters are personal property, and to throw over them the protection which is appropriate to such property. It was not intended to restrict the right of disposing of them by contract or otherwise. At most it merely confines the legal title in the oysters to the lessee while they are in his grounds. It does not prevent his disposing of rights which can be protected in equity. *New England Oyster Co. v. McGarvey*, 12 R. I. 385.

A person who holds a valid lease from the state to lands on which he has planted oyster beds may enjoin others from

trespassing thereon and taking oysters therefrom. *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375.

<sup>3</sup> *Gustafson v. State*, 40 Tex. Crim. Rep. 67, 43 L. R. A. 615, 45 S. W. 717, 48 S. W. 518.

<sup>4</sup> *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

In the statute of Texas, passed for the preservation of oysters and oyster beds, and for protecting the rights of persons to the same, the words "stream made navigable by the laws of the state or of the United States" do not refer to legislative enactments with reference to particular waters, but to the body of the law as declared both by statute and the decisions of the courts. *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

A statute providing for the ascertaining and location of natural oyster beds by a committee did not authorize the committee to include beds which had previously been designated to individ-

A statute regulating the proceedings for the leasing of territory upon which to plant and cultivate oysters does not confer upon any private citizen the right to object to the granting of a lease on the ground that the applicant has not taken the proper preliminary steps for obtaining the same; neither does it confer upon the board of commissioners who are given the power to lease such territory any jurisdiction over questions involving title thereto.<sup>5</sup> A mere grant of the right to use a parcel of land so long as certain rent shall be paid does not constitute an irrevocable contract, but it is subject to alteration or termination at the pleasure of the legislature.<sup>6</sup> Implied licenses are revoked by the granting of licenses to others.<sup>7</sup> The right of planting oysters on state land for the exclusive use of the one planting them is an exclusive privilege within the meaning of a constitutional provision forbidding the granting of such privileges by private or special laws.<sup>8</sup> One who knowingly takes oysters from a tract which has been leased from the state is guilty of a misdemeanor, even though the statute declares that all natural oyster beds shall remain open to the public, and the tract was a natural oyster bed in fact, where the statute also declares that the designations on a certain map as to which tracts are natural oyster beds and which are not shall be conclusive evidence.<sup>9</sup> Permitting the location of oyster beds gives no title to the soil, and the licensee loses his right to possession when he parts with the ownership of the oysters.<sup>10</sup> Under a statute authorizing the staking out of oyster grounds with the consent of a committee appointed for that purpose, the consent of a majority of the committee is sufficient; and where the licensee is a member of the committee, the consent of a majority of the remaining members is sufficient.<sup>11</sup> The question whether or not a lease can be assigned depends upon the terms of the statute and the policy of the state. In *Hess v. Muir*<sup>12</sup> it is said that the restricted privilege of

uals pursuant to the provisions of prior statutes. *Re Clinton Oyster Ground Committee*, 52 Conn. 5.

But an act for the preservation of oysters and other shell fish, requiring that one part of the lease executed by the lessee and the commissioners shall be transmitted forthwith to the general treasurer, is directory to the commissioners, and a compliance therewith need not be proved by the state in an indictment for stealing oysters from a private bed granted by such lease. *State v. Sutton*, 2 R. I. 434.

<sup>5</sup>*Parsons v. Prey*, 115 Ga. 955, 42 S. E. 234.

<sup>6</sup>*Woonum v. Mills*, 17 Va. L. J. 195.

<sup>7</sup>*Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

<sup>8</sup>*State v. Post*, 55 N. J. L. 264, 26 Atl. 683.

<sup>9</sup>*Fraser v. State*, 112 Ga. 13, 37 S. E. 114.

<sup>10</sup>*Housman v. Weir*, 15 Abb. N. C. 415.

<sup>11</sup>*Gallup v. Tracy*, 25 Conn. 10.

It is not necessary that the committee be actually assembled when it grants the license, but a majority of the committee may act at any time. *Ibid*.

<sup>12</sup>65 Md. 586, 5 Atl. 540, 6 Atl. 673.

locating oyster lots, given by the Maryland statute, has no element of a grant by patent, but is simply a license, revocable at the pleasure of the legislature, and not inheritable; nor is it assignable, since no power of assignment is given by statute, and, if permitted, it would defeat the purpose of the act to restrict individual holdings, and would increase the facilities of nonresidents to get possession of oyster lots in contravention of the statute. But in a Rhode Island case it was held that the assignment of a lease of a private oyster fishery in the public waters of the state, given by the commissioners under the "Act for the Preservation of Oysters and Other Shell Fish within This State," if made with the assent of the commissioners, will pass to the assignee the legal title of such fishery.<sup>13</sup> The legislature may empower committees to supervise the licensing of shell fisheries within the bounds of a municipal corporation.<sup>14</sup> One who has planted oysters in tide water under a license issued under provisions of the statute has no right to remove them after he has neglected to obtain a renewal, and a license for the particular bed in which they lie has been issued to another.<sup>15</sup>

**402c. Natural beds.**— It may seem wise to the legislature to confine the lease of oyster land to that on which oysters are not growing naturally, for the purpose of enlarging the acreage devoted to oyster culture and to preserve to the people a portion of the natural fisheries. For this purpose the legislature may provide that provisions for the leasing of oyster grounds shall not apply to places on which oysters are growing naturally. A natural, as distinguished from an artificial, oyster bed, is one not planted by man, and is any shoal, reef, or bottom where oysters are to be found, growing, not sparsely or at

<sup>13</sup>*State v. Sutton*, 2 R. I. 434.

So, a constitutional provision that the "people shall continue to enjoy and exercise freely all the rights of fishery and the privilege of the shore to which they have been heretofore entitled under the charter and usages of the state" does not confine the fisheries so exclusively to the people of the state that lessees of private oyster beds are prohibited from giving persons other than citizens of Rhode Island an interest in the oysters taken in return for investment of capital. *New England Oyster Co. v. McGarvey*, 12 R. I. 385.

<sup>14</sup>Under a statute giving a committee power to designate places for planting oysters within the navigable waters of a town, the committee's jurisdiction is not limited to the territorial proprie-

torship of the town, which extends only to high-water mark, except in case of bays and harbors, but extends to the state boundary by meridional lines from the termini of the lines separating the territorial lines of the towns. *Rowe v. Smith*, 48 Conn. 444.

Where a committee designated ground for oyster cultivation in waters which were not included in a statute authorizing the committee to designate oyster grounds in a specified portion of the navigable waters of the town, such designation was validated by a subsequent statute confirming and validating all designations made in the navigable waters of any town by its committee. *State v. Bassett*, 64 Conn. 217, 29 Atl. 471.

<sup>15</sup>*Keene v. Gifford*, 158 Mass. 120, 32 N. E. 946.

intervals, but in a mass, or stratum, and in sufficient quantities to be valuable to the public.<sup>1</sup> When there is no provision for the exclusive possession of natural beds, persons planting oysters in them have no right to protection from the depredations of persons attempting to fish in such beds.<sup>2</sup> The local committee has no power to lease natural beds in violation of statute.<sup>3</sup> In a direct attack on the designation of land for oyster culture, it may be shown that the land designated was a natural oyster bed, although it was not mentioned in the statute determining and enumerating the natural oyster beds of the state, such statute having been adopted subsequent to the designation of the land.<sup>4</sup> But this cannot be done by a collateral attack.<sup>5</sup> A statute validating and confirming all previous designations of places for planting oysters made by authority of the town does not validate a previous designation of an unauthorized place, such as a natural oyster bed.<sup>6</sup> Though planting oysters in a public clam fishery con-

<sup>1</sup>*State v. Willis*, 104 N. C. 769, 10 S. E. 764.

The fact that oysters grow naturally at the mouth of a stream emptying into tide water, and upon the harder portions of the bed of a pond formed at the outlet, and have immemorially existed in great abundance and been openly and constantly taken by the public, furnishes very high, if not conclusive, evidence of the existence of a natural oyster bed, and of a public and common right to the enjoyment of it as such. *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255.

Those parts of bottoms that have always been regarded and recognized as natural rock, and have been used by the people as such, will continue to be so regarded until they shall become worthless to the public, or shall be declared by the legislature as open for planting. *Woonum v. Mills*, 17 Va. L. J. 195; *Clark v. Providence*, 16 R. I. 337, 1 L. R. A. 725, 15 Atl. 763.

<sup>2</sup>*Shepard v. Leverson*, 2 N. J. L. 391; *Townsend v. Brown*, 24 N. J. L. 80.

One digging clams from a natural clam bed in navigable tide waters beyond high-water mark, and acting in good faith, who incidentally disturbs and fatally injures oysters planted there by another who has no state grant to the bed, is not liable to the oyster planter for the damage suffered by him. *Brown v. DeGroot*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219.

But when leasees of tracts of navigable tide waters duly staked off to them under the terms of a statute plant

oysters therein, and there are at the time a few other oysters naturally growing there, a trespasser thereon cannot escape liability upon the principle that by mixing the planted with the natural oysters there was an abandonment of property in them, at least so as to require proof that those taken were the planted ones, to justify a recovery. *Woolley v. Campbell*, 37 N. J. L. 163.

<sup>3</sup>*Averill v. Hull*, 37 Conn. 320.

But where the natural oyster beds of the state had been determined and enumerated in a statute enacted for that purpose, a person charged with having taken oysters from a bed designated for oyster planting cannot defend on the ground that the bed was a natural oyster bed, and that, therefore, the designation was invalid, unless such place was one of those mentioned in such statute enumerating the natural oyster beds. *State v. Nash*, 62 Conn. 47, 25 Atl. 451.

<sup>4</sup>*Cook v. Raymond*, 66 Conn. 285, 33 Atl. 1006.

<sup>5</sup>*State v. Nash*, 62 Conn. 47, 25 Atl. 451.

<sup>6</sup>*Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548.

But a statute providing that the designation of oyster grounds shall be valid, although such places may have been natural oyster beds, if in other respects valid, applies to a designation made without authority, where such unauthorized designation was afterwards validated by legislative enactment. *State v. Bassett*, 64 Conn. 217, 29 Atl. 471.

stitutes a nuisance, it cannot be abated summarily by one injured thereby, but without special private injuries.<sup>7</sup>

**403. Rights of riparian owner.**— There is no reason to doubt that originally the ownership of fisheries in public waters followed the ownership of the soil, and that the same rule applied in tidal and nontidal waters. This rule made the title to shell fisheries depend on the ownership of the soil, and it has been stated to apply even in modern times.<sup>1</sup> But under the influence of the English doctrine that the fishery was parcel of the King's prerogative rights, and that it could not be granted except by express mention, many of the courts have held that a mere grant of the soil did not carry the fishery right unless the right was mentioned; and this seems to be the logical conclusion so far as fisheries in public waters are concerned. The right to these fisheries being public and common to all inhabitants, no intention by the legislature to make them several should be presumed, and therefore they should be expressly mentioned in order to pass to a grantee.<sup>2</sup> But the riparian owner may acquire an exclusive right to the fishery, either by grant or prescription.<sup>3</sup> The planting

<sup>1</sup>*Brown v. DeGross*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 4 Atl. 219.

<sup>2</sup>*Den ex dem. Russell v. Jersey Co.* 15 How. 432, 14 L. ed. 760; *McKenzie v. Hulet*, 4 N. C. (Term. Rep.) 181; *LeStrange v. Rowe*, 4 Fost. & F. 1048; *Moore v. Griffin*, 22 Me. 350; *King v. Young*, 76 Me. 76, 40 Am. Rep. 596; *Porter v. Sullivan*, 7 Gray, 441; *Brookhaven v. Strong*, 60 N. Y. 56.

In *Rogers v. Allen*, 1 Campb. 309, in discussing the claim that a fishery must be entire, and that, if the public has a right to fish for all kinds of floating fish, the lord of the manor cannot claim the right of an oyster fishery, Heath, J., said: "Part of a fishery may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish in the river; but it by no means follows that they are justified in dredging for oysters, which may still remain private property."

<sup>3</sup>*Lakeman v. Burnham*, 7 Gray, 437; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

The public has a right to take shell fish upon the land of a private individual between high and low water marks, although it is necessary to dig the soil in order to obtain them. *Peck v. Lockwood*, 5 Day, 28; *Parker v. Cutler Mill-*

*dam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 493, 59 Am. Dec. 57.

Since it is now well settled that there is a public right to take shell fish on the shore and flats below high-water mark and within 100 rods of the upland, until the flats are inclosed by the proprietors, a fortiori there is a right to pass over them for fishing in the stricter sense; and there is no trespass chargeable against one who enters upon the said flats from tidal waters, walks along them, and takes trout, in the exercise of his common right. *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101, 11 N. E. 578.

Disturbing the thatch of a riparian owner by digging clams below high-water mark is not a trespass, as the public right of fishery is paramount to the private right to cut grass or sedge. *Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497, 61 Am. St. Rep. 738, 32 Atl. 166.

<sup>4</sup>*Hayes v. Bridges*, *Ridgeway L. & S.* 390.

Under Texas Act March 8, 1879, for the preservation of oysters and oyster beds, and for protecting the rights of persons to the same, etc., the owner of land bordering on any unnavigable creek, lake, bayou, or cove is also the true and legal owner of the oyster beds along the entire front of his land, from



of oysters is not within the provision of a statute giving riparian owners exclusive right to make improvements in front of their land.<sup>4</sup> The riparian owner has an equal right with the public at large to take oysters in front of his property, and a stranger can acquire no exclusive right as against him by planting them in front of his shore.<sup>5</sup> If one having the exclusive right to the oysters in front of his shore secures from the state a license to take them, he cannot afterwards insist that the statute requiring the license is unconstitutional.<sup>6</sup> No rights adverse to the shore owner can be acquired by going upon the property to take shell fish where the fishery is common.<sup>7</sup> If the title to the soil is in the public the riparian owner can acquire no exclusive rights in the absence of statute or custom by staking out land and planting oysters on it.<sup>8</sup> A contract to sell land lying on the side of

low-water mark to the center of such creek, lake, bayou, or cove; or, if the lake, bayou, or cove upon which his land borders is public, navigable water, then the owner of the land is the owner of the oyster beds along the entire front of the land, and extending out from low-water mark into such lake, bayou, or cove, for the distance of 100 yards. *Holt v. Follett*, 65 Tex. 550.

So long as the owner of the land along a navigable stream is content with what the law gives him by virtue of his riparian ownership, he is protected by the imaginary line running at a distance of 100 yards from low-water mark along the entire front of his shore; and, to constitute one a trespasser within the meaning of the law, who, without the consent of the owner of the land, takes oysters within such space, it is not necessary that the owner shall have first designated it by staking it off. The provision of such act which requires one's location to be designated by stakes planted at its four corners applies only to those cases where the riparian owner, or other person, wishes to secure a right beyond these limits. *Ibid.*

Riparian owners into whose land a creek makes are entitled to the exclusive use of such creek for oyster beds on its becoming less than 100 yards in width at its mouth at low water, as against a locator of oyster beds therein by virtue of the general statutory right of citizens of the state while it exceeded that width, under a provision of the statute giving an exclusive right to riparian owners for oyster-bed purposes in case of a creek making into their land of less than that width or upon its becoming less; since

the prior location in such a creek is subject to the contingency that the mouth of the creek might thereafter become less than the specified width. *Powell v. Wilson*, 85 Md. 347, 37 Atl. 216.

A riparian owner on both sides of a navigable creek cannot, under the act of March 9, 1855, acquire exclusive rights in the bed thereof by merely staking it off; he must plant, or at least intend forthwith to plant, oysters or clams therein. *Birdsall v. Rose*, 46 N. J. L. 361.

In *Bagott v. Orr*, 2 Bos. & P. 472, which was trespass for entering upon plaintiff's close within the ebb and flow of the tide and taking away shell fish, the defendant pleaded that the place was a part of an arm of the sea where all the subjects of the realm had a right to take fish, without denying that the title to the *locus in quo* was in the plaintiff. But the court held that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea fish he should have replied that matter specially, and that not having done so the defendant must succeed upon his plea as far as related to his taking of the fish. But that the right did not extend to the taking of the shells.

<sup>4</sup>*Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

<sup>5</sup>*Brinckerhoff v. Starkins*, 11 Barb. 248.

<sup>6</sup>*Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545.

<sup>7</sup>*Peck v. Lockwood*, 5 Day, 28.

<sup>8</sup>*Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356; *Paul v. Hazleton*, 37 N. J. L. 106.

a river in which are oyster beds must be subject to the law of the state as to the ownership of the beds; and the fact that they are, under the law of the state, leased by the state to third persons, will not absolve the purchaser from complying with his contract.<sup>9</sup> A riparian owner having the exclusive right of fishery may grant it to another.<sup>10</sup>

**404. Rights acquired by planting and cultivation.**—Oysters are a peculiar kind of property. As said in *State v. Taylor*,<sup>1</sup> they are not *feras naturas*, as they do not stray away nor require taming; hence, private ownership in them may be acquired. Therefore, when one places a certain number of oysters in a marked place under water, if no one interferes with them he may be reasonably certain that he can go and secure them again at his pleasure. Since the right to use the bed of a tidal body of water which has never passed into private ownership is common to all, it may be regarded as a reasonable use for one person to take a limited quantity of oysters and place them in the water in a place suitably marked, to grow and multiply. Therefore, a custom is reasonable which permits the one doing so to assert and protect his ownership of such waters against the claims of trespassers or persons having no title to them. Such a custom is not valid if opposed to the statutes or if not sanctioned by the legislature, but in the absence of any controlling rule to the contrary the owner of the oysters under such circumstances should be protected in the enjoyment of his property, and strangers should no more be permitted to appropriate them to their own use than they would be to appropriate his cattle when they were for the time being feeding by the roadside. The only condition to his preservation of his property right is that he should not interfere with the rights of others, and should mark his property so definitely that not only may he take it again, but that every other person may know that he has a claim to it.<sup>2</sup> But a person creating a private oyster bed in tidal waters can have no property therein if located upon land the title to which is in

<sup>1</sup>*Bigler v. Morgan*, 77 N. Y. 312.

<sup>2</sup>A devise of a privilege of "digging 10 barrels of clams yearly at the southern end of my farm, to a person, his heirs and assigns," creates an assignable estate of inheritance. *Lakeman v. Butler*, 17 Pick. 436, 28 Am. Dec. 311.

Where one relies upon an implied license to plant and cultivate oyster beds to the exclusion of the owner, he must show his continued occupation of such lands, and cannot abandon them and afterwards exclude the owner simply be-

cause at one time he may have had a right thereto. *Riddell v. Brown*, 25 Wash. 514, 65 Pac. 758.

<sup>3</sup>27 N. J. L. 117, 72 Am. Dec. 347.

<sup>4</sup>*People v. Hazen*, 121 N. Y. 313, 24 N. E. 484; *Loundes v. Dickerson*, 34 Barb. 586; *McCarthy v. Holman*, 22 Hun, 53; *Decker v. Fisher*, 4 Barb. 592.

Such oysters are the subject of larceny, and one indicted for stealing them cannot justify the asportation on the ground that they constituted a public nuisance and encroachment upon the

another.<sup>3</sup> In Texas, one claiming oysters as his property because planted by him must have complied with all the regulations of the statute of the state as to the acquisition of private right to oysters in navigable waters. It is not sufficient for him merely to file in the record of deeds a notice of his claim to the body of water where the oysters were planted.<sup>4</sup> The owner of oysters planted in an oyster lot in a creek under a location thereof which is thereafter defeated by the subsequent narrowing of the creek so as to give riparian owners the exclusive right to its use under the terms of the statute is entitled to remove them within a reasonable time.<sup>5</sup> Under the act for the preservation of oysters and other shell fish in the state, the lessees of oyster fisheries in public waters are obliged to set up stakes, buoys, and marks only in case the commissioners require this to be done.<sup>6</sup> A person in possession of oyster grounds in public waters under claim of right cannot be ousted therefrom on the suit of one who can show no right acquired under the formalities of the law by virtue of which he could have acquired such right, although the statutory rental to the state had been paid.<sup>7</sup>

**405. Prescriptive rights.**— Where the legislature has authority to grant the exclusive right of fishery in a public water, a right may be acquired by long-continued adverse use under the doctrine of presumed grant or prescription,<sup>1</sup> unless by the policy of the state time cannot run against it.<sup>2</sup> But if the legislature cannot make a sale of the oyster beds, no title to them can be acquired by prescription.<sup>3</sup> To establish a prescriptive right the exercise of it must be exclusive, and it is not sufficient that the claimant has been accustomed to take the

common rights. *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347.

Oyster fishermen have a right, as incidental to the right of fishing, to lay oysters dredged in impure waters, upon the foreshore in another part of the fishery where the water is pure, for the purpose of having them rendered pure and marketable. *Truro v. Rowe* [1901] 2 K. B. 870.

One who sets up claim to an exclusive oyster bed in tidal waters, founded upon staking it off, planting, and sometimes taking oysters there, does not prove a possession so complete, so exclusive, or so continued, as to establish a right against those having an equal claim with himself. *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356.

<sup>1</sup>*Loundes v. Dickerson*, 34 Barb. 586.

<sup>2</sup>*Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

<sup>3</sup>*Powell v. Wilson*, 85 Md. 347, 37 Atl. 216.

<sup>4</sup>*State v. Sutton*, 2 R. I. 434.

<sup>5</sup>*West v. Adams*, 2 Va. Dec. 517, 27 S. E. 496.

<sup>6</sup>See *ante*, 376.

The presumption of a grant from the Crown of a several oyster fishery in a tidal river arising from user is not affected by evidence that the inhabitants of a borough had from time immemorial exercised the right of dredging for oysters in the river during Lent. *Saltash v. Goodman*, L. R. 7 Q. B. Div. 106.

<sup>7</sup>*Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802.

<sup>8</sup>*Louisiana Land & Fisheries Co. v. Gasquet*, 45 La. Ann. 759, 13 So. 171.

oysters at his free will and pleasure.<sup>4</sup> Where a committee authorized to designate for oyster planting places other than natural oyster beds designated as such place a natural oyster bed, the grantee taking possession thereunder cannot acquire any rights therein by adverse possession, when the title to the natural oyster beds is in the state, against which title by adverse possession cannot be acquired.<sup>5</sup> Rights, if any, acquired by a citizen of the state of New York under the common law by long possession and user of an oyster bed in any of the common or public lands of the state are yielded up by removal from the state.<sup>6</sup> A custom among oyster men to assert or acknowledge between themselves an exclusive right to the possession of land under public waters staked out for the planting of oysters cannot, in the absence of color of title, give rise to any prescriptive right as against the state, or create or vest any title in, or right of possession to, the land in any person.<sup>7</sup>

**406. Remedy for interference with shell fishery.**— Trespass is an appropriate remedy for interfering with an exclusive shell fishery.<sup>1</sup> Or an action may be maintained for the value of the oysters in case they are converted by a stranger to his own use.<sup>2</sup> Even when the statutes prohibit the planting of oysters in tide waters without the consent of the legislature a stranger is not entitled to confiscate them, and may be liable for so doing.<sup>3</sup> Interference with private beds may be made a misdemeanor by statute, and subject the one doing so to prosecution.<sup>4</sup> While one who plants his clams on a bed previously leased to another might have been compelled to remove them, and the lessee might have removed them himself, the fact that they were placed on the *locus* by one who neither knew of the lease nor was chargeable with any knowledge of it by reason of absence of buoys or stakes does

<sup>1</sup>*Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

<sup>2</sup>*Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548.

<sup>3</sup>*Huntington v. Lowndes*, 40 Fed. 625.

<sup>4</sup>*Housman v. Weir*, 15 Abb. N. C. 415.

<sup>5</sup>*Decker v. Fisher*, 4 Barb. 592; *Fleet v. Hegeman*, 14 Wend. 42.

<sup>6</sup>*Grace v. Willets*, 50 N. J. L. 414, 14 Atl. 559; *Metzger v. Post*, 44 N. J. L. 74, 43 Am. Rep. 341.

<sup>7</sup>*Sutter v. Van Derveer*, 47 Hun, 366.

<sup>1</sup>*Com. v. Manimon*, 136 Mass. 456; *State v. Tayler*, 13 R. I. 541.

Where a person is indicted for stealing oysters from a private oyster bed under the act for the preservation of oysters and other shell fish in the state, it is no defense, where it appears that

the oysters were taken from a private bed, that the place from which the oysters were taken had been used as a common and public fishery; and it is no defense that the place where the private bed was located had been a common quahaug fishery, and this fishery was interrupted and destroyed by the planting of the oyster bed. *State v. Cozzens*, 2 R. I. 561.

The right to proceed criminally against one taking clams from a private clam bed in public waters under a section of the statute forbidding such act is not affected by the alternate enactment and repeal of another section authorizing the granting of licenses to make oyster and clam beds in the waters of the state, when the latest repealing act on the sub-

not forfeit his property in the shell fish, nor justify the lessee in appropriating the clams to his own use.<sup>5</sup> A right of action against a trespasser for taking oysters from a planting ground staked out by the plaintiff is not abated by the repeal, pending the action, of the statute in pursuance of which the planting ground was staked out.<sup>6</sup> Equity will restrain concerted action to appropriate the benefits of oyster fields during the pendency of a suit to determine whether the public have a right of fishery upon oyster grounds alleged to be private property, when it appears that, if private property is destroyed, no adequate remedy can be obtained, owing to the pecuniary irresponsibility of the defendants, or that a multiplicity of suits would have to be brought, owing to the large number of defendants.<sup>7</sup> The joint lessees of adjoining tracts of navigable tide waters, who have by agreement planted them in common with oysters, may properly join in prosecuting for damages a trespasser thereon.<sup>8</sup> The assignee, from the state, of oyster beds may maintain an action of unlawful entry and detainer against one depriving him thereof.<sup>9</sup> A witness cannot give his opinion as to the damages caused by dredging across a bed planted with young oysters.<sup>10</sup>

**407. Extinction of fishery rights.**—The common rights in a public fishery are at all times subject to the disposal of the legislature, and it may deprive the public of the right at its pleasure. This may be done by granting exclusive rights to individuals, or by dealing with the water in such a way that the fishery is destroyed.<sup>1</sup> But the legislature has no such absolute control over private fisheries. It can regulate such fisheries, but it cannot prohibit the owner from enjoying them, any further than is necessary for the public good. The

ject applies only to oyster beds, so that the maintenance of private clam beds may be regarded as lawful. *State v. Goulding*, 131 N. C. 715, 42 S. E. 563.

An indictment for wrongfully taking oysters, under R. I. Pub. Laws, chap. 71, § 1, is sufficient where it charges the offense in the words of the statute, designating the bed as the bed of the lessee who is named. It is not necessary to allege the ownership of the oysters, for it matters not whose they were, so long as they were wrongfully taken. Nor is it material that another was proved to have been interested with the lessee, for, as ownership was not alleged, there could be no variance by reason of such proof. *State v. Tayler*, 13 R. I. 541.

<sup>1</sup>*Davis v. Davis*, 72 App. Div. 593, 76 N. Y. Supp 539.

<sup>5</sup>*Gallup v. Tracy*, 25 Conn. 10.

<sup>6</sup>*Britton v. Hill*, 27 N. J. Eq. 389.

But the lord of the manor cannot maintain an equitable action against the lord of another manor to quiet his right to an oyster fishery until such right shall have been first determined at law, as he is not entitled to an equitable remedy where there is a controversy with but one person, which may be determined in a single action at law. *Tenham v. Herbert*, 2 Atk. 483.

<sup>7</sup>*Wooley v. Campbell*, 37 N. J. L. 163.

<sup>8</sup>*Power v. Tazeucll*, 25 Gratt. 786.

<sup>9</sup>*Newton v. Fordham*, 7 Hun. 58.

<sup>10</sup>*Hoyce v. Grush*, 131 Mass. 207.

The rights of fishing to which the people of Rhode Island are entitled, under the Constitution guaranteeing continuance of the rights previously existing,

question whether or not the legislature can destroy a private fishery by closing the water course against the passage of the fish, or by authorizing a use of the water which will drive the fish from it, has never been settled. There are *dicta* in some of the cases already cited which would tend to uphold such rights. But they are not founded on sound principle. The use of property is as much property as is the land itself, and the legislature can no more take the use of property for public use without making compensation than it can take the property. The difficulty in applying this rule is that the courts are inclined to hold that a mere deprivation of the private owner of its use, which is not in fact applied to the benefit of the public, is not a taking of property. These decisions, it is believed, are made by courts which are not yet fully free from the old idea that might makes right. Strong cases are sometimes necessary to show forth a principle. It is believed that no one would contend that the legislature could take for a public park a strip of land around a tract belonging to a private owner, and then forbid the latter to make any use of his land which would destroy the beauty of the park, without making compensation to him for the value of the use of which he was thereby deprived. And when cases shall be decided solely upon principles of right and justice, it will not be held that for the public good a use may be made of a stream of water which will absolutely prevent the fish from reaching a particular fishery without compensating the owner for the loss. In order to entitle the owner to compensation, however, it must be shown that the value of the fishery was in fact destroyed solely by the course adopted or sanctioned by the legislature. A public fishery right is subject to the right of the riparian owner to improve his property, so that when his improvements are such as to exclude the public the fishery right is lost.<sup>2</sup> A several fishery may be abandoned to the public, or it may be forfeited to the Crown.<sup>3</sup> But the fact that the owner of a several fishery and his predecessors in title have for a long period of years permitted the public without molestation to fish there does not raise a presumption that the fishery

are not violated by filling a cove covered by tide water under the authority of a state statute, if the fisheries have ceased to have a substantial value. *Clark v. Providence*, 16 R. I. 337, 1 L. R. A. 725, 15 Atl. 763.

Where the soil and water of a river remain vested in the public a riparian owner cannot complain that his right of fishing in the water in front of his property is invaded by the erection of a dam

upon the stream under authority of the state for the improvement of navigation. *Shrunk v. Schuykill Nav. Co.* 14 Serg. & R. 71.

<sup>2</sup>*Ipswich v. Herrick*, 9 Gray, 529.

<sup>3</sup>But the forfeiture of a several fishery is not shown by evidence that the owners of the fishery had forfeited their liberties and free usages, as these words are not sufficient to include a several fishery. *Northumberland v. Houghton*, L.

has been abandoned or dedicated to the public.<sup>4</sup> The right to fish for certain kinds of fish may be abandoned to the public, while the remainder of the fishery is retained.<sup>5</sup> There can be no implied dedication of a private fishery to the public use.<sup>6</sup> In order to effect the dedication it must be by grant or prescription, or a definite intention to make the dedication must be shown.<sup>7</sup> The grant by the ecclesiastical commission of lands adjoining a river in which a right of fishery had previously been granted by its predecessor, without any reservation of such right, does not, therefore, extinguish it.<sup>8</sup> The lord of a manor extinguishes his right of fishery by granting to the copyholder the fee of his riparian land, with the appurtenant fishery, with privilege to enjoy it by going along the bank of the stream.<sup>9</sup>

**408. Trespass lies for injury to a fishery.**— A fishery is property and is classified as real estate, and therefore trespass may be maintained for unlawfully interfering with it.<sup>1</sup> Even one having a mere free fishery may maintain trespass against one fishing there without right.<sup>2</sup> And the action lies against the owner of the soil if he has no right to enjoy the fishery.<sup>3</sup> The pollution of the stream is a sufficient interference with the fishery to give a right of action.<sup>4</sup> So, trespass *quare clausum* lies against one who breaks down weirs on his own land, causing the water to overflow another's fishery on adjoining land; and the fact that the fish thereby escape is but an aggravation of damages, and does not change the nature of the action.<sup>5</sup> The pos-

R. 5 Exch. 127, 39 L. J. Exch. N. S. 66, 43 Ill. 447, 92 Am. Dec. 146; *Re Water* 22 L. T. N. S. 491, 18 Week. Rep. 495. *Smith v. Andrews* [1891] 2 Ch. 678, *Greenhill*, Cro. Car. 553.

65 L. T. N. S. 175. A writ of trespass *quod cepit piscem* is good although the charge is for taking divers fishes from divers places. 4 Hen. VI., 11, pl. 7.

<sup>1</sup>*Rogers v. Allen*, 1 Campb. 309. <sup>2</sup>*Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718. <sup>3</sup>*Smith v. Kemp*, Carth. 285, Holt, 322, 2 Salk. 637; *Bagott v. Orr*, 2 Bos. & P. 472, 5 Revised Rep. 668; *Gipps v. Woolhoot*, Holt, 323, Skinner, 677, Comb. 433, 464.

Where the owner of a fishery does not himself work it for profit, but suffers the public to fish in it without objection, a user by an individual which is not distinguished from that of the public will be considered permissive, unless there is evidence that it was under a claim of right in himself, and that the owner, knowing of such right acquiesced in it. *Cobb v. Davenport*, 32 N. J. L. 369.

<sup>4</sup>*Lembeck v. Nye*, 47 Ohio St. 337, 8 L. R. A. 578, 24 N. E. 686. <sup>5</sup>*Turner v. Hebron*, 61 Conn. 175, 187, 14 L. R. A. 380, 22 Atl. 951.

<sup>6</sup>*Hamilton v. Musgrove*, Ir. Rep. 6 C. L. 129, 19 Week. Rep. 443. <sup>7</sup>*Fitzgerald v. Furbank* [1897] 2 Ch. 96, 76 L. T. N. S. 584, 66 L. J. Ch. N. S. 529.

<sup>8</sup>*Tilbury v. Silva*, L. R. 45 Ch. Div. 98, 63 L. T. N. S. 141. <sup>9</sup>*Hart v. Hill*, 1 Whart. 131; *Holford v. Bailey*, 8 Q. B. 1000, Affirmed in 13 Q. B. 426; *Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Beckman v. Kreamer*,

But in an action for trespass for taking fish from plaintiff's free fishery, judgment was rendered for defendant because the declaration did not allege that the defendant took *salmones suos*. *Gibbs v. Woolliscott*, 3 Salk. 291, 360.

But it has been held that a grantee of a right of fishery on grantor's flats can

sessory title of one occupying land containing a trout stream under an unrecorded, but valid, lease is sufficient to enable him to maintain trespass against one fishing in the stream under no better title.<sup>6</sup> The lessee of lands occupied by him for fishing purposes may maintain trespass against one who unlawfully enters and fishes upon them.<sup>7</sup> In trespass for fishing in plaintiff's several fishery it is no defense that defendant caught no fish, for the act of fishing was not only an infringement of plaintiff's right, but would afterwards be evidence of a using and exercising of the right by the defendant if such an act were overlooked.<sup>8</sup> But case, and not trespass *vi et armis*, is the remedy to be pursued by the owner of a sole and separate fishery against a lower owner of a similar fishery who, by the construction of fish traps and weirs, prevents the passage of fish up the stream to plaintiff's fishery.<sup>9</sup>

**409. Other remedies.**— Ejectment will not lie to recover a fishery.<sup>1</sup> But if the ordinary remedy at law is not sufficient, the owner of the fishery will be protected in his property by the extraordinary remedies available in equity.<sup>2</sup> A claim of sole fishery rights under grant from the Crown may be tested by *quo warranto*.<sup>3</sup> Injunction will lie to restrain interference with exclusive fishery rights, where there is no adequate remedy at law.<sup>4</sup> A man in actual possession of a sole right of fishery may maintain a bill against one threatening to disturb him in his right, for a commission to examine his witnesses and perpetuate their testimony, without first bringing an action at law; though it would be otherwise had he been actually disturbed in his fishing, thereby giving him a remedy at law.<sup>5</sup> Apprehended injury may be

maintain case, and not trespass *quare clausum*, for an injury to his easement. *Mattheus v. Treat*, 75 Me. 594.

<sup>1</sup>*Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 602, 41 Atl. 349.

<sup>2</sup>*Solomon v. Grosbeck*, 65 Mich. 540, 36 N. W. 163.

<sup>3</sup>*Patrick v. Greenway*, cited in *Mellor v. Spateman*, 1 Wms. Saund. 346b.

<sup>4</sup>*Hamilton v. Donegall*, 3 Ridgeway, 267, 324.

<sup>5</sup>*Waddy v. Newton*, 8 Mod. 275; *Herbert v. Laughllyn*, Cro. Car. 492.

<sup>6</sup>*Pery v. Thornton*, Ir. L. R. 23 Eq. 402.

<sup>7</sup>*Warren v. Mattheus*, 1 Salk. 357.

<sup>8</sup>*Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097; *Allen v. Donnelly*, 5 Ir. Ch. Rep. 229.

The grantee of an exclusive right of fishing in a non-navigable river may maintain an action for injunction and

damages against a person who, by discharging water polluted with sand and gravel into the river, has driven away the fish and injured the spawning beds. *Fitzgerald v. Firlbank*, 66 L. J. Ch. N. S. 529 [1897] 2 Ch. 96, 76 L. T. N. S. 584.

Making the unlawful destruction of fish a misdemeanor and punishable as such does not preclude a civil proceeding to enjoin it as a nuisance. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

Equity will not restrain the removal of stakes from a fishing ground when they will not be needed for immediate use, and can be easily replaced in ample time for use, and at a price easily ascertained and measurable in damages. *Hettrick v. Page*, 82 N. C. 65.

<sup>9</sup>*Dorset v. Girdler*, Prec. in Ch. 531.



enjoined.<sup>6</sup> The owner of premises used for fish culture, whose pond is supplied by water from an underground channel of a stream, and not merely by percolation, is entitled to an injunction requiring the erection of a barrier or dam on the premises of an adjoining owner, so as to restore to a spring on his premises the water diverted from the pond supplied thereby and from a natural water course which is the outlet thereof, by the digging of a well on such other premises.<sup>7</sup> One who has been in possession of a sole fishery for a considerable length of time may bring a bill to be quieted in possession, although he has not established his right at law; and it is no objection to such relief that the different defendants have separate defenses, as the question whether the plaintiff has a general right to the sole fishery extends to all the defendants.<sup>8</sup> One not occupying, or intending to occupy, his alleged private fishery cannot be so injured in respect thereto as to give him any claim to protection by an injunction against an interference with any technical right he may have.<sup>9</sup> Injunction will not lie to restrain interference with a public fishery, upon the suit of one who shows no special injuries arising from the violation of private right.<sup>10</sup> An injunction restraining the drawing of nets in a public fishery adjoining private lands in violation of statutory rights cannot be broader than is justified by the statute.<sup>11</sup> Interruption of a fishery in such a way as to constitute a public nuisance may be abated by any citizen who is injured thereby, in case it can be done without breach of the peace.<sup>12</sup> The owner of a several fishery may detain the nets and oars of persons unlawfully fishing as security for his damages; but, if he destroys them, he is liable in trespass.<sup>13</sup> Any act which interferes with the enjoyment of the right of fishery in Lake Michigan in any particular locality, if it affects all alike who fish in that locality, is a public, and not a private, nuisance; and no

<sup>6</sup>*Bathurst v. Burden*, 2 Bro. Ch. 64.

<sup>7</sup>*Castalia Trout Club Co. v. Castalia Sporting Club*, 8 Ohio C. C. 194.

<sup>8</sup>*York v. Pilkington*, 1 Atk. 282.

<sup>9</sup>*Stannard v. Hubbard*, 34 Conn. 375.

<sup>10</sup>*Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561; *Reyburn v. Saucyer*, 128 N. C. 8, 37 S. E. 954.

But equity will restrain the maintenance of a fishing trap in violation of law upon the suit of one who suffers special damage thereby. *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55.

<sup>11</sup>*Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

<sup>12</sup>*Day v. Day*, 4 Md. 262.

A right to remove engines placed in a tidal river for catching salmon is not limited to the conservators or overseers under a statute providing that any engine placed or used in contravention of the statute may be taken possession of or destroyed. *Williams v. Blackwall*, 32 L. J. Exch. N. S. 174, 2 Hurlst. & C. 33, 9 Jur. N. S. 579, 8 L. T. N. S. 252, 11 Week. Rep. 621.

<sup>13</sup>*Reynell v. Champernoou Cro. Car.* 228.

private individual may maintain an action in equity to enjoin its continuance.<sup>14</sup>

**410. Penalties.**—For the preservation of the public peace as well as for the conservation of the fishery the legislature may protect fisheries by the enactment of penal statutes, and such statutes are violated by the mere performance of the forbidden act, without the necessity of a specific criminal intent.<sup>1</sup> Such statutes will be construed so as to effect the legislative intent.<sup>2</sup> If the statute provides for the punishment of one fishing without consent the indictment must negative consent by all named in the statute as capable of giving it.<sup>3</sup> One who paddles a boat in which another is illegally fishing may be convicted for participating in the offense.<sup>4</sup> To maintain an action for the penalty, one must bring himself within the terms of the statute.<sup>5</sup> Under a statute against killing fish in a private river without the consent of the owner, such killing must have occurred in inclosed ground.<sup>6</sup> At common law an indictment will lie for fishing in another's pond and carrying away the fish, they being the goods and

<sup>14</sup>*Kuehn v. Milwaukee*, 83 Wis. 583, 18 L. R. A. 553, 53 N. W. 912.

<sup>1</sup>*State v. Turner*, 60 Conn. 222, 22 Atl. 542.

<sup>2</sup>Under the English act of 1878, forbidding the fishing for trout with rod and line without a license, a person licensed to fish with rod and line will be subject to the penalty if he attempts to use three rods and lines at the same time while having only one license. *Cambridge v. Harrison*, 64 L. J. M. C. N. S. 175, 15 Reports, 327, 72 L. T. N. S. 592, 59 J. P. 198.

<sup>3</sup>*Holtzgraft v. State*, 23 Tex. App. 404, 5 S. W. 117.

<sup>4</sup>*Com. v. Richardson*, 142 Mass. 71, 7 N. E. 26.

If two or more persons join in drawing a bush seine in a river where the act is prohibited, it is a several offense in each, and each is separately liable to the penalty. *Curtis v. Hurlburt*, 2 Conn. 309.

<sup>5</sup>One not the owner or lessee of all the land under or around and adjoining a pond is not entitled to maintain an action to recover the penalty prescribed by N. H. Gen. Laws, chap. 179, § 1, for catching fish in the pond of another. *Chase v. Baker*, 59 N. H. 347.

One who owns the land on but two sides of a pond of water, the other sides of which are owned by other persons whose title extends to low-water mark,

is not entitled to maintain a proceeding under N. Y. Laws 1887, chap. 623, to recover the prescribed penalties for taking fish from a pond laid out as a private park for propagating and protecting fish, since he has no such exclusive ownership or control over the waters or the land underneath as is required by the act. *Hill v. Bishop*, 43 N. Y. S. R. 736, 17 N. Y. Supp. 297.

The fish committee cannot maintain an action for the penalty provided by the act of 1826, unless they have taken the oath required by the act. *Fussett v. Geyer*, 55 Me. 160.

Under a penal statute prohibiting the erection of a fish weir in tide waters below low-water mark in front of the shore or flats of another, without the owner's consent, if "the rights of others" would thereby be interfered with, it was held that the owner has acquired no such fishing right as to be protected by equity, unless he actually uses such privilege. *Perry v. Carleton*, 91 Ma. 349, 40 Atl. 134.

<sup>6</sup>*Rea v. Sadler*, 2 Chitty, 519.

So, a statute protecting the fishery of the owner of a "private" stream, spring, or pond relates only to a stream, spring, or pond the waters of which are entirely controlled in every part by the person claiming the fishery. *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

chattels of the prosecutor.<sup>7</sup> That a weir is placed on land from which the tide wholly ebbs does not prevent its being within the terms of a statute forbidding the placing of a weir below low-water mark in front of the shore of a third person without his consent. It is sufficient if the weir is erected beyond or nearer the middle of the channel than the low-water line of the flats intended to be protected.<sup>8</sup>

**411. Procedure.**— A vessel cannot be seized and condemned for interfering with a private fishery, without giving the owner a jury trial.<sup>1</sup> A statutory provision that any person taking fish in violation of its terms shall forfeit his vessel does not authorize the forfeiture and sale of the vessel of another of which the offender had possession at the time.<sup>2</sup> A cause of action for wrongfully entering upon plaintiff's lands under water and taking and carrying away fish therefrom may be united with a cause of action for an entry upon the same land at another time and catching and killing muskrats there.<sup>3</sup> Claimants of rights in a fishing privilege may be joined as defendants in an action to quiet title thereto by the owner of the land to which such right is by statute appurtenant, although claiming and exercising such rights severally and separately, each at a distinct part of the shore, where their claims, though under different patents, were from the same source, and the injury to the plaintiff, as well as their defenses to the action, depend as to each upon the same facts.<sup>4</sup> One claiming an exclusive fishery in tide water must establish his right by satisfactory proof.<sup>5</sup> To entitle plaintiff to a verdict he must show his possession or right.<sup>6</sup> It is not necessary to show that one's own weir

<sup>1</sup>*Reg. v. Steer*, 6 Mod. 183.

But an indictment at common law for a nuisance does not lie for obstructing the passage of fish by a dam built across a river not navigable. Recourse must be had to the remedy provided by statute, where the statute has changed the common law on the subject. *Com. v. Chapin*, 5 Pick. 109, 16 Am. Dec. 386.

<sup>2</sup>*Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017.

<sup>3</sup>*Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302. Affirming 13 App. Div. 195, 43 N. Y. Supp. 304; *The J. W. French*, 13 Fed. 916.

<sup>4</sup>*The J. W. French*, 13 Fed. 916.

<sup>5</sup>*Whitling v. Nash*, 41 Hun. 579.

<sup>6</sup>*Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

<sup>7</sup>*Gould v. James*, 6 Cow. 309; *Yard v. Carman*, 3 N. J. L. 937; *Fitzwalter's Case*, 1 Mod. 105; *Crichton v. Coltery*, 19 Week. Rep. 107; *Preble v. Brown*, 47

Me. 284; *Paley v. Birch*, 8 Best & S. 336, 16 L. T. N. S. 410.

No right to an exclusive fishing privilege in a navigable river is established without proving a compliance with the statutory requirements. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674; *Reynolds v. Com.* 93 Pa. 458.

One claiming a right to abridge the common-law right of any subject to take sea fish must plead that matter specially; it cannot be presumed. *Baggott v. Orr*, 2 Bos. & P. 472, 3 Revised Rep. 668.

And so, one claiming the right to fish in private water must show the foundation of his right. *Fitzwalter's Case*, 1 Mod. 105.

<sup>8</sup>*Richardson v. Orford*, 2 H. Bl. 182, 4 T. R. 437, 1 Anstr. 231.

is within his defined limits to maintain an action for infringing his exclusive right of fishing on certain flats, although its position might have a material effect upon the amount of damages to be recovered.<sup>7</sup>

An inhabitant of a place is not a competent witness to prove a prescriptive fishery in all the inhabitants.<sup>8</sup> Prospective profits of a fishing business are of too speculative a nature to be allowed in an action for damages for negligent injury to nets.<sup>9</sup>

<sup>7</sup>*Matthews v. Treat*, 75 Me. 594.

<sup>8</sup>*Gould v. James*, 6 Cow. 369; *Jacobson v. Fountain*, 2 Johns. 175.

But, upon the question of the right of the proprietor of a certain neck of land to an exclusive shell fishery upon the shore, a neighboring proprietor similarly situated is a competent witness to establish the right. *Gould v. James*, 6 Cow. 369.

And an inhabitant of an adjoining

town is admissible as a witness on behalf of another inhabitant sued for trespassing on a private shell fishery to prove a free fishery in the *locus in quo* on behalf of all the inhabitants of the state, even though he is liable to prosecution for a similar trespass in case the right does not exist. *Ibid.*

<sup>9</sup>*Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045.

## CHAPTER XV.

### BOUNDARY OF PUBLIC GRANTS.

- 412. Introduction.
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**412. Introduction.**— It being established that the sovereign owning land which borders on a body of water may grant not only the upland, but the land under the water as well,<sup>1</sup> the question to determine in any particular case is as to whether or not he has granted the land under the water. In grants made by the early English kings which may be regarded as establishing the common law on the subject, there was no attempt to retain title to the land under the water. All grants either expressly mentioned waters in the granting clause, or it was taken for granted that the land under the water would pass, so that the grantee took possession and asserted his title to such property. With respect to the land under nontidal waters this custom has continued and the rule with reference to it has become so firmly fixed that in every case the presumption is so strong that there was no intention to reserve title to the water that the grant bounded by a water course will carry title to the point of contact with the grant on the opposite side of the stream. With reference to estuaries and arms of the sea, there seems to be no definite evidence as to what was the custom any further than that grants on the borders of such waters where the tide ebbcd and flowed were treated, at least

<sup>1</sup> See *ante*, § 45.

so far as the title to the shore was concerned, as were grants which bordered on the sea, and the boundary of the grant went to low-water mark. When Mr. Digges promulgated his theory as to the prerogative rights of the Crown,<sup>2</sup> which asserted its title to the sea so far as high-water mark, he created a class of property which had not before been recognized, which consisted of the seashore. The discussion which arose out of the attempted adoption of his theory brought into prominence this class of property so that it was accorded a place by itself, and distinct rules for the interpretation of grants relating to it were promulgated. This discussion was going on at about the time the American colonies were established; and, losing sight of the fact that the Crown was not able to establish the rights claimed for it, and that the law was in fact established to be the reverse of Mr. Digges's contention, his assertion of the law was, without investigation, adopted and carried into the law of the colonies so that the shore between high and low water mark on tidal waters was treated as a distinct class of property, which would not pass by a public grant unless it was expressly mentioned. Carrying the law as it was at first administered to its logical conclusion, the rule should be that with reference to all waters which are of such a character that there are private owners on opposite banks which are within a reasonable distance of each other, the title of the opposite owners should touch each other; and that on other waters which are in fact bays or arms of the sea and are so broad that the opposite owners could not in fact take possession of, or exercise control over, them, the title should go to low-water mark. This rule is subject to the modification which has arisen out of the great regard which has always been possessed for the sea, which regards everything as sea where the tide ebbs and flows, so that the rule which applies to the sea applies to every water where there is tide, no matter how narrow the water may be at that place. The rule that the title of the upland owner should go to low-water mark was modified in theory by the contentions of Mr. Digges, who effected a needless departure from the common law, and it has also to some extent been modified by the contentions of some jurists in the United States, who, losing sight of the basis upon which Mr. Digges's contention rested, expanded the theory so as to include not merely tidal waters, but those which were in fact navigable for sea-going vessels. This departure is entirely unsupported by principle, and should not be followed any further than the rule of *stare decisis* requires it to be followed. Several rules have been adopted for

<sup>2</sup>Ante, § 30a.

the interpretation of grants bordering on water courses, which will be taken up in their order.

**413. Grants bordering on non-navigable streams.**—As stated in the preceding section, no attempt was made in the early English grants to reserve to the Crown title to the water courses which flowed through or bordered on real property which became the subject of Crown grants. They passed to the grantee under the general term “waters,” or were regarded as included in the wider term “lands,” and passed into private possession. Therefore, when a stream formed the boundary between two grants, the boundary was regarded as in the middle of the stream. And this rule is in force at the present time.<sup>1</sup> With respect to private grants, the thread of the stream is the line midway between the banks at the ordinary stage of the water, without regard to the channel or lowest and deepest part of the stream.<sup>2</sup> The reason for this rule has been suggested to be that the stream is to be regarded as a line, so that when the stream is mentioned it must be regarded as having only the dimensions of a line, and the boundary is placed at this line. There is another reason, however, which is more satisfactory.<sup>3</sup> Land covered with water will pass by the grant of land.<sup>4</sup> If the sovereign does not, in granting land bounding on a stream, reserve any title to himself, the presumption is that the boundary is upon the next adjoining owner, and his holding being on the opposite side of the stream, each tract being regarded as the boundary of the other, the point of contact is necessarily carried to the center of the stream. If the sovereign making the grant has

<sup>1</sup>*Att’y. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631; *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 8 S. W. 439; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 1 S. W. 765; *Coover v. O’Conner*, 8 Watts, 477; *Ball v. Slack*, 2 Whart. 538, 30 Am. Dec. 278; *Benner v. Platter*, 6 Ohio, 505. (In that case it was stated that the court did not intend to decide in *McCulloch v. Aten*, 2 Ohio, 307, that a boundary on an non-navigable stream would only go to the edge at low water.) *Williams v. Buchanan*, 23 N. C. (1 Ired. L.) 535, 35 Am. Dec. 760; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Ex parte Tibbits*, 6 Cow. 551; *People v. Seymour*, 6 Cow. 579; *Jackson ex dem. Kingston v. Louw*, 12 Johns. 252.

<sup>2</sup>*Stale v. Burton*, 106 La. 732, 31 So. 291; *Willey v. Lewis*, 28 Ohio L. J. 104, 11 Ohio Dec. Reprint, 607; *Hopkins Academy v. Dickinson*, 9 Cush. 544.

The thread of a stream is the middle

line between the shores, irrespective of the depth of the channel, taking it at the ordinary stage of the water at its medium height, neither swollen by freshets nor shrunk by drought. *Braham v. Blodsoe Creek Turnp. Co.* 1 Lea, 704, 27 Am. Rep. 789.

<sup>3</sup>The lines of a survey do not always have a mathematical definition,—length without breadth; they are as broad as the rivers and pass-ways which are appropriated as monuments for public as well as for private convenience, and, when so used in adjusting the legal rights of parties by them, the center or middle of them, whether a river, a creek, a spring, or a pass-way, fixes the limitation of the rights of parties, unless otherwise expressly provided for in the feoffment. *Muller v. Landa*, 31 Tex. 265, 98 Am. Dec. 529.

<sup>4</sup>*Ross v. Portsmouth*, 17 U. C. C. P. 195.

title to the opposite shore, his grant will carry to that point.<sup>5</sup> If it is shown that the actual line used by the government surveyors was the middle of the stream, that line will be the boundary of the grant.<sup>6</sup>

**414. Grants bounded by tide water.**—As stated in a preceding section,<sup>1</sup> when Mr. Digges promulgated the theory that the shore around the Kingdom of England should belong to the Crown by its prerogative right, because it partook of the nature of the sea, and that the sea being his, the shore should be his also, he gave the shore a distinct character which it had never before possessed, and raised it into a class by itself, to which the rule could be applied that nothing passed by a Crown grant except what was expressly mentioned. Prior to that time, it had been regarded as part of the upland, and would pass by a grant of the upland, without question. After that time the ancient rule was ignored, and in order for the shore to pass by a grant, it must be mentioned. Otherwise the title would go only to high-water mark. This application of the rule ignored a fact and the rule which grew out of it. The fact was that the shore had always been regarded as parcel to the upland, and the rule was that as parcel of the upland, it would pass with it without express mention. The strict rule of construction of Crown grants did not apply as much to real estate as to prerogative rights, franchises, monopolies, etc., which deprived the public of a portion of their common rights. In such cases it was necessary to express everything that was intended to pass or the grantee would acquire no title to it. In case of a grant of real property, however, woods, streams, houses, and other things which were always regarded as parcel of the estate would pass without express mention, and the same rule applied to the shore. However, after the shore was given a distinct character of its own, the rule of strict construction was, as it would seem, erroneously, though generally, applied to grants affecting it, and in most instances this is a rule of property, so that it must be upheld on the principle of *stare decisis*. Under this rule a grant of land bounded by tide water passes title only to high-water mark.<sup>2</sup> This line is the line of ordi-

<sup>1</sup>*Jones v. Water Lot Co.* 18 Ga. 539. Bosw. 254; *Stillman v. Burfeind*, 21 App. Div. 13, 47 N. Y. Supp. 280; <sup>2</sup>*Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255. *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356; *Com. v. Alger*, 7 Cush. 53; <sup>3</sup>*Ante* § 412. *State v. Pinckney*, 22 S. C. 484; *Forrest River Lead Co. v. Salem*, 165 Mass. 200, 43 N. E. 802; *Litchfield v. Ferguson*, 17 L. ed. 865; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *New York v. Hart*, 95 N. Y. 443, Reversing 16 Hun. 380; *McFarlane v. Kerr*, 10 Vol. II.—WATERS, 92. *Luskin v. Haskell*, 3 Pick. 356; *Loundes v. Dickerson*, 34 Barb. 586; *Coburn v. San Mateo County*, 75 Fed. 520; *Galveston v.*



nary high tide, and not of the highest spring tide.<sup>3</sup> So strictly is this rule adhered to in some instances that even though the calls of the grant would extend into the water, and convey the shore and a portion of the soil below low-water mark, they will be restricted to high-water mark.<sup>4</sup> Pennsylvania, while refusing to follow the common-law rule with reference to the title to the soil under nontidal navigable rivers, has followed it with reference to the title to the shore, so that in that state a grant bounded by tide water is presumed to go to low-water mark.<sup>5</sup>

**415. Grants bounded by nontidal navigable stream.**—At common law a grant of land on a nontidal navigable river carried the title to the thread of the stream and the discussion which effected the change in the presumption as to title to the seashore did not affect the title to the land under such streams.<sup>1</sup> In this country some of the states have directly assumed title to the soil under the navigable rivers and in others the courts have thought that they ought to do so, and so have proceeded upon the theory that title should have been retained. If the title was in fact retained, then, of course, the grant bounded by the river will not pass title to the bed. In order to determine the rule which is in force in any particular state, attention is called to the

*Menard*, 23 Tex. 349, 398; *Wright v. Seymour*, 69 Cal. 122, 10 Pac. 323.

A grant of land described as "the island called Cheney's island containing two hundred twelve acres," conveys to high-water mark only. *Cheney v. Gup-till*, 13 N. B. 379.

*Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143, 30 So. 645.

*Mann v. Tacoma Land Co.* 44 Fed. 27; *Jones v. Martin*, 13 Sawy. 314, 35 Fed. 348; *Cortelyou v. Van Brundt*, 2 Johns. 357, 3 Am. Dec. 439.

The upland boundary of tide and shore lands is the line of ordinary high-water mark, and such line is not necessarily determined by a meander line, so the title to tide and shore lands received by the state from the United States, passes the land lying between high and low water mark, and not the land between the meander line and low-water mark. *Washougal & L. Transp. Co. v. Dallas, P. & A. Nav. Co.* 27 Wash. 490, 68 Pac. 74.

*More v. Massini*, 37 Cal. 432; *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559; *East Hampton v. Kirk*, 68 N. Y. 459, 6 Hun, 257.

But the limiting of the grant by the shore will not exclude the shore if the

grantee exercises dominion over it. *Re Belfast Dock Act*, Ir. Rep. 1 Eq. 128.

The act of Congress of the republic of Texas of Dec. 9, 1876, relinquishing to Menard "one league and one labor of land, lying and situate on, and including the east end of Galveston island" if viewed as an ordinary grant would not, it seems, include the shore and flats lying south of the bay, but such act did grant the flats and shore, as it was clearly shown that the legislature intended to include them in the grant for the purpose of furthering the erection of a city with streets and lots running to and bordering on the channel. *Galveston v. Menard*, 23 Tex. 349, 398.

*Palmer v. Farrell*, 129 Pa. 162, 15 Am. St. Rep. 708, 18 Atl. 761.

In Virginia a grant of land on the seashore will extend to low-water mark. *French v. Bankhead*, 11 Gratt. 136.

*Varick v. Smith*, 9 Paige, 547, 5 Paige, 151, 28 Am. Dec. 417; *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 8 S. W. 439; *Berry v. Snyder*, 3 Bush. 266, 96 Am. Dec. 219; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Houck v. Yates*, 82 Ill. 179; *Cobb v. Lavelle*, 89 Ill. 334, 31 Am. Rep. 91.

discussion of the question as to title to beds of water ways.<sup>2</sup> Among the earliest cases in which the question was discussed in this country was *Canal Comrs. v. People*.<sup>3</sup> In that case the wording of the grant was such as to indicate an intention to reserve the bed of the stream from the grant and there was evidence that the stream was tidal, so that the discussion as to the rule that should apply in regard to nontidal navigable streams was mere *dicta*. But the decision in its final form seems to have denied the claim of the riparian owner as much upon the ground that the rule that the title of the shore owner went to the center of the stream should not apply to the large rivers in this country as upon any other.<sup>4</sup> This doctrine was subsequently repudiated in New York.<sup>5</sup> But it has had an effect upon shaping decisions in other states. In Tennessee a grant bounded by a stream which is navigable for sea-going vessels will not carry title beyond the shore.<sup>6</sup> In Missouri the boundary stops at the shore,<sup>7</sup> so, in North Carolina.<sup>8</sup> And in Iowa it goes only to high-water mark.<sup>9</sup> Some courts which have not found it necessary to decide whether or not title went to the center of the stream have held that it went at least to low-water mark.<sup>10</sup> Pennsylvania and Montana have adopted the rule that the boundary was low-water mark.<sup>11</sup> A distinction has been made by some courts in favor of rivers which form international boundaries, the courts holding that in case of such rivers, a state grant will carry title only to the shore.<sup>12</sup>

<sup>2</sup>*Ante* §§ 48 et seq.

<sup>3</sup>*Abbot v. Doe ex dem. Kennedy*, 5 Ala. 393; *Widdicombe v. Rosemiller*, 118 Fed. 295.

<sup>4</sup>5 Wend. 423.

<sup>5</sup>*Canal Appraisers v. People*, 17 Wend. 571.

<sup>6</sup>*Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

<sup>7</sup>*Stuart v. Olark*, 2 Swan, 9, 58 Am. Dec. 49; *Martin v. Nance*, 3 Head, 850.

The title only goes to low-water mark. *Posey v. James*, 7 Lea, 98.

<sup>8</sup>*Cooley v. Golden*, 117 Mo. 43, 21 L. R. A. 300, 23 S. W. 100.

<sup>9</sup>The grant of land covered by the water of a navigable river, not being subject to entry, is void, and may therefore be collaterally attacked. *Holley v. Smith*, 130 N. C. 85, 40 S. E. 847; *Wilson v. Forbes*, 13 N. C. (2 Dev. L.) 30; *Ingram v. Threadgill*, 14 N. C. (3 Dev. L.) 59; *Smith v. Ingram*, 29 N. C. (7 Fred. L.) 179.

<sup>10</sup>*Bennett v. National Starch Mfg. Co.* 103 Ia. 207, 72 N. W. 507.

<sup>11</sup>*Louisville v. Bank of United States*, 3 B. Mon. 138.

In *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59, the court inclined toward the opinion that a grant of land on the bank carried title to the middle of the stream, and it was decided that the title went at least to low-water mark, which was sufficient to determine the controversy in that case.

<sup>12</sup>*Freeland v. Pennsylvania R. Co.* 197 Pa. 529, 38 L. R. A. 529, 80 Am. St. Rep. 850, 47 Atl. 745; *Gibson v. Kelly*, 15 Mont. 417, 39 Pac. 517; *Poor v. McClure*, 77 Pa. 214.

<sup>13</sup>*Re State Reservation*, 16 Abb. N. C. 191, Affirmed in *Re State Reservation*, 37 Hun, 537; *Hensler v. Hartman*, 16 Abb. N. C. 176, note.

The rule that bounding a grant on a stream will convey title to the center has no application to the case of a stream forming the boundary between nations, and in case of a grant upon such a stream, running the side line to the waters of said stream and thence

**416. Boundaries of grants by United States government.**— When the Federal government acquires title to land which is not yet organized into a state, it has the absolute ownership,—both the *jus publicum* and the *jus privatum*; and it may make such grants of the land, either above or below the water, as it chooses to make. But the land is always held under the possibility that the territory will eventually be organized into a state, which will have a right to make its own rule as to what shall be the extent of riparian rights, and where shall rest the title to the beds of navigable waters. Under these circumstances, while Congress may, if it chooses to do so, grant the title to the soil under the waters, the Federal courts have, for the purpose of avoiding embarrassment to the future state, adopted the rule of holding that Congress will not be presumed to have intended to grant title to the land under the water in such a way as to effect such embarrassment, unless it has done so in express terms. As said by Mr. Justice Field in *Packer v. Bird*,<sup>1</sup> while the courts of the United States must construe the grants of the Federal government, without reference to the rules of construction adopted by the states for their grants, yet “whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.” Continuing his thought was to the effect that, since the rule of the state would determine whether the riparian rights of the grantee would extend to the center or only to the margin of the stream, for the sake of uniformity it was better to let that question be determined by the policy of the state than to hold absolutely that the congressional grant fixed the rights for all time, and thereby embarrass the state in the development of its policy, unless the terms of the congressional grant required the court to hold that the title went to the center. This rule is consistent and is well adapted to leave the states free to deal with the whole matter when it arises. At the same time the mere holding by the Federal court that congressional grants will not, for the express purpose of leaving the matter to the determination of the states, be held to extend to the center of the stream does not fix the rule that at common law the title should not extend to that point; nor does it furnish a reason why the state should not extend it in accordance with the common-law rule and with the better policy ex-

along the stream will not convey the soil     <sup>1</sup> 137 U. S. 661, 34 L. ed. 821, 11 Sup. of the stream. *Kingman v. Sparrow*, 12 Ct. Rep. 210. Barb. 201.

pressed by that rule, when it obtains the power to do so. Under the policy adopted by the Federal court, no congressional grant will be held to extend to the center of the stream, unless the intent to extend it to that point is expressed. But the question as to what the extent is will be determined by the local law of the state where the land lies.<sup>2</sup> Some of the state courts, losing sight of the reason for this ruling, have held that, because the Federal courts held that congressional grants did not of their own force carry title to the bed of the stream, therefore such title should not be recognized, holding that the rule adopted for the mere accommodation of the states should be regarded as a rule preventing the states from recognizing the title of the riparian owner according to the rule of the common law, which had been adopted by the states, either by their constitutions or statutes.<sup>3</sup> But the true rule is stated in *Lamprey v. State*,<sup>4</sup> where it is said it is well settled that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie, and consequently whether the land forming the beds of these waters belongs to the state or to the owners of riparian lands is a question of Minnesota law, in a controversy involving the right of the United States to convey it after the recession of the waters. And therefore, in states where private ownership is recognized, Federal grants will carry title to the beds of the streams, unless they are expressly reserved from the grant.<sup>5</sup> The erroneous effect which the rulings of the United States Supreme Court has been given by some of the state courts is well illustrated by some decisions in Wis-

<sup>2</sup>*Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Hardin v. Jordan*, 140 U. S. 381, 35 L. ed. 433, 11 Sup. Ct. Rep. 808, 838; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Surgett v. Lapies*, 8 How. 69, 12 L. ed. 991.

The local law of the state wherein the land lies is the guide for all courts when called upon to adjudge the extent or limits of the title of premises abutting on rivers, lakes, or other waters. Therefore, in accordance with the rule in Iowa, the deed to land adjacent to a non-navigable body of water, consisting of lots bounded by a meander line along said body of water, conveys also the land lying between said meander line and the high-water line of said lake. *Re Valley*, 116 Fed. 983.

<sup>3</sup>*Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 100; *Shoemaker v. Hatch*, 13 Nev. 261; *St. Paul, S. & T. F.*

*R. Co. v. First Div. of St. Paul & P. R. Co.* 26 Minn. 31, 49 N. W. 303; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842.

In an action to recover the value of ice taken from a river at a place where the complainant owned the land upon the adjoining banks, where the United States government, at the time the land was patented and for a long time thereafter, regarded the river as navigable, it was held that, although by a subsequent statute the river was declared to be not navigable, the plaintiff owned only to the meandered line of survey on the bank of the stream. *Serrin v. Grefe*, 67 Iowa. 196, 25 N. W. 227.

<sup>4</sup>52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139.

<sup>5</sup>*Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

consin. In that state the rule was early adopted that the title of the riparian owner went to the center of the stream.<sup>6</sup> But after the decision by the Supreme Court of the United States of the case of *St. Paul & P. R. Co. v. Schurmeir*,<sup>7</sup> the court in *Wright v. Day*,<sup>8</sup> in determining the title to a strip of land between the meander line and the stream, held that the patent conveyed title to the high-water mark of the stream, apparently relying upon the rulings in the *Schurmeir Case*; and in *Wisconsin River Improv. Co. v. Lyons*,<sup>9</sup> there is a suggestion that the Wisconsin doctrine was overruled by the *Schurmeir Case*. The court thereby overlooked the fact that the question was one for the Wisconsin court to settle for itself, and that its conclusion cannot be affected in any way by a rule that the governmental grant does not extend the title to the center of the stream; and, further, in the *Schurmeir Case*, the *locus in quo* was a part of a flat or low land which was between the meander line and the river; and it was held that the patentee's title went to the river, so that what was said about going to the thread of the stream was mere *dictum*. The effect of the extreme application of the doctrine with respect to congressional grants is seen in *Hinman v. Warren*,<sup>10</sup> where it is held that a patent from the government of land in a territory, the description of which carries it beyond the line of ordinary high tide, vests in him no estate in the land beyond such line, as, under the rule adopted by the government, that a grant of land adjacent to a navigable river, below the farthest point to which the neap tide flows, extends only to the meander line of high tide, the act of the officers in so describing the land is unauthorized. It would seem that the question of the authority of the officers of the Federal government is for the Federal government to settle, and not for the state courts. Under the system of land surveys the practice has been not to carry the lines of the surveys across navigable waters, but to make such waters one of the boundaries of the survey, and therefore of the grant. A navigable river or lake, in order to form a boundary to a fractional section under the act of Congress of 1796, need not be actually navigable at every point, or at the point where it acts as a boundary.<sup>11</sup> One who purchases a lot in a section which is intersected by a river, when by the map of the section the river crosses a part of the lot, may not have title beyond the river if it actually bound or enter the lot; and

<sup>6</sup> *Jones v. Pettibone*, 2 Wis. 319.

<sup>7</sup> 7 Wall 272. 19 L. ed. 74.

<sup>8</sup> 33 Wis. 260.

<sup>9</sup> 30 Wis. 65.

<sup>10</sup> 6 Or. 408.

<sup>11</sup> *James v. Howell*, 41 Ohio St. 696.

if it does not, they may not go beyond the first eighth line in that direction.<sup>12</sup>

**417. Definitions.**— Before proceeding to consider the various rules which have been adopted to determine the construction of grants bounded upon water courses, it is necessary to ascertain the meaning of the terms used. With respect to grants on tide water where the high-water mark is comparatively constant, that term refers to the ordinary height which the tide reaches and not to the highest spring tides. With reference to rivers which are not affected by the tide, the meaning of the term is somewhat more difficult to determine. But the definition which best meets all requirements of the case and which has in effect been adopted by the weight of authority is that high-water mark is the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as with respect to the soil itself. This definition applies both to navigable,<sup>1</sup> and to non-navigable streams.<sup>2</sup> Courts have attempted to define the high-water mark in other terms as that the term means the point reached by the water when the river is ordinarily full and the water ordinarily high,<sup>3</sup> or as the average height of the water after the great flow of the spring has abated and the river is in its ordinary state.<sup>4</sup> But these definitions are not so satisfactory as that which marks high-water mark by the physical point of division between the bank and bed. In *Howard v. Ingersoll*,<sup>5</sup> it is said that the terms "ordinary low water and low water" are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring and neap tides. But

<sup>12</sup>*Lally v. Rossman*, 82 Wis. 147, 51 N. W. 1132.

<sup>1</sup>*St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195, 13 S. W. 931.

<sup>2</sup>*Welch v. Browning*, 115 Iowa, 690, 87 N. W. 430; *Paine Lumber Co. v. United States*, 55 Fed. 954; *Houghton v. Chicago, D. & M. R. Co.* 47 Iowa, 370; *Re Minnetonka Lake Improv.* 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295; *Dow v. Electric Co.* 69 N. H. 408, 76 Am. St. Rep. 190, 45 Atl. 350.

<sup>3</sup>*Morrison v. First Nat. Bank*, 88 Me. 155, 33 Atl. 782.

The point to which water usually rises in an ordinary season of high water is said in *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418, to be high-water mark constituting the true meander line which is the boundary of the land claim under

the donation law, as to land below which no title passes to the patentee.

<sup>4</sup>*Plumb v. McGannon*, 32 U. C. Q. B. 8. '13 How. 381, 14 L. ed. 189.

"Low water" means low water at ordinary tides, when used in a grant of an island together with all contiguous small islands that are joined to or connected with the said island by the beach or shoal, dry at low water. *Doe ex dem. Fry v. Hill*, 7 N. B. 587.

And therefore by a grant of an island "with all contiguous small islands that are joined to or connected with the said island or shoal which is only dry at low water," an island that is connected with the principal one by the shoal which is only dry at extraordinary tides will not pass, as low water means low water at ordinary tides. *Doe ex dem. Fry v. Hill*, 7 N. B. 587.

the term has been applied to streams above the influence of the tide and it is held that the term does not refer to the lowest stage of the water in seasons of great drought, but the height of the water at ordinary stages of low water.<sup>6</sup> One case held that it was the point to which the water receded at its lowest stage.<sup>7</sup> This definition is more satisfactory than one which leaves a strip of land between the riparian owner and the water. All the advantages of riparian ownership depend upon access to the water and the boundary of the riparian owner should be fixed at the point which will preserve such access under all circumstances, and therefore his title should follow the receding water to the farthest point of its withdrawal. In *Ware v. Houk*,<sup>8</sup> it is said that the question what is low-water mark of a river is for the jury. It cannot be said that it is the lowest point to which the river has ever been known to recede, nor can it be said as a matter of law that it is the average point to which the river has receded each year for the last thirty years, as shown by waterworks records. But the jury may take these records into consideration in determining what line may reasonably be considered low-water mark. When the state erects a dam in a public stream the surface of the water thus raised becomes low-water mark for the riparian owner.<sup>9</sup> A river is composed of bed, banks, and stream,<sup>10</sup> and is to be distinguished from a lake by the fact that it is characterized by confining channel banks which give it a substantial single course throughout, while a lake occupies a basin of greater or less depth and may or may not have a single prevailing direction.<sup>11</sup> The fact that the lake has a current will not destroy its character as lake if its other characteristics make it such.<sup>12</sup> The bed of a river is a definite and commonly a permanent channel and consists of the soil which is permanently submerged by the water.<sup>13</sup> The banks of the stream are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are still confined to a definite course and

<sup>6</sup>*Kentucky Lumber Co. v. King*, 23 Ky. L. Rep. 1422, 65 S. W. 156.

<sup>7</sup>*Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 556; *Slauson v. Goodrich Transp. Co.* 94 Wis. 642, 69 N. W. 990.

<sup>8</sup>*Paine Lumber Co. v. United States*, 55 Fed. 954.

<sup>9</sup>10 Ohio Dec. Reprint, 724.

<sup>10</sup>*O'Connor v. Bigler*, 2 Pearson (Pa.) 219, Affirmed in 32 Phila. Leg. Int. 355.

<sup>11</sup>*Eastman v. St. Anthony Falls Water-Power Co.* 43 Minn. 60, 44 N. W. 882.

<sup>12</sup>*Jones v. Lee*, 77 Mich. 35, 43 N. W. 855.

<sup>13</sup>*State v. Gilmanton*, 14 N. H. 467.

A provision in the charter of a railroad company granting it "all such lands, streams and materials, belonging to the state" for railroad purposes, does not include lands covered by the waters of lake Michigan. *Illinois C. R. Co. v. Chicago*, 173 Ill. 471, 53 L. R. A. 408, 50 N. E. 1104.

<sup>14</sup>*Paine Lumber Co. v. United States*, 55 Fed. 854.

channel.<sup>14</sup> The channel is the passageway between the banks through which the water of the stream flows.<sup>15</sup> Ship channel, in a grant of lands between high tide and ship channel, is the line of low tide, where no artificial boundary has been established by competent authority.<sup>16</sup> A description to or down the channel of a stream refers to the thread or central line of the channel.<sup>17</sup> The mouth of a stream emptying into a tidal river is where it flows into it when the tide permits it to flow and is the same at high water as at low water.<sup>18</sup> In a statute which requires measurement from the coast, the coast is the point of contact of the main land with the main sea; and when a bay intervenes the point of contact of the bay with the main land is to be considered as the coast.<sup>19</sup> The term "creek" properly imports a recess, cove, bay, or inlet in the shore of a river, and not a separate or independent stream, although sometimes used in the latter sense.<sup>20</sup> But in popular usage and therefore in a usage which will be recognized by the courts it means a small stream of flowing water.<sup>21</sup> The head of a creek means the source of the longest branch, unless general reputation has fixed upon an inferior branch, which reputation must

"So where a grant limits the boundary to land to the bank of a stream, the high-water mark and not low-water mark will determine its location. *People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 9, 17 N. E. 147.

"*Benjamin v. Manistee River Improv. Co.* 42 Mich. 628, 4 N. W. 483.

In *Dayton v. Robert*, 8 Ohio C. C. 649, 1 Ohio Dec. 385, it is said that the channel of a stream within the rule that a riparian proprietor is without right to interrupt the natural flow of water in its appropriate channel to the injury of another riparian proprietor embraces the ground covered by the current of the stream, not only at its usual stage but all that may be occupied by it at any stage which it may reasonably be expected to reach.

The term "natural channel" includes not only all channels through which in the existing conditions of the country water naturally flows, but new channels through which by changes in the conformation of the country occurring in the building of a city the water is, under natural laws, discharged. *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143.

"*Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

In that case in determining the limits of a town bounded in its creative acts by ship channel, it is said that the chan-

nel of a river, strait, or bay in the technical sense of the word, means the deeper part which can be most safely navigated, but in this sense it cannot imply any fixed depth of water, for it is entirely relative to the particular river, strait or bay to which reference is made, and the deepest portion of one body of water may be shallow compared to the channel of another. And in the same body of water the channel for vessels of lighter draft would generally be more extensive than the channel for vessels of heavier draft.

"*Warren v. Thomaston*, 75 Me. 329, 46 Am. Rep. 397.

"*Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278.

The mouth and the inlet of a river are convertible terms when used to locate objects generally. *Ocean Beach Asso. v. Yard*, 48 N. J. Eq. 72, 20 Atl. 763.

"*Hamilton v. Menifee*, 11 Tex. 718.

"*Schermerhorn v. Hudson River R. Co.* 38 N. Y. 103.

"A call for a certain creek as the boundary of land is a call for the main stream, not a mere branch of the creek, and the boundary being the main channel or center of the creek, islands will belong to the proprietor of that side of the channel where they are found. *Benner v. Platter*, 6 Ohio, 504.



be conclusively established.<sup>22</sup> In small streams the left hand fork is to be ascertained by ascending the stream.<sup>23</sup>

**418. Meander lines.**— In approaching the question of what actually passes under a particular grant, it is necessary to determine the effect of meander lines. The Federal government, in surveying the public lands and preparing them for settlers, ran meander lines along the shores of lakes and water courses which were of such size that they could not conveniently be included in the measurement of the land. The various fractional sections were described with reference to these meander lines, and the question arises whether these lines were intended to be boundaries or not. The rule is settled that meander lines are not intended as boundaries, but that the body of water will be regarded as the true boundary.<sup>1</sup> As stated in *St. Paul & P. R. Co. v.*

<sup>22</sup>*Davis v. Bryant*, 2 Bibb, 110.

<sup>23</sup>*Smith v. Crow*, 3 A. K. Marsh. 603.

<sup>1</sup>*Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *St. Paul & P. R. Co. v. Schurmeier*, 7 Wall. 286, 19 L. ed. 78; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Forsyth v. Smale*, 7 Biss. 201, Fed. Cas. No. 4,950; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403, 6 N. W. 857; *Rice v. Ruddiman*, 10 Mich. 125; *Boorman v. Sunnucks*, 42 Wis. 233; *Stoner v. Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968; *Hardin v. Jordan*, 16 Fed. 823; *Pratsch v. Aberdeen Packing Co.* 7 Wash. 346, 35 Pac. 123; *Poynter v. Chipman*, 8 Utah, 442, 32 Pac. 690; *Knudsen v. Omanson*, 10 Utah, 124, 37 Pac. 250; *Maynard v. Pudget Sound Nat. Bank*, 24 Wash. 455, 64 Pac. 754; *Underwood v. Smith*, 109 Wis. 334, 85 N. W. 384; *Olson v. Thorndike*, 76 Minn. 399, 79 N. W. 399; *Com. v. Hipple*, 7 Pa. Dist. R. 399; *Wood v. Appal*, 63 Pa. 210; *Hill v. Rowers*, 1 Mich. N. P. 51; *June v. Purcell*, 36 Ohio St. 396; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; *St. Paul, S. & T. F. R. Co. v. First Div. of St. Paul & P. R. Co.* 26 Minn. 31, 49 N. W. 303; *Everson v. Wassera*, 44 Minn. 247, 46 N. W. 405; *Peucker v. Canter*, 62 Kan. 363, 63 Pac. 617; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479; *Shelton v. Maupin*, 16 Mo. 124; *Sphung v. Moore*, 120 Ind. 352, 22 N. E. 319; *Tolleston Club v. State*, 141 Ind. 197, 38 N. E. 214; *Sizer v. Logansport*,

151 Ind. 626, 44 L. R. A. 814, 50 N. E. 377; *French-Glenn Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102; *Houch v. Yates*, 82 Ill. 181; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59; *Minto v. Delaney*, 7 Or. 337; *Moore v. Willamette Transp. & Locks Co.* 7 Or. 355; *Wright v. Day*, 33 Wis. 260; *Menasha Wooden Ware Co. v. Laurson*, 70 Wis. 600, 36 N. W. 412; *Turner v. Parker*, 14 Or. 340, 12 Pac. 495; *St. Clair County v. Lovington*, 23 Wall. 64, 23 L. ed. 62; *Provins v. Lovi*, 6 Okla. 941, 50 Pac. 81; *Johnson v. Tomlinson*, 41 Or. 198, 68 Pac. 406; *Washougal & L. Transp. Co. v. Dalles, P. & A. Nar. Co.* 27 Wash. 400, 68 Pac. 74.

The rule that the water itself and not the meander line is the boundary applies to grants on the sea shore. *Jones v. Martin*, 35 Fed. 348; *Coburn v. San Mateo County*, 75 Fed. 520.

Ledges or spits or tongues or points of land projecting out beyond the meander line of a bay are included as part of the fractions of sections shown on a government survey, and are conveyed by government title. *Ex parte Davidson*, 57 Fed. 883; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

The boundary of a lot in a section surveyed and sold in lots instead of regular subdivisions extends to the next 8th line, and not merely to the meander

*Schurmeir*,<sup>2</sup> meander lines are run in surveying fractional portions of the public land bordering upon navigable waters, not as boundaries of the tract, but for the purpose of defining the sinuosities of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. The fact that by carrying boundaries to the water the grantee will receive more land than he paid for will not alter the rule.<sup>3</sup> But the quantities of land between the meander line and the water may be so great as to indicate that there was no intention of making the stream the boundary, or the facts of the case may be such as to show that the stream was not regarded as the boundary, and in such cases the boundary will not go beyond the line. Thus, where the meander line of the government survey was really a mile or more from the main waters of the river, and the water line of a bayou opening into the river was evidently intended as the real boundary, the patent will not convey a strip of unsurveyed land between the bayou and the river.<sup>4</sup> Conceding that a meander line bordering on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the banks of the stream, as a means of ascertaining the amount of land subject to sale, nevertheless the question whether such line does define the sinuosities of the bank of the stream or not is one which may be determined by evidence *aliunde*. The mere fact that it is run and designated as the meander line upon the plats is not conclusive.<sup>5</sup> Therefore, where the line is not in fact run on the banks of the water, and was apparently not intended to be run on the bank, the line, and not the water, will be the boundary.<sup>6</sup> As stated in *Fuller v. Shedd*<sup>7</sup> a grant of land by the gov-

line of a river constituting such boundary on a government plat, where the actual location of the river differs from the meander line; unless the river is reached without extending the boundary to that line. *Lally v. Roseman*, 82 Wis. 147, 51 N. W. 1132.

<sup>1</sup> 7 Wall. 272, 19 L. ed. 74.

<sup>2</sup> *Schlosser v. Cruickshank*, 96 Iowa, 414, 65 N. W. 344; *Kirwan v. Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275; *Herald v. Yumisko*, 7 N. D. 422, 75 N. W. 806.

<sup>3</sup> *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Security Land & Exploration Co. v. Burns*, 87 Minn. 97, 91 N. W. 304.

<sup>4</sup> *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303.

<sup>5</sup> *Lammers v. Nissen*, 4 Neb. 245; *Bis-*

*sell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Harrison v. Stipes*, 34 Neb. 431, 51 N. W. 976.

A patentee of lands bounded by a meandered line run under the mistaken supposition that it adjoined a body of water is not entitled to land beyond the meandered line if no body of water would have been within the boundaries of the section had the sectional lines been run at their proper places. *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160.

If the government surveyor omits to include large tracts of land between the meander line and the stream, the grant will extend only to the meander line, and not to the stream. *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195; *Little v. Pherson*, 35 Or. 51, 56 Pac. 807; *Lam-*

ernment will be construed as bordering upon a stream or other natural body of water, although a narrow strip of land lies between the meander line as surveyed and the natural boundary, but much smaller in proportion than the land granted; but where the land outside the meander line is so grossly in excess of that sold that it is apparent there is fraud or mistake in the survey, the meander line will be the boundary. If the grant is made with reference to the lines, and only the land which is duly surveyed is intended to be conveyed, the lines will be the boundaries.<sup>8</sup> So, a line meandered along the water line of a marsh forms the boundary line of the fractional sections bordering on the marsh and will not be considered as merely indicating the quantity of upland to be paid for, where the patents convey only the lands surveyed and make the meander line the boundary.<sup>9</sup> The government may subsequently survey such lands and grant them to another person.<sup>10</sup> The rule is well settled that, in surveying or meandering a navigable stream or lake by the government, unless an intent is plainly shown to make the "meander line" the actual boundary of the fractional section surveyed, it must be considered as run for the purpose of ascertaining the quantity of land to be paid for by the purchaser, and not as a boundary line, and the section lines will extend beyond such meandered line to the actual stream or lake; but when the intent of the surveyors was plainly to make the meandered line the boundary of the fractional section, such meandered line will govern as the boundary, and not include marsh land, in which are islands of dry land, between it and the navigable water.<sup>11</sup> The policy of such a construction is well shown in *Knudsen v. Omanson*,<sup>12</sup> where the court said the owners of lands bordering on small inland lakes have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If they are limited to the meander or high-water line it would open the door for prowling speculators to step in and acquire title

*mers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303.

<sup>8</sup> 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286.

<sup>9</sup> Under a grant by Congress of swamp lands which grants all legal subdivisions, land lying between the meander line of lands bordering on the bank of a slough and the slough as it actually exists, which has never been surveyed or platted, will not pass, since the land, not being a legal subdivision, is not within the terms of the grant. *Boynton v. Miller*, 22 Iowa, 579.

It is incumbent upon one claiming land as embraced within a donation land grant, the boundary of which is the meander line, to show that the land so claimed is above such line. *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418.

<sup>10</sup> *Niles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 608, 85 Fed. 45.

<sup>11</sup> *Smith v. Miller*, 105 Iowa, 688, 70 N. W. 123, 75 N. W. 499.

<sup>12</sup> *James v. Howell*, 41 Ohio St. 606.

<sup>13</sup> 10 Utah, 124, 37 Pac. 250.

from the state to any relictions produced in course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines and practical injustice to the owner of the original riparian estate which would follow would of themselves be sufficient reasons for refusing to adopt any such doctrine. After the government has sold lands as bounded upon a navigable lake in accordance with its survey, the land department has not authority, on a claim that the meander line as shown by the plat is incorrect and is in fact at some distance from the lake, to survey and sell the land between such meander line and the actual boundary of the lake, as against purchasers in good faith of the fractional lots, who bought them largely because of the riparian rights, where the only monument or boundary visible was the bank of the lake, with reference to which they formed their judgment as to the location, character, and value of the land.<sup>13</sup> High and dry land between a meander line and the shore of a lake, whether navigable or not, belongs to the abutting owners as though it came from accretion or reliction, the side lines of such land being conveyed toward a point at the center of the lake.<sup>14</sup> The title of the grantee will extend to the point allowed by the local laws, so that, in case they regard his title as going to the thread of the stream, it will extend to that point.<sup>15</sup> If the meander in fact attempts to run along the bank of the stream, the line is conclusive that the stream is the boundary, and that no unsurveyed land was left between the meander line and the stream, in any action between individuals.<sup>16</sup> The rule as to the meander line not being a boundary applies equally when the line is run in the water. So that, in case, by the local law, the title stops with the shore, it will not go to the line but will stop at the shore.<sup>17</sup> Some courts have held that the meander line, if it can be found, constitutes the true boundary, and that the grantee cannot claim the water as his boundary.<sup>18</sup>

**419. Monuments.**— Many of the original government grants in this country were made with reference to lines which were run through

<sup>13</sup>*Murphy v. Kirwan*, 103 Fed. 104.

<sup>14</sup>*Hanson v. Rice* (Minn.) 92 N. W. 982.

<sup>15</sup>*Illinois & M. Canal v. Haven*, 10 Ill. 548; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Jones v. Pettibone*, 2 Wis. 308.

A grant of land bounded by the meander line of a non-navigable river carries with it title to the soil to the center

of the stream, including islands left unsurveyed by the Federal government, unless the terms of the grant clearly indicate the intention to stop at the margin of the river. *McBride v. Whitaker* (Neb.) 90 N. W. 966.

<sup>16</sup>*McBride v. Whitaker* (Neb.) 90 N. W. 966.

<sup>17</sup>*Musser v. Hershey*, 42 Iowa, 356.

<sup>18</sup>*Fulton v. Frandolig*, 63 Tex. 330.

a wilderness, under circumstances which made accuracy of measure and the running of true magnetic courses very difficult. Under such circumstances it was held that if actual monuments could be found, with reference to which the grant was made, they would control the courses and distances. Within this rule streams, rivers, springs, lakes, the seashore, and other natural bodies of water are regarded as monuments.<sup>1</sup> A swamp may also constitute a natural monument. But in order to make the rule applicable, the call for the natural object must be of a kind which makes it controlling.<sup>2</sup> Calls are divided into two classes,—descriptive or directory, and special locative calls. The former, though consisting of lakes, rivers, and creeks, must yield to special locative calls, for the reason that the latter, consisting of the particular objects upon the lines or corners of the land, are intended to indicate the precise boundary of the land, while the former are called for without any care for exactness, and merely intended to point out or lead a person into the region or neighborhood of the tract surveyed.<sup>3</sup> The call in a grant for land lying on both sides of a creek is general and directory, and must yield to a call for special and locative courses and distances, even though such courses and distances, when run out, throw said land entirely on one side of said creek.<sup>4</sup> But when a call for a water course is locative and there are no circumstances to control the application of the rule, it must govern the location of the grant, and both course and distance must yield to it.<sup>5</sup>

<sup>1</sup>*Horton v. Chevington & Bun Coal ly*, 5 T. B. Mon. 159, 17 Am. Dec. 50: Co. 2 Pennyp. 25; *Den ex dem. Pollock v. Harris* 2 N. C. (1 Hayw.) 252; *Brown v. Milliman*, 119 Mich. 606, 78 N. W. 785; *Robertson v. Mosson*, 26 Tex. 249; *Phillips v. Ayres*, 45 Tex. 601; *Stafford v. King*, 30 Tex. 258, 94 Am. Dec. 304.

<sup>2</sup>*Hartseld v. Westbrook*, 2 N. C. (1 Hayw.) 258.

<sup>3</sup>*Stafford v. King*, 30 Tex. 258, 94 Am. Dec. 304; *Phillips v. Ayres*, 45 Tex. 601; *Roberts v. Cunningham*, Mart. & Y. 67.

<sup>4</sup>*Wright v. Mabry*, 9 Yerg. 55.

<sup>5</sup>*M'iver v. Walker*, 9 Cranch, 173, 3 L. ed. 694; *Elliot v. Mitchell*, 28 Tex. 106; *Watkins v. King*, 55 C. A. 290, 118 Fed. 536; *Hollister v. Hunt*, 9 Ohio, 8; *Rayfield v. Dixon*, 38 Md. 81; *Howard v. Moale*, 2 Harr. & J. 249, 269; *Doe ex dem. Haughton v. Rascoe*, 10 N. C. (3 Hawks.) 21; *Swaine v. Bell*, 3 N. C. (2 Hayw.) 139, 3 N. C. (2 Hayw.) 179; *Whiteside v. Singleton*, 1 Meigs, 207; *Disney v. Coal Creek Min. & Mfg. Co.* 11 Lea, 607; *Doe ex dem. Madison v. Hildreth*, 2 Ind. 274; *Alexander v. Live-*

*ly*, 5 T. B. Mon. 159, 17 Am. Dec. 50: *Simms v. Baker*, 1 Cooke (Tenn.) 146; *Rush v. Todd*, 1 Bibb, 64; *Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Newson v. Pryor*, 7 Wheat. 7, 5 L. ed. 382.

A boundary described as along a stream in a certain magnetic direction will convey along the stream when the two descriptions are variant. The "natural" boundary governs rather than the "mathematical." *Den ex dem. Becton v. Chestnut*, 20 N. C. (4 Dev. & B. L.) 335.

Where the call in a grant describes a line as crossing a river, it will prevail over a call for a distance by such line falling short of such river: and the fact that a surveyor, in making a professional survey of such lands, refused to fix the boundary beyond the distance called for, and unlawfully surveyed such line accordingly, thereby depriving the owner of a part of the land legally his under said grant, would not be binding upon such owner. in the absence of proof that he had authorized such line to be

And this is true even though the length of the line is increased as much as four times the distance called for.<sup>6</sup> And the converse of the rule is true, so that the line will be shortened if the monument is reached before the distance is run.<sup>7</sup> A call for a lake will carry title to the water.<sup>8</sup> So, with respect to a sound,<sup>9</sup> and the seashore,<sup>10</sup> and a bayou.<sup>11</sup> There are cases where the general rule cannot be applied. For instance, if, in locating the lines, the surveyor did not in fact run them upon the ground, but platted them, assuming that they reached a body of water which he did not in fact find, such call will not control the distance which is marked on the plat.<sup>12</sup> So, where there is a

no run, and that he had afterwards recognized and adopted it as the true boundary of his tract. *Overton v. Cannon*, 2 Humph. 264.

*Fulwood v. Graham*, 1 Rich. L. 491; *Witherspoon v. Blanks*, 3 N. C. (2 Hayw.) 75; *Witherspoon v. Blanks*, 1 N. C. (1 Taylor) 110; *Fowler v. Nixon*, 7 Heisk. 719.

The fourth boundary line of a tract of land will be a river with its meanders, where the point of beginning is on the river and the call for the third line is a given distance from a stake to another stake on the river, thence down the river binding thereon a given course and distance to the point of beginning, although the distance called for as the third line will fall short of the river by a long distance, and the course and distance called for between the two points on the river do not correspond with the course and distance necessary to follow the river, and the quantity embraced thereby is considerably more than the grant called for. *Pitman v. Nunnally*, 17 Ky. L. Rep. 793, 32 S. W. 606.

*Den ex dem. Carroway v. Witherington*, 4 N. C. (Term. Rep.) 275.

*Booth v. Strippleman*, 26 Tex. 436; *Literary Fund v. Clark*, 31 N. C. (9 Ired. L.) 58.

*Slade v. Neal*, 19 N. C. (2 Dev. & B. L.) 61.

*Northern R. Co. v. Jordan*, 87 Cal. 23, 25 Pac. 273.

Boundaries by courses and distances which include land between the lines of extraordinary and ordinary high tides, as given in a survey and patent based upon a confirmatory decree of a Mexican land grant calling for the "shore" of the bay of San Francisco as the boundary thereof, which under the law of Mexico was the line of extraordinary high tide, will control the latter call,—especially where such shore is not shown to be a

feasible and obviously natural boundary or monument. *Valentine v. Sloss*, 103 Cal. 215, 37 Pac. 226, 410.

<sup>11</sup> Where a Spanish grant describes property which lies on the Mississippi and extends back to the sea marsh as "about 2 leagues" from one bayou, the name of which is given, to another bayou, the name of which is also given, the grant is *per aversionem*, and the boundaries thus named control the superficial and lineal measurement. *Booth v. Buras*, 104 La. 614, 29 So. 260.

<sup>12</sup> *New York & T. Land Co. v. Thomson*, 83 Tex. 169, 17 S. W. 920; *Sanborn v. Gunter*, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72; *Colclough v. Richardson*, 1 M'Cord, L. 168.

Where on a plat annexed to an original grant a river was represented as running in nearly a straight line within and immediately along the southern boundary, which was shown as a straight line, the southwest corner being 5 chains south of the river, and the southeast corner 10 chains south; and on a resurvey the lines on the north side of the river were found to be distinctly marked, while those on the south had never been run, and were open lines, and that, by a southerly and considerable bend in the river, considerable land lying north of it would be cut off if a straight line was drawn from the southwesterly to the southeasterly corners,—it was held that, as course and distance must determine the location in the absence of actual marks, the eastern and western lines should not be extended beyond the southeastern and southwestern corners as shown on the plat, so as to take in the entire bend of the river, but a straight line should be drawn from one corner towards the other until it intercepts the bend in the river, when it should yield to that as a natural mark and follow it until it arrives at a point

conflict of monuments, that should be taken which is best established.<sup>13</sup> If, at the time of the survey, the water of the river is so high that the true location of the river cannot be ascertained, it will not control distance.<sup>14</sup> And in case of evident mistake in the name of the stream called for, the stream intended, and not the one called for, will control.<sup>15</sup> And if it is evident that the course and distance most nearly indicate the intent of the grantor, the call for the natural object will not control.<sup>16</sup> Thus, where the courses and distances seem to be accurately run and marked, and to indicate truly, what was intended to be conveyed, they will control the call for a natural object.<sup>17</sup>

where such straight line would have crossed the river had it continued, and then continue in a straight line to the opposite corner. *Coats v. Matheus*, 2 Nott & M'C. 99.

<sup>13</sup>*Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099; *Ulman v. Clark*, 100 Fed. 180; *Graham v. Dudley*, 1 Cooke, 353.

Where a description in a grant, after describing the third line as extending east and terminating at a tree, continues "thence southwardly along the various courses of the river," the third line will not be extended to the river but will terminate at the tree, where it is apparent that such was the intention when the original survey was made; and the fourth line will commence at the tree and run southwardly until it strikes the river, and continue along the river in the same direction. *Pender v. Coor*, 3 N. C. (2 Hayw.) 183.

But a river constitutes a boundary under a description in a patent which, after calling for the lines leading to a white oak, reads "thence along the river to the place of beginning," although the white oak is situated one half mile from the river. *Den ex dem. Sandifer v. Foster*, 2 N. C. (1 Hayw.) 237.

<sup>14</sup>A water highway constituting one of the boundaries of a grant of land will not control the courses, distance, and quantity, where at the time of the grant the line of the highway was not designated on the surface, and it had no definite dimensions or boundaries, but all the country thereabouts was a waste of waters. *Payne v. English*, 79 Cal. 540, 21 Pac. 952.

Calls for courses and distances in a patent will control and determine the location of the thread of a changeable creek called for as one of the boundaries, in case of doubt as to the location

thereof at the time of the survey, if the other calls lead to a place where such thread might naturally have been; and to locate it at a different place where it is claimed to have been would require not only a variance of the courses and distances, but the disregarding of certain fixed points. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 139.

<sup>15</sup>*Jones v. Burgett*, 46 Tex. 285.

Where an original grant called for a certain creek as a boundary, and referred to a plat which represented the creek as a boundary, and also certain bluffs as situate on the creek, when in fact the bluffs were situated on a mud flat or creek which had probably been mistaken for the creek mentioned in the grant and plat, and which was as far as the surveyor had gone, such mud flat or creek will be considered the boundary. *Schoolbred v. Vanderhorst*, 1 Brev. 315.

It being in issue whether the east line of a survey was a river or was a slough taken by mistake for the river, it is competent to show that, although calling for the river, the meanders given did not conform to the bed of the river, but did very nearly follow the course of the slough; and upon such evidence, tending to show the footsteps of the surveyor, it was proper to submit to the jury the question as to the locality of the east line as made by the surveyor.—that is, whether the slough or the river was the original line as made by him. *Allen v. Koepsel*, 77 Tex. 505, 14 S. W. 151.

<sup>16</sup>*Linney v. Wood*, 66 Tex. 22, 17 S. W. 244.

<sup>17</sup>*Buckley v. Gilmore*, 12 Ohio 63; *Ulman v. Clark*, 100 Fed. 180; *Wright v. Mabry*, 9 Yerg. 55; *Roberts v. Cunningham*, Mart. & Y. 67; *Yoder v. Swope*, 3 Bibb, 204.

So, where the call for the natural object is plainly a mistake.<sup>18</sup> Where the grantee accepts a location according to course and distance, he cannot afterwards claim according to the call for natural objects.<sup>19</sup> If the grant calls for two monuments and the river is the only one found, that will control.<sup>20</sup> The fact that the call for the body of water is in the course of the line, and not its terminus, does not change the application of the rule.<sup>21</sup>

**420. Running boundary along stream.**—If a stream is made a boundary of a grant, the boundary will follow the course of the stream in its meanderings; and the fact that lines are attempted to be run along the bank which do not in fact correspond with the course of the stream is immaterial,—at least where the corners of the courses designated are not specified.<sup>1</sup> Where the call for a line to run down a stream does not call for its meanders, and the call for the stream conflicts with the call for courses and distances, the line of the survey will be

<sup>18</sup>*Evans v. Corley*, 9 Rich. L. 143; *Massengill v. Boyles*, 4 Humph. 205; *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696; *Bruce v. Morgan*, 1 B. Mon. 26; *Bailey v. McConnell*, 12 Ky. L. Rep. 473, 14 S. W. 337; *Hicks v. Coleman*, 25 Cal. 143, 85 Am. Dec. 103; *Smallwood v. Hatton*, 4 Md. Ch. 95; *Galveston Co. v. Tankersley*, 39 Tex. 652; *Webb v. Bedford*, 2 Bibb, 354; *Weakly v. Legrand*, 1 Overt. 265; *Posey v. James*, 7 Lea, 98.

<sup>19</sup>*Singleton v. Whiteside*, 5 Yerg. 18. But this case was decided differently on different evidence in 1 Meigs, 207.

<sup>20</sup>*Unscheid v. Scholz*, 84 Tex. 265, 16 S. W. 1065.

<sup>21</sup>*Newson v. Pryor*, 7 Wheat. 7, 5 L. ed. 382.

A boundary line proved to have been actually run between two given points, so as to go through the middle of a spring, will control calls in a deed to run from corner to corner without mentioning any intervening objects, although such spring is entirely on one side of a straight line run between the given corners. *Lyon v. Ross*, 1 Bibb, 466.

But the rule that a water course or other natural boundary will control course and distance is not so closely adhered to where the water course is represented as running through the tract close to the boundary, as it is where the water course is called for as a boundary; in the latter case the course and distance are laid down with more attention to rule while in the former they are often laid down by mere conjecture. *Colclough v. Richardson*, 1 M'Cord, L. 168.

<sup>1</sup>*Cockrell v. M'Quinn*, 4 T. B. Mon. 62; *Bruce v. Taylor*, 2 J. J. Marsh, 160; *Brown v. Huger*, 21 How. 306, 16 L. ed. 126; *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289; *Buckley v. Blackwell*, 10 Ohio, 508;

Where a grant described the boundary as beginning at a hickory standing not far from the river, thence down the river a certain course and distance, which course ran obliquely from the river, it will be disregarded and the call for the river will control. *Harromond v. M'Glaughon*, 3 N. C. (2 Hayw.) 67.

A call for a boundary down the line of a certain creek or slough to its mouth in a bay requires the following of such creek to its mouth, and does not authorize a turning aside at an intermediate point where another branch flows in, to follow up the latter and include a widely detached basin in which it has its source. *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

A call for a line as beginning at a marked white oak on a certain creek and running up the creek a specified distance to a marked oak requires such line to bind on the creek only because of a subsequent statement in the description that the tract was bounded on that side by such creek, since the expression "running up the creek" is not a binding call, but merely indicates the general direction of the line referred to, and, but for the other statement, would require the



controlled by the magnetic line called for.<sup>2</sup> In measuring distance along a navigable stream for the purpose of locating the beginning corner of a grant, the meanders of the stream will be followed.<sup>3</sup> It is said in *White v. Wilson*,<sup>4</sup> there seems to be a diversity of opinion as to the most rational construction of a locative call in an entry where a given distance up or down a water course is specified,—whether it should be on the meanders of the stream or in a direct line. But this difference of opinion is merely in the application of the rule to classes of streams. While the rule stated above is correct so far as large streams are concerned, it is not applicable to branches and small streams. The usual mode of traveling along the latter class of streams is not upon the water but on land, and usually in a straight line, crossing and recrossing the stream as may be required; so that, in going a certain distance upon the course of such a stream, the presumption is that the distance is measured in a straight line; and that method will be followed in looking for a locative point, unless it is evident that a different method was pursued in marking it.<sup>5</sup> But, as said in *Thurston v. Masterson*,<sup>6</sup> the rule that a call for distance from one object to another on a small stream is to be construed in a straight line has exceptions, one of which is when there are insuperable obstacles to running a straight line. There can be no fixed rule applicable to all cases. The intention of the locator must be arrived at by construction, from the calls of his entry, compared with the objects and obstacles found on the ground. So that, in locating a point of beginning on a stream a given distance from another point thereon, the distance will be measured with the meanders of such stream, and not in a direct line, where such stream is difficult to cross, which would be necessary if the measurements were to be taken in a direct line, and no course or direction is given other than the creek itself; that being the more reasonable construction, under the circumstances of the case, of the intention of the locator.<sup>7</sup> When surveying an entry

running of a straight line between the designated points. *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

<sup>2</sup>*Ulman v. Clark*, 100 Fed. 180.

<sup>3</sup>*Littlepage v. Fowler*, 11 Wheat. 215, 6 L. ed. 458; *Johnson v. Pannel*, 2 Wheat. 206, 4 L. ed. 221; *People v. Henderson*, 40 Cal. 29; *Burns v. Greaves*, Cooke (Tenn.) 75; *Roberts v. Huff*, 1 Hardin (Ky.) 379; *Hite v. Graham*, 2 Bibb, 141; *Thurston v. Masterson*, 9 Dana, 228; *McClung v. Overton*, 1 Litt. (Ky.) 186.

<sup>4</sup>3 Bibb, 539.

<sup>5</sup>*Stephens v. Hedden*, 4 Bibb, 107;

*Johnson v. Brown, Sneed* (Ky.) 49; *Morrison v. Coghill*, 4 Bibb, 379; *Carland v. Rowland*, 3 Bibb, 125; *Boicman v. Melton*, 2 Bibb, 151; *Sanders v. Morrison*, 2 T. B. Mon. 109, 15 Am. Dec. 140; *Landrum v. Hite*, 1 A. K. Marsh. 419; *Finlay v. Granger*, 2 A. K. Marsh. 175; *Theobalds v. Fowler*, 3 A. K. Marsh. 578; *Banta v. Calhoon*, 2 A. K. Marsh. 160.

<sup>6</sup>9 Dana, 228.

<sup>7</sup>*Thurston v. Masterson*, 9 Dana, 228.

The boundary lines of land described as being on the Kentucky river, beginning thereon at the upper side of the

the meanders of the stream are always reduced to a straight line.<sup>8</sup> Therefore, when an entry is run down a stream a certain distance and then away from the stream for quantity, the distance on the stream will be a straight line.<sup>9</sup>

**421. What will reserve title in grantor.**— In order to have the rule that a grant bounded by a water course will extend to the thread of the stream apply, the grant must be in fact bounded by the water course.<sup>1</sup> In addition to this there must be nothing to indicate an intention on the part of the grantor to reserve the title to the bed of the water course. Therefore, to pass the title to the thread of the stream, the grant must be made unreservedly with the water course as a boundary. Under this rule, if the form of the grant is such as to indicate an intention on the part of the government to reserve the title, it will not pass. A good illustration of this rule is found in *Canal Comrs. v. People*.<sup>2</sup> In that case the grant was of all that tract lying and being in and upon the banks of the river and extending along both sides of said river. Subsequently the state granted the islands in the river to other persons, thereby showing that the intention was not to pass the title to the bed to the original grantee. There was enough in this to prevent the title from passing to the grantee of the banks; but, while the court decided against the grantee of the banks, the judges were not agreed upon the ground of the decision,

mouth of a creek and running down the river a certain distance, thence out from the river, including the lower part of the next creek below, and extending along near that creek far enough so that a line parallel to the river over from that line to and across the upper creek, and from thence to include such creek to its mouth at the point of beginning, —will be the Kentucky river with its meanders, and both creeks, just including the same with the meanders thereof, although the distance called for to run down the Kentucky river would extend somewhat below the mouth of the next creek, as called for. *Holder v. Jouitt*, Litt. Sel. Cases, 381.

<sup>1</sup>*Littlepage v. Fowler*, 11 Wheat. 215, 6 L. ed. 458.

<sup>2</sup>*Craig v. Hawkins*, 1 Bibb, 53; *Green v. Watson*, 1 Bibb, 105.

A grant of a square league of land bounded on a non-navigable stream is to be measured by a line on such stream following the meanderings thereof until a point is reached one league distant, then reduced to a straight line, from the point of beginning; the second and fourth lines to be extended parallel to

each other and at right angles to the general course of the first line for the required distance, and the third line to be run between such side lines, following the river in all its meanderings and not parallel with its general course, where it is called for as parallel to the river. *Hicks v. Coleman*, 25 Cal. 142, 85 Am. Dec. 103.

<sup>1</sup>*Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243.

The purchaser of a fractional lot in the northeast quarter of a quarter section, bounded on the survey and map by the meander line of a lake, which in fact does not touch the east half of such quarter section, takes only the full northeast one quarter of that quarter section, and not the whole east half thereof. *Whitney v. Detroit Lumber Co.* 78 Wis. 240, 47 N. W. 425.

Land which lay under the waters of a bay at the time a survey was made which only ran to a marsh bordering the bay is not within the limits of the survey. *Buras v. O'Brien*, 42 La. Ann. 527, 7 So. 632.

<sup>5</sup> 5 Wend. 423.

and it is difficult to determine what the actual decision in that case was.<sup>3</sup> A grant of land upon the banks of a navigable river, extending from the west side of the river westward and from the east side of the river eastward, does not include what lies between the east and west banks of the river.<sup>4</sup> And if the beginning point is on the bank of a river and the calls immediately run away from it, the bed of the river will not pass.<sup>5</sup> A patent running to a river, thence "down along said river," will not carry title to the center where it appears that the government intended to convey only a certain number of acres of land to each patentee, and, when there was not enough land on the bank to make up such amount, it used the islands in the river to fill the quota.<sup>6</sup> Anything which indicates the intention of the state to reserve title to itself will prevent its passing to the grantee.<sup>7</sup> And the subsequent conduct of the government may be looked at in arriving at its interpretation of the grant. For, while the government cannot defeat its grant by subsequent acts, if it shows by its conduct that it understood the grant in a certain way, the courts may consider such understanding in arriving at the true construction of the grant.<sup>8</sup>

<sup>3</sup>*Canal Comrs. v. People*, 5 Wend. 423. The decision was put upon many different grounds, some of which were that a portion of the grant was upon tide water, that the grant was to be construed by the civil, and not by the common, law, that it must be construed strictly in favor of the state, and that the grantee could claim nothing which did not pass by the express terms of the grant.

In a later case it was held that grants by the state of islands in a river do not show the intention to abrogate the common-law principle that grants bounded by a river carry title to the center. *People ex rel. Tibbits v. Canal Appraisers*, 13 Wend. 355. The decision in that case in favor of the riparian claimant was, however, reversed in 17 Wend. 507, and the decision in 5 Wend. was affirmed upon the ground, so far as it can be derived from the opinions, that the common-law rule of riparian ownership should not apply in cases of the large rivers of this country.

<sup>4</sup>*People v. Page*, 39 App. Div. 110, 56 N. Y. Supp. 834, Affirming 39 App. Div. 115, note, 58 N. Y. Supp. 239.

In *Donegal v. Templemore*, 12 Ir. L. Rep. 175, a patent from the Crown for land the boundaries of which were described as beginning on a river which "runs between the lands and other territories and parcels called" a certain name, was held to exclude the river.

<sup>5</sup>The upper bank of a creek, not including any part of the bed of the stream, will form the boundary line to a tract of land described in the entry as beginning at the mouth of a creek where it empties into a river, and to run up the creek and up the river for quantity. *Greenup v. Sneed*, 2 Bibb, 527. Conversely, a river and creek, including the bed of the creek, will form two of the boundary lines to land described in the entry as beginning at the mouth of a creek where it empties into a river on the upper side of such creek, thence running down the river a given distance, thence from the beginning up the creek for quantity. *Ibid.*

<sup>6</sup>*Orendorff v. Steele*, 2 Barb. 126.

<sup>7</sup>*People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 491.

<sup>8</sup>Where the Federal government surveyed wet and marshy land adjacent to Lake Erie, and afterwards conveyed it to the state as swamp land, the boundaries of the lake are thereby conclusively established; and in an action by a private purchaser of the lands from the state, to enjoin parties from hunting and fishing on the land, such privilege cannot be insisted on on the ground that such land is a part of the bed of the lake. *Brown v. Parker*, 127 Mich. 390, 86 N. W. 989.

After a secretary of the interior has directed a survey to be made upon the

If the grant is bounded by a well-marked line on the bank which is not coincident with the water, the title will extend only so far as the line, and the grantee will acquire no riparian rights.<sup>9</sup> So, if the line along the river is described as a direct line, the line, and not the river, is the true boundary.<sup>10</sup> In order to have this rule apply, however, the line must be described so distinctly as to indicate an intention that the stream shall not be the boundary.<sup>11</sup> A description of boundaries

basis of the boundary of a lake as it existed in 1769, at the time of the grant, a survey ordered by a succeeding secretary of the interior to be made along the line as it existed in 1888, at the time the survey was first ordered, will not be enjoined on the ground that the rights of the owners of the grant were conclusively fixed under the first decision, and that under the guise of interpreting that decision their rights are to be totally taken away. *New Orleans v. Paine*, 49 Fed. 12.

Continuous adverse possession of an island in a stream for more than twenty years under a purchase from the government according to a survey thereof made by the government after the making of the original survey, under which the adjacent lands were sold, is sufficient to vest a good title thereof in the claimant as against a riparian owner on one side of the stream claiming the same as an accretion to his land by reason of the formation of a bar in the channel of the stream on that side, partially filling it up until there was no current except in high water, but who never has had possession of the island nor exercised any acts of ownership over the same. *Bonevits v. Wygant*, 75 Ind. 41.

A purchaser from the United States of land which appears by the survey thereof to abut on a non-navigable lake does not take to such lake, where, prior to his purchase, a second survey had been made which meandered the margin thereof at some distance from the original survey, as he must be deemed to have taken with knowledge that the government had resurveyed the upland between the first survey and the margin of the lake; and he is therefore estopped to claim beyond the boundary of the survey under which he purchased. *Warner Stock Co. v. Calderwood*, 36 Or. 228, 59 Pac. 115.

But a resurvey of lands, mostly covered with water, between the meander line of a lake as originally surveyed and the lake, no fraud or mistake being

claimed in the original survey, and but slight changes in the condition having taken place since the original survey, is unauthorized; and patents for the land thus surveyed are void as attempting to destroy the vested riparian rights of those holding under the original grants to accretions forming on their shores. *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286.

<sup>9</sup>*McCormick v. Huse*, 78 Ill. 363; *Fulton v. Frandolig*, 63 Tex. 330; *Moseley v. Jamison*, 1 A. K. Marsh. 606.

Where a surveyor runs a division line till it strikes the bend of a river, there is no law to prevent him from going around the bend and running his survey from a point on the river directly in the course he was running, so as to give to the tract on each side of the line its proper quantity of land. *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671.

A description of boundaries beginning at three bounded white oaks standing by a river, and running and bounding on the said river a specified distance and then by several courses and distances in varying directions, running in the first instance almost directly from the river, and the last line running to a bounded white oak by the river,—requires the running of the lines subsequent to the first by courses and distances, and not as bounding on the river, which would require the rejection of all the courses subsequent to the first, as the expression "bounding on the river," placed in the first clause of the description, cannot be supplied as a necessary implication in the subsequent clauses. *Hammond v. Ridgely*, 5 Harr. & J. 246, 9 Am. Dec. 522.

<sup>10</sup>*Thomas v. Godfrey*, 3 Gill & J. 142.

<sup>11</sup>*Jefferson Seminary v. Wagon*, 1 A. K. Marsh. 243; *Turner v. Parker*, 14 Or. 340, 12 Pac. 495.

Where the calls in a conveyance of land are for two corners at, in, or on a stream, or its banks, and there is an intermediate line extending from one such corner to the other, the stream is the boundary unless there is something

beginning at a bounded red oak standing by a branch of a river, and running around the land to the river, then running by the river a certain distance to a tree, then by a straight line to the point of beginning, will prevent the land from going to the river between the two latter points, and will bound it by a straight line.<sup>12</sup> Where the question whether or not a line is to run by the river or to be run straight is ambiguous on the face of the deed, it is to be determined by the jury.<sup>13</sup> If the boundary is expressly made as beginning on the bank of the stream, and running thence by its margin, the title will go no farther.<sup>14</sup> And a boundary on the bank or edge of the stream may prevent the title from extending to the center.<sup>15</sup> As said in *Penrod v. Bruce*,<sup>16</sup> notwithstanding the general rule of construction of calls in a deed or patent, that where the meander of a stream is designated as a line, the boundary is at the thread or center of the stream, still this rule will not prevail where it is clear that the line is intended to be on the bank, and the whole bed of the stream is to belong to the

which excludes the operation of this rule by showing that the intention of the parties was otherwise. *St. Clair County v. Lovington*, 23 Wall. 63, 23 L. ed. 62.

If the lines are run around the grant from a beginning corner on the side of a stream to the third corner on an island in the stream, thence to the beginning, the last line will be a straight line and not follow the meanders of the stream, although it is stated in the grant that the grant bounds on the stream. *Yoder v. Swope*, 3 Bibb, 204.

A peremptory call for a line as binding on a creek controls the running of the line by courses and distances which would be otherwise necessary by reason of inability to find either a tree called for as the termination of the line or to locate a point of land on the mouth of the creek on which it stood, under the rule that a line calling for a lost boundary must be run by courses and distances; and the line should be run to a point on the creek where its specified length, expended on the meanders thereof, terminates. *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

<sup>12</sup>*Hammond v. Ridgely*, 5 Harr. & J. 256, 9 Am. Dec. 522.

<sup>13</sup>*Dorsey v. Hammond*, 1 Harr. & J. 190, 201; *Davis v. Batty*, 1 Harr. & J. 264.

<sup>14</sup>*Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Sisson v. Cummings*, 35 Hun, 22.

<sup>15</sup>*Barthel v. Scotten*, 24 Can. S. C. 367.

Where a grant from the Crown is described as beginning at a stake standing on the "bank or edge" of a lake, and (after describing other courses) then south to a stake standing on the westerly bank or edge of said lake, and thence following the several courses of the said "bank or edge" to the place of beginning, it was held that the words "bank or edge" were intended to express the margin, and make the waters edge the boundary of the grant. *Burke v. Niles*, 13 N. B. 166.

A grant of land bounded by the water's edge at low-water mark on a lake will not extend the title to the center of the lake, although it is navigable only in the ordinary sense, so that the title to the bed might vest in private owners. *Webster v. Harris* (Tenn.) 59 L. R. A. 324, 69 S. W. 782.

The Kentucky court has made a strict application of this rule by holding that where the boundary lines are described as beginning on the bank of a creek, thence up the creek with its meanders, the boundary will be on the bank, and the grant will not include any portion of the stream,—at least where the grantor owns the land on both sides of the stream, and there is nothing to show that he intends to convey any part of the water. *Fleming v. Kenney*, 4 J. J. Marsh. 155.

<sup>16</sup>22 Ky. L. Rep. 1697, 61 S. W. 1.

land on one side. But something more than a mere bounding on the water's edge is necessary to prevent the grant from passing title to the center, for, under ordinary circumstances, a boundary on the water's edge means no more than a boundary on the water.<sup>17</sup> So, bounding the grant on the shore will reserve title to the soil under water.<sup>18</sup> But a grant described as extending to the bank of the river and thence along the river does not indicate an intention to depart from the general rule, and title will pass to the center.<sup>19</sup> Where the law prohibits the crossing of navigable streams by the lines of survey, this may be sufficient of itself to indicate an intention that the beds of the stream shall not pass;<sup>20</sup> although it is not conclusive, because the intention may be merely to permit as many persons as possible to obtain access to the water; and, in order to effectuate this, to prevent one grantee from obtaining land on both sides of the stream. If, after the survey is made, the river changes its channel so that the land is no longer riparian, the title of the grantee, when it is clear, will not follow the river to its new bed.<sup>21</sup> A public grant of land on a highway leading to a river will carry title to the center; so that, in case they border on the stream, the title to the soil beneath the stream to the center opposite the end of the highway will vest in the grantee.<sup>22</sup> If there is a highway upon the bank of a stream, the title to the bed of which is in the public, a grant bounded on the highway will carry title only to it, and the grantee will have no riparian rights.<sup>23</sup> And in one case it was held that the mere presence of a highway on the bank would prevent the grantee from obtaining riparian rights, because his title would go only to the center of the highway.<sup>24</sup> This decision can hardly be regarded as sound, because the extension of the titles is limited only by the private rights of opposite owners. And where the only private title on the opposite highway was on the opposite side of the stream, it extended only to the center of the stream; and a

<sup>17</sup>*Kains v. Turville*, 32 U. C. Q. B. 17.

<sup>18</sup>*Lock v. Cleveland*, 6 N. B. 390; *Smith v. State*, 13 Jur. 713.

Where a grant of land describes it as extending "to the Gulf of Mexico, thence with meanders of the gulf to the south-east corner," etc., the land is described as extending to the shore of the gulf and bounded by it. *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559.

But the limiting of the grant by the shore will not exclude the shore if the grantee exercises dominion over it. *Re Belfast Dock Act*, Ir. Rep. 1 Eq. 128.

<sup>19</sup>*Varick v. Smith*, 9 Paige, 547.

<sup>20</sup>*Swisher v. Grumbles*, 18 Tex. 164.

<sup>21</sup>*Rissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

<sup>22</sup>*Boston v. Richardson*, 13 Allen, 146.

<sup>23</sup>Where the survey of the confirmation of a Spanish concession bounded it by a street in an incorporated town, running along the bank of a river, the confirmer will not be entitled to land subsequently formed by accretion, although his original concession may have called for the river as a boundary. *Smith v. St. Louis*, 21 Mo. 36.

<sup>24</sup>*Illinois & M. Canal Trustees v. Haven*, 11 Ill. 554.

private grant on the side on which the highway was located would go to that point, including the whole of the highway.

**422. Effect of form of grant by United States Land Department.—**

The method of surveying and disposing of the public lands adopted by the Land Department of the United States government may have some effect in modifying the ordinary doctrine with respect to extension of boundaries into the water. If the lines of a section of land are run into a lake for the purpose of completing the section, and then a grant is made of the entire section, the grantee will take all, and only, what is included within his section lines; and it is immaterial that the shore line is meandered.<sup>1</sup> A grant having been of a definite section of land, there is no room for presumption or construction as to what the government intended. It granted a section of land and nothing else. So, if a quarter section of land is made fractional by a navigable water course, and a person receives a patent for a part of it on one side of the course where the area sold to him is noted on the plat and the contents calculated, his entry and purchase will not extend across the stream.<sup>2</sup> On the other hand, if the water course is included in the plat and sold, there is no question but that the grantee acquired title to the bed.<sup>3</sup> One claiming under a patent of a subdivi-

<sup>1</sup>*Kean v. Calumet Canal & Improv. Co.* 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; *Stoner v. Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968.

A purchaser from the government of a certain fraction of a section according to a resurvey of the section, which specifies the number of acres and describes the tract by metes and bounds, corresponding on one side to the meanders of the shore of a non-navigable pond covering a portion of the section and included in the survey, is confined to the boundaries defined in that survey; and his title does not, by virtue of his riparian rights as a shore owner, extend to the middle of the pond, where by the original survey the pond, as well as its margins, was surveyed as though dry land. According to such survey the government subsequently sold to another the whole quarter section, of which the above-described tract was a part, and the effect of extending the boundary of the first grant to the middle of the pond would be to over-lap the sectional lines as originally surveyed, and absorb a part or all of the land conveyed by the subsequent grant. *Edwards v. Ogle*, 76 Ind. 302.

So, one purchasing public land border-

ing on non-navigable water, as a given subdivision, according to a resurvey which meandered the water and described the land by metes and bounds, cannot maintain a claim of title to the center of the water, where such a claim would over-lap the section lines as originally surveyed as though no water existed. *Ibid.*

<sup>2</sup>*McCormick v. Huse*, 78 Ill. 363.

Where a public survey runs the lines of a section directly across the stream, and a grant is made of a triangle of land formed by the stream and two of the section lines, giving the length of the lines and the number of acres, and it appears that the requisite length and acres will be satisfied by stopping the lines at the top of a bluff bordering the river and running a straight line between the ends of those lines, such straight line will be the boundary of the tract, and not the meander line of the river, and the grant will not convey anything below the top of the bluff. *Hostetter v. Los Angeles Terminal R. Co.* 108 Cal. 38, 41 Pac. 330.

<sup>3</sup>A patent to land on both sides of a navigable river above tide water, making no reservation or restriction as to the ownership of the bed of the stream,

vision of a fractional quarter section described as lying north of a certain creek takes all the land in such subdivision to the creek.<sup>4</sup> Where a patent issues for a fractional lot, appearing by the plat of the United States survey to be bounded on one side by a meandered lake, the patent is not void so far as it purports to convey the land under the water, though it was error in the survey to treat the tract covered by water as lake to be meandered, instead of land to be surveyed. Conceding the patent to that extent to be voidable, it can be avoided only by the United States in a suit to which the patentee is a party. The land passes and a private individual cannot complain.<sup>5</sup>

**423. Construction and location of grants.**—If the one attempting to make the grant has authority to make it, he must follow the statutory directions, if any, as to the manner in which the lines shall be run.<sup>1</sup> And the validity of the grant will be determined by the common law

but on the other hand calling for a given number of acres which necessitates that the bed of the stream should be included to make that quantity, passes to the grantee title to the whole of the bed of the stream to the extent of the length of his lands upon it. *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Hunt v. Rowley*, 87 Ill. 491.

Land described in a patent as the northwest fraction of the southwest fractional quarter will embrace all the land in the quarter lying between a navigable lake and a river, without regard to an outlet connecting the lake and the river and dividing such tract into two nearly equal parts, where the original survey as shown by the plat and field notes embraced all such land in one entire tract, and the number of acres marked on the plat included the land on each side of the outlet and corresponded with the precise quantity entered by the grantee, whose entry number was marked but once on the tract and that across the outlet, although technically the northwest fraction would only include that portion lying north of the outlet, and the part lying south would be the southwest fraction. *Hunt v. Rowley*, 87 Ill. 491.

Where, in a patent, the lines cross an inland lake without taking any notice of it, the portion of the lake within the lines will pass to the grantee. *Ledyard v. Ten Eyck*, 36 Barb. 102.

*Stein v. Ashby*, 24 Ala. 521, 30 Ala. 363.

<sup>4</sup>*Lampray v. Mead*, 54 Minn. 290, 55 N. W. 1132.

<sup>5</sup>Under the New York acts limiting the right to grants of land under water to the riparian owner, the lines must run perpendicularly to the general course of the shore. *People v. Schermerhorn*, 19 Barb. 540; *United States v. Ruggles*, 5 Blatchf. 35, Fed. Cas. No. 16,204.

As the object of the grant of the republic of Texas of December 19, 1836, granting one league and one labor of land on the east end of Galveston island, was to include the flats so that a city could be built on the island, with streets and lots running up to, and bordering on, the channel of the bay, it was held that the call in the title, to run from the beginning corner as therein described "due north 150 varas to a stake: thence easterly to the harbor in the bay of Galveston and with the general course of the island, at the distance of at least 150 varas from the shore, to a stake 150 varas from the extreme eastern point of the island," should be construed so that the line shall run from the beginning point easterly, keeping at least 150 varas from the shore, to the channel, and not in a direct line to the nearest part of it; and then along the channel, as long as its direction corresponds with the general course of the island; and when it does not, then at least 150 varas from the shore, to be continued with the course of the island. *Galveston v. Menard*, 23 Tex. 349, 398.



in the absence of a statutory or constitutional rule changing such law.<sup>2</sup> The strict rule of construction of grants by the sovereign should not be applied to grants of land made for a valuable and adequate consideration paid by the grantee.<sup>3</sup> A conveyance by the state of riparian rights vests all rights which the grantee could acquire against any grantor.<sup>4</sup> A patent for land covered with water, by the description of a certain island commonly known as Green Flats, is sufficient to pass the land, although it is not in fact an island, but flats covered with water.<sup>5</sup> The grantee under a confirmatory Spanish grant of land covered by a former English grant, and conveying, in addition, soil "from the river to the limits" of the former grant, necessarily takes all the land from a high-water mark to the channel of the river, together with any gradual increase of soil by the receding of the river, where the limit of the former grant was high-water mark, and additional soil so conveyed had previously been, and was at the time of the grant, partly below low-water mark; and in order to embrace all such land the boundary lines of the original tract must run without variation of course from high-water mark to the margin of the channel.<sup>6</sup> A meander line as shown on a plat controls the field notes of the surveyor.<sup>7</sup> But it does not conclusively show the character of land adjoining it—whether it is river, lake, marsh, or unsurveyed land.<sup>8</sup> The purchaser of land according to a plat showing it to be bounded by a lake cannot

<sup>2</sup>*Canal Appraisers v. People*, 17 Wend. 571, Lockw. Rev. Cas. 51.

<sup>3</sup>*Langdon v. New York*, 93 N. Y. 129.

<sup>4</sup>*Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

<sup>5</sup>*Brink v. Richtmyer*, 14 Johns. 255.

<sup>6</sup>*Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Hallett v. Doe ex dem. Hunt*, 7 Ala. 882; *Mobile v. Emanuel*, 9 Port. (Ala.) 403.

<sup>7</sup>*Hanson v. Rice* (Minn.) 92 N. W. 982.

But when the statute under which land is surveyed requires that the lines run to a river, and the entries in the field-books show that one boundary of a tract runs until it intersects the left bank of the river, at which point a meander corner post is set, and that another boundary line runs until it also intersects the river, which point is also marked, and then the meander line commences at one post and runs thence up stream (the courses and distances being given) until the other post is reached,—neither party in a suit in which the grant is called in question should be

permitted to show that the river is in a place different from that which the field-books designate, and the river constitutes the boundary of one side of the lot. *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59.

<sup>8</sup>*Carr v. Moore* (Iowa) 93 N. W. 52; *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Western Invest. Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57 Pac. 912; *French-Glenn Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102.

Whether a lake ever existed in front of, or bordering on, land patented to the state of Oregon under the swamp-land grant, the recession of whose waters would leave the bed of the lake thus laid bare to accrue to the owner of such land, is a question of fact which is not concluded by a mere call in the official survey, plats, and maps for a meander line along the side of a lake as a boundary of such land. *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

be deprived of his littoral rights when the government discovers its mistake in granting those rights which it intended to reserve.<sup>9</sup> Where, owing to meandered lakes, but one quarter corner post was established upon the ground on the boundary lines of a certain section, which post was in the south line thereof, the division line between the south-east and southwest quarters of said section must be ascertained by running a line due north from the quarter post to the meandered lake upon the north side of the section.<sup>10</sup> If one branch of a small river has by consent retained the name of the main river in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the boundary intended in a deed calling for the stream by its name.<sup>11</sup> Swamp and boggy land is to be treated as land, and not as water, for the purpose of determining the rights of proprietors bordering on it.<sup>12</sup> A call in a deed of land for one boundary line to run "with the meanders of a river binding thereon" will vest in the grantee title to the thread of the stream, including an island lying between such line and his shore.<sup>13</sup> In a grant of land under water the term "sound," named as a boundary, means the body of water known by such name, and does not include water opening into or connected with it.<sup>14</sup>

**424. Boundaries on lakes.**—The same rules apply with reference to the boundaries on the Great Lakes as are applied to boundaries on the sea.<sup>1</sup> As said in *Seaman v. Smith*,<sup>2</sup> these great bodies of water, having no currents like rivers and other running streams, cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is to be held the line, from each side. And such a rule, for want of a current, could not be adopted in case of the lakes. It would not be sanctioned either by analogy to the rule,

<sup>9</sup>*Kirwan v. Murphy*, 48 C. C. A. 399, 109 Fed. 354.

<sup>10</sup>*Beardsley v. Crane*, 52 Minn. 537, 54 N. W. 740.

<sup>11</sup>*Reynolds v. M'Arthur*, 2 Pet. 417, 7 L. ed. 470.

<sup>12</sup>*Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124.

<sup>13</sup>*Asher Lumber Co. v. Lunsford*, 17 Ky. L. Rep. 245, 30 S. W. 968. *Contra*, *Jackson ex dem. Teed v. Halstead*, 5 Cow. 216.

<sup>14</sup>*Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

<sup>1</sup>*People ex rel. Moloney v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830; *Nash v. Newton*, 30 N. B. 610.

In *Seaman v. Smith*, 24 Ill. 521, the line of land bounded on Lake Michigan is held to be that at which the water usually stands when undisturbed.

A grant "to the lake" or "to the bank of the lake" will convey title only to high-water mark. The judge says: "I think that in grants of land having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place a highway. *Park-*

*er v. Elliott*, 1 U. C. C. P. 470.

<sup>2</sup>24 Ill. 521.

or by reason. And if the outer edge of the water is passed owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed or the shape it should assume. But in case of boundaries on small lakes and ponds, the boundary will go to the center the same as in case of non-navigable streams. Whether land described in a grant from the government is located in a navigable lake, and hence not subject to entry and sale, is a matter of which the courts will not take judicial notice unless it is established by the record.<sup>3</sup>

**425. County and district boundaries.**— In the absence of constitutional limitations the question of boundaries of counties and local districts situated on the shores of a body of water is exclusively within the jurisdiction of the legislature. It may fix the boundary between the two counties in the center of the stream, or it may give the county on one side an exclusive jurisdiction so far as the opposite shore.<sup>1</sup> In the absence of any statutory provision the presumption will be that the county boundaries follow the rules with respect to boundaries between private individuals on a nontidal river,—that the county or parish on each side of the stream extends to the thread.<sup>2</sup> The terms of the statute creating the county may be such as to exclude the water from its jurisdiction.<sup>3</sup> If the boundary is fixed at high-water mark, the district has no authority to tax the half of a bridge adjoining its territory.<sup>4</sup> For the purpose of charging a county with its share of the cost

<sup>1</sup>*Wilcox v. Jackson*, 109 Ill. 261.

<sup>2</sup>The county of New York extends to low-water mark on the Long Island shore and to the bulkhead line of the city of Brooklyn. *Kelsey v. Murray*, 49 Barb. 241.

The county of Niagara extends westerly to the middle of the Niagara river. *People v. Babcock*, 11 Wend. 586.

From the fact that the boundaries of the counties bordering upon Long Island sound were not extended over the waters of the sound, it would seem that the state of New York does not claim any jurisdiction over such water. *Mahler v. Norwich & N. Y. Transp. Co.* 45 Barb. 226.

<sup>3</sup>*McCannon v. Sinclair*, 2 El. & El. 53, 28 L. J. M. C. N. S. 247, 5 Jur. N. S. 1302, 7 Week. Rep. 543; *Rex v. Landolph*, 1 Moody & R. 393.

<sup>4</sup>Where the boundaries of a county are described as including "all that part of Pasquotank county lying on the northeast side of said river," all of the river is included in the opposite county,

which, therefore, has sole jurisdiction to establish a ferry over it. *Robinson v. Lamb*, 131 N. C. 229, 42 S. E. 701.

A county boundary running to, and thence up, a navigable river runs by the bank, as the common-law principle of *usque ad filum aquæ* is not applicable to navigable waters in Pennsylvania, the title to which is in the state. *Johas v. Davidson*, 16 Pa. 512.

A county boundary designated as running by the main stream of a river, so as to include the whole of every island any part whereof is nearer to the north-east shore than to the opposite shore, intends that the middle of the main stream shall be followed with sufficient variation so as not to divide an island therein, but to leave it on that side of the shore to which it is nearer, and does not justify the taking of the line out of the main stream. *Re Spier*, 20 N. Y. S. R. 389, 3 N. Y. Supp. 438.

*Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955.

of a bridge upon its boundary, it is immaterial whether its title goes to the bank or to the thread of the stream.<sup>5</sup> That branch of the stream which is known as the main branch will be the boundary when the stream is named as such.<sup>6</sup> When the county is given title to the vacant lands within its borders, it cannot claim lands beyond the center of the stream, where its boundary goes only to the thread.<sup>7</sup> The legislature cannot, without the consent of the electors, establish a disputed line between two counties, where the Constitution prohibits the division of a county without their consent.<sup>8</sup> Where the language fixing the boundary is ambiguous, that line will be chosen which is most conformable to the legislative intent.<sup>9</sup> If the boundary river gradually and imperceptibly changes its course, the boundary will change with it.<sup>10</sup>

**426. Boundaries of municipal corporation.**—As in the case of counties, so the extent of boundaries of a municipal corporation may be fixed by the legislature at any point where it pleases. It may give a municipal corporation jurisdiction over the whole of the stream flow-

<sup>5</sup>*Keiser v. Union County*, 156 Pa. 315, 26 Atl. 1066, Affirming *S. O. 12 Pa. Co. Ct. 17*.

<sup>6</sup>Where a certain branch of a river has always been regarded as the principal channel of a stream, and therefore the boundary between two counties, legislation in reference to the establishment of ferries upon the boundary cannot be applied to a cut-off which is much narrower than the other channel, on the ground that the cut-off is the main channel, without an act of legislature clearly so indicating. *Robinson v. Lamb*, 131 N. C. 229, 42 S. E. 701.

<sup>7</sup>*Hart v. Rogers*, 9 B. Mon. 418.

<sup>8</sup>*Rock Island County v. Sage*, 88 Ill. 582.

<sup>9</sup>In locating the boundary line between two counties, described as being a certain slough connecting two rivers, where, owing to a divide or strip of high land about midway between the two rivers, there appear to be two distinct sloughs, one from each river to the divide, with no well-defined connection between them; and there is also doubt as to which of two forks thereof is the main channel,—the line across the divide will be a direct line between the nearest points known to be in the thread on each side, unless there is a palpable difference in levels, in which case the lowest ground must be sought: and that branch will be followed which appears to have been the main channel at

the time of the passage of the act of legislature establishing such counties and fixing the boundaries thereof. *Rock Island County v. Sage*, 88 Ill. 582.

Although a literal construction of an act of legislature changing the county line of a county will make a river, with its meanders, the boundary line along the whole distance of one side, such act will be construed as making the river a boundary line of only so much of that side as abuts upon another county, where the title to the act indicates that it was the intention to change only the county line between those counties, and the act expressly grants to each all the land formerly belonging to the other on their respective sides of the river; and the effect of changing the boundary line for the entire distance would be to take away a portion of land belonging to a third county, also abutting on that line, and adding to the second county a tract of land lying between the river and the third county, entirely detached from the second county and upwards of 3 miles therefrom, and which should properly form a part of the third county. *Perry County v. Jefferson County*, 94 Ill. 214.

<sup>10</sup>So, made land or accretions lying north of the river are in the northern county, although the land on which they formed originally lay south of the center of the channel. *McBaine v. Johnson*, 155 Mo. 191, 55 S. W. 1031.

ing along its boundaries, or over a portion of it; or it may fix the limits of its jurisdiction at high-water mark. This is well illustrated in the case of individual municipalities, whose jurisdiction has been held to extend all the way from high-water mark on its own side of the stream to high-water mark on the opposite side.<sup>1</sup> And the power to

<sup>1</sup> In *Louisville Bridge Co. v. Louisville*, 81 Ky, 189, the corporate limits of the city of Louisville are held to extend to the state boundary at low-water mark on the opposite shore of the Ohio river. The description in the charter of the village of Edgewater of its boundary "along the lower and upper Bay of New York" is not intended to give an absolute and fixed boundary to the shore as it then existed, but to give a boundary which will shift with the change of the shore by natural causes, or by the erection of artificial structures for the purpose of commerce. *Bechtel v. Edgewater*, 45 Hun, 240.

And the same is true of the city of Henderson. *Henderson Bridge Co. v. Henderson*, 90 Ky. 498, 14 S. W. 493.

The city and county of New York under the statutes includes the whole of the rivers and harbor to actual low-water mark on the opposite shores, and therefore a floating vessel made fast to the end of a wharf or dock on the East river on the Brooklyn or Long Island shore is within the city of New York so as to be outside the jurisdiction of a licensed measurer of grain for the village of Brooklyn. *Stryker v. New York*, 19 Johns. 179.

A floating elevator lying inside the piers on the Brooklyn side of the East river below the low-water mark is not in Brooklyn so as to charge that city with liability for its destruction by a mob. *Orr v. Brooklyn*, 36 N. Y. 665.

But the jurisdiction of Brooklyn follows the shore as it advances by natural or artificial means. *Udall v. Brooklyn*, 19 Johns. 175; *Luke v. Brooklyn*, 43 Barb. 54; *Re Brooklyn*, 73 N. Y. 179.

Whatever rights of property the corporation of New York may have in the made land on the Long Island shore of the river, such territory is, for all purposes of police regulation at least, within the city of Brooklyn. *Re Furman Street*, 17 Wend. 649.

So, a pier on piles, although below the original line of low-water mark on the Brooklyn side of the East river, is in Brooklyn, and the city may be held liable for its destruction by a mob. *Atlantic Dock Co. v. Brooklyn*, 3 Keyes, 445, 1 Abb. App. Dec. 24.

In *Tedo v. Brooklyn*, 134 N. Y. 341, 31 N. E. 984, it was said that, the boundaries of Brooklyn having been changed, it is claimed that they extend now below low-water mark; but this question was not decided. Affirming 32 N. Y. S. R. 726, 10 N. Y. Supp. 749, where it was held that the land was within the city limits.

Albany extends to the middle of the

Hudson river. *Hart v. Albany*, 9 Wend. 602, 24 Am. Dec. 165.

The description in the charter of the village of Edgewater of its boundary "along the lower and upper Bay of New York" is not intended to give an absolute and fixed boundary to the shore as it then existed, but to give a boundary which will shift with the change of the shore by natural causes, or by the erection of artificial structures for the purpose of commerce. *Bechtel v. Edgewater*, 45 Hun, 240.

Brooklyn, Illinois, extends to the center of the Mississippi river. *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90.

East St. Louis extends to the state line of Illinois in the middle of the Mississippi river. *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 17 N. E. 439; *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468; *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, 12 N. E. 723.

So, the eastern boundary of the city of St. Louis, is, like the eastern boundary of the state, the middle of the Mississippi river under its charter, by which its boundary begins at a mill on the bank of the Mississippi, then following several calls returns "to the Mississippi" and "from thence by the Mississippi to the place first mentioned." *Jones v. Soulard*, 24 How. 41, 16 L. ed. 604; *St. Louis Pub. Schools v. Risley*, 10 Wall. 91, 19 L. ed. 850.

The state of California by the act of March 28, 1851, conveyed to the city of San Francisco the beach and water lot property in the bay of San Francisco. *Payne v. English*, 79 Cal. 540, 21 Pac. 952.

The eastern boundary of the tract of land confirmed to the city of San Francisco is the bay of San Francisco on the line of ordinary high-water mark as it existed in 1846. *Tripp v. Spring*, 5 Sawy. 209, Fed. Cas. No. 14,180.

Mission creek constitutes no part of the bay of San Francisco. The boundary line of the tract confirmed to the city crosses the mouth of all creeks running into the bay. *Ibid.*

The municipal jurisdiction of the city of San Diego extends, by the act of re-

fix includes the power to reduce the boundaries of a municipality so as to exclude portions of the soil under water which had formerly been within its boundaries.<sup>2</sup> In the absence of specific directions as to the point to which the boundary of a municipality will extend, the same rules of construction will be applied as in case of grants to private individuals.<sup>3</sup> However, unless the title to the soil is included in the grant of corporate authority, the mere establishment of the municipal boundaries so as to include a portion of the body of water gives no title to the soil under the water as against the state or private owners.<sup>4</sup> A grant by the Crown to several freeholders and inhabitants of a town, of land which they bought from the Indians, confirming the purchase to certain persons named, "as patentees for and in behalf of themselves and their associates, the freeholders and inhabitants of the town, their heirs, successors, and assigns," conveys to the inhabitants of the town, and not to the individuals, so that titles must be derived from the town, to be valid.<sup>5</sup> Applying the rules applicable in case of private grants, which, as has already been indicated, are

incorporation of 1876, over the waters of the bay and into the ocean to the extent of one marine league from the shore. *San Diego v. Gramiss*, 77 Cal. 511, 19 Pac. 875; *Fisher v. San Diego Police Ct.* 86 Cal. 158, 24 Pac. 1000.

The limits of the city of New Orleans extend to the Mississippi river, and do not include the river. The city terminates at the outer edge of the levee, which is by law the bank of the river. *Municipality No. 2 v. Municipality No. 1*, 17 La. 573.

Meadows, pastures, and marshes below high-water mark did not pass as appurtenant to the grant by Governor Nichols of October 11, 1667, to the village of New Harlem, of lands bounded on one side by the Harlem river, together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, and other profits, commodities, emoluments, and hereditaments belonging to the lands "within the said bounds and limits set forth." *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Jarvis v. Lynch*, 157 N. Y. 445, 52 N. E. 657.

Land below the high-water line of a creek flowing into the Harlem river and covered by tide water was within the terms of the grant to the freeholders of Harlem of land bounded on one side by the Harlem river, including creeks, waters, etc., thereunto belonging. *Breen v. Locke*, 46 Hun, 291.

The center of the Congaree river is the boundary of the city of Columbia. *State ex rel. Columbia Bridge Co. v. Columbia*, 27 S. C. 137, 3 S. E. 55.

<sup>2</sup> It is considered in *People v. Oakland Water Front Co.* 118 Cal. 234, 50 Pac. 305, that the construction of the boundary of a municipality by subsequent legislation, so as to exclude from its limits submerged lands granted it by its creative act to facilitate the construction of wharves, docks, and piers for the improvement of its commercial facilities, amounts to a renunciation on the part of the municipality and resumption by the state of the control of so much of the grant as may have been covered by such excluded portion of the municipality.

<sup>3</sup> *Ft. Smith & V. B. Bridge Co. v. Hawkins*, 54 Ark. 509, 12 L. R. A. 487, 16 S. W. 565.

A street bounded on a navigable stream above tide water will extend to the center of the stream unless the contrary intention is clearly shown. *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90.

<sup>4</sup> *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705; *Kean v. Stetson*, 5 Pick. 492; *Russ v. Boston*, 157 Mass. 60, 31 N. E. 708; *Palmer v. Hicks*, 6 Johns. 133.

<sup>5</sup> *Atkinson v. Bowman*, 42 Hun, 404.

the ones applicable in case of bounding a municipal corporation generally upon a water course, to cases in which the extent of such boundaries has been brought in question, a boundary on a meander line will not limit the municipality to that line, but its jurisdiction will extend to the water.<sup>6</sup> And, if the water is of such a character that under the law of the state a grant to a private individual would carry title to the center, the boundary of the municipality, which is stated to be the water, will go to the thread of the stream.<sup>7</sup> It has been held that the "center of the river," as forming the boundary line between two towns situated on opposite banks of it, has reference to the center of a surface measurement of it from bank to bank, and not to a line dividing the water running in the stream into equal quantities.<sup>8</sup> But analogy to the rule of division between independent governments requires a holding that the line shall be fixed at the middle of the navigable channel. This rule is more equitable, and better serves the interests of the municipality, because it gives each an interest in the navigable channel, so that the other cannot interfere with its use.<sup>9</sup> In one case it was held that a boundary will run by the thread of a stream, under an act incorporating so much of a town as lies southwest of the outlet of a pond into a new town, etc., as there is no reason for adopting a different rule than prevails in the construction of deeds and grants.<sup>10</sup>

<sup>6</sup> The margin of the river, and not the meander line run by the surveyor, controls in a government plat of a fractional township bounded by a river. *Hendricks v. Feather River Canal Co.* 138 Cal. 423, 71 Pac. 496.

But a municipal corporation is bounded by the meandered line of the government subdivision of the included land, and not by the low-water line or thread of a public stream, when located according to that subdivision, the government survey of which followed the meanderings of the shore. *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75, 84 N. W. 607.

<sup>7</sup> *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Re Ipswich*, 13 Pick. 431; *Marseilles v. Kiner*, 34 Ill. App. 355; *Marseilles v. Howland*, 23 Ill. App. 101. Affirmed in 124 Ill. 547, 16 N. E. 883; *Re M'Donough*, 30 U. C. Q. B. 288; *Reg. v. Carleton*, 1 Ont. Rep. 277; *Granger v. Avery*, 64 Me. 292; *Albany R. Bridge Co. v. People*, 197 Ill. 199, 64 N. E. 350; *People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 9, 17 N. E. 147; *State ex rel. Pankonin v. Cass County*, 58 Neb. 244, 78 N. W. 494; *State v.*

*Canterbury*, 28 N. H. 195; *Perkins v. Oxford*, 66 Me. 545; *Hall v. Benton*, 69 Me. 346.

When the grant of a town makes its boundaries run to, and then upon, a river, the grant will be construed as extending to the thread of the river; but when such boundaries extend to, and run upon, any large body of standing water, whether called river or lake, in the absence of anything to show a contrary intention the boundaries of the town will go only to the water's edge. *State v. Gilmanton*, 9 N. H. 461.

Where the boundary of a town is fixed "by a river" to a wall, the course will be through the center of the stream until the point opposite the wall is reached, although the wall ends a few rods from the river bank; and it will not run diagonally from the end of the wall to the other corner located in the river. *Re Ipswich*, 13 Pick. 431.

<sup>8</sup> *Roscauen v. Canterbury*, 23 N. H. 189.

<sup>9</sup> *Roice v. Smith*, 51 Conn. 266, 50 Am. Rep. 16.

<sup>10</sup> *Perkins v. Oxford*, 66 Me. 545.

This is somewhat contrary to the rule which makes the boundary begin at the river when the bank is made the beginning monument and the grant runs away from the river for quantity. If the boundary is made a particular line, which does not coincide with the water, the municipality will have no jurisdiction over any portion of the water except what may be included within the line.<sup>11</sup> If, under the rule of the state, private grants extend only to high-water mark, the municipal boundaries will extend only to that point; and they may be expressly limited to that point by the statute.<sup>12</sup> And, in case the sea is made the boundary, the jurisdiction of the municipality will not extend beyond high-water mark unless it is expressly granted.<sup>13</sup> Where the title of the private owner extends to low-water mark, the jurisdiction of the municipality will extend to the same point.<sup>14</sup> If the boundary is described as running to the bank, no jurisdiction will be acquired over the water.<sup>15</sup> A call for the opposite shore of a navigable creek or estuary as the boundary of a town in the act creating it, which contains a gratuitous donation of lands to it, must be strictly construed so as to carry the boundary only to low-water mark on that side, and not to high-water mark,—especially where there are com-

<sup>11</sup> Where the boundary of a city begins on a donation meander line, along the shore of a bay, which does not coincide with either the high or low water mark, and the last call is along the shore of the bay "to the place of beginning," the donation meander line, and not the high and low water marks of the bay, is the boundary, as that is the only line that will close at the place of beginning. *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183, 66 Pac. 428.

<sup>12</sup> *Ft. Smith & V. B. Bridge Co. v. Hawkins*, 54 Ark. 509, 12 L. R. A. 487, 16 S. W. 565.

Under the proclamation fixing the western boundary of a town in Fiji as the seacoast at high-water mark, and the eastern boundary at a specified distance therefrom, the northern and southern boundaries to connect the eastern, all lines of specified lengths with certain points on the high-water mark, the western boundary varies from time to time as the high-water mark shifts, but the eastern boundary is absolutely fixed. *Smart v. Suva Town Board* [1893] A. C. 301, 68 L. T. N. S. 774.

<sup>13</sup> *Bridgewater v. Bootle-cum-Linacre* Twp. 36 L. J. Q. B. N. S. 41, L. R. 2 Q. B. 4, 15 L. T. N. S. 351, 15 Week. Rep. 169.

In Texas, however, it was held that,

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where grants under which a city claims describe the land as extending to the seashore and bounded by it, the city may have the right to exercise jurisdiction over the shore and surf for police and sanitary purposes, but it has no power to grant to certain persons a right to the exclusive use of any portion of the shore and surf for the purpose of constructing public bath houses. Any citizen has the right to erect a bath house in the surf providing it is not made a nuisance, or so constructed or used as to materially interfere with the rights of the public to the enjoyment of the waters and the shores of the sea. *Galveston City Surf Bathing Co. v. Heindenheimer*, 63 Tex. 559.

<sup>14</sup> *Gilchrist's Appeal*, 109 Pa. 600; *State v. Eason*, 114 N. C. 787, 25 L. R. A. 520, 41 Am. St. Rep. 811, 19 S. E. 88; *Thompson v. Blackwell*, 5 La. 465; *New York v. Hart*, 16 Hun. 380; *Perrott v. Bryant*, 2 Younge & C. Exch. 61, 6 L. J. Exch. N. S. 26.

The boundary of a ward of a city "on the river," which is a broad tidal river or arm of the sea, will not extend its limits beyond low-water mark. *Trull v. Wheeler*, 19 Pick. 240.

<sup>15</sup> *People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 9, 17 N. E. 147.

The channel of the Connecticut river



munities on the opposite side thereof having a natural right to the common use of such body of water, to unrestricted access to its shores, and to the privilege of constructing wharves, docks, piers, and other aids to commerce, fully equal to that of the inhabitants of such town.<sup>16</sup> The bounding of a town on one of the Great Lakes does not extend its jurisdiction over the water of the lake.<sup>17</sup> Of course, the municipality may be given jurisdiction over the water adjacent to it by express legislation.<sup>18</sup> The state may grant to the municipal corporation, not only jurisdiction over the water, but the title to the soil under the water. But a grant by the state to a municipal corporation, of land bounded by tide water will not convey the title below high-water mark except by the use of words so unequivocal as to leave no reasonable doubt concerning the meaning; and the use of the words "waters, water course, ports, havens, rivers, and fishings" are not sufficient to convey the soil.<sup>19</sup> And a grant of land with certain boundaries will include the land under water within such boundaries.<sup>20</sup> But water not expressly included within the bounds of the grant will not pass.<sup>21</sup> The Mexican grant to the pueblo of San Francisco conferred no title, but merely jurisdiction over the water, and therefore it did not, by the confirmation of its grant, acquire the title to the soil

between Lyme and Saybrook is not within the patented limits of either town, the former of which is bounded by the "channel of the Connecticut river" and the other is bounded "by" or "on" the Connecticut river; but by virtue of ancient, infallible, and undisputed uses the towns bordering on the river have jurisdiction to the center of the channel, and constables may serve process to that line. *Pratt v. State*, 5 Conn. 388.

<sup>16</sup>*Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

<sup>17</sup>*People v. Bouchard*, 82 Mich. 156, 9 L. R. A. 106, 46 N. W. 233.

<sup>18</sup>*Smith v. Skagit County*, 45 Fed. 725.

When the legislature included an island as a part of a municipality, it undoubtedly intended, in the absence of express reservation, to include the water in a narrow passageway between the island and mainland. *Adams v. Ulmer*, 91 Me. 47, 39 Atl. 347.

The boundary of a town on a sound, including therein the harbors, havens, etc., will include a tidal bay inclosed by necks of land lying between the inhabited part of the town and the sound. *Robins v. Ackerly*, 91 N. Y. 98.

<sup>21</sup>*East Haven v. Hemingway*, 7 Conn. 186.

<sup>19</sup>*Robins v. Ackerly*, 24 Hun, 499, Affirmed in 91 N. Y. 98.

The practical interpretation of a patent to certain named persons of land forming a town including land under water, as vesting the title in the town, and not in the grantees as tenants in common, and acquiescence therein for a long series of years, is the most important evidence in the determination of the rights existing thereunder. *Southampton v. Meco Bay Oyster Co.* 116 N. Y. 1, 22 N. E. 387.

<sup>20</sup>*East Hampton v. Vail*, 151 N. Y. 463, 45 N. E. 1030, Affirming 71 Hun, 94, 24 N. Y. Supp. 583.

A line indicating high-water mark on a map required, by an act of legislature granting to a city certain water-lot property, to be filed with the secretary of state, clearly delineating such property, is not conclusive as to the extent of such property, the boundaries of which were specified in the act, and as to what was the water line of the city at the date of the act; but such question is one of fact. *Cook v. Bonnet*, 4 Cal. 397.

as against the state.<sup>22</sup> A grant by the state to a municipal corporation of land under tide water for a particular purpose does not divest the state of its obligation to protect the public against encroachments upon such land, other than those authorized by the grant.<sup>23</sup> If the boundaries are fixed at a particular point, they will not be changed by the change of the channel of the stream.<sup>24</sup>

<sup>22</sup>*United Land Assn. v. Knight*, 85 Cal. 448, 24 Pac. 930, Overruling *People v. San Francisco*, 75 Cal. 388, 17 Pac. 522.

<sup>23</sup>*People v. Vanderbilt*, 26 N. Y. 287.

<sup>24</sup>The power to change the boundary line between two towns resides only in the general assembly, and such boundary line, having existed in the center line of a stream, is not changed even though the stream be diverted into a new channel by artificial means by a riparian owner. *Re Boundary Line*, 21 R. I. 581, 42 Atl. 870.

A statute fixing the boundaries of

towns, which has been continued in force by re-enactment without change of phraseology, as a portion of successive Digests, from 1759 to 1822, is to be construed as fixing the boundaries as established by the statute when originally enacted according to its original meaning, notwithstanding that the course of a river, named therein as the dividing line between two towns, has been changed in its course since the statute was originally enacted. *Kent v. Atlantic DeLaine Co.* 8 R. I. 305.

## CHAPTER XVI

### ARTIFICIAL BODIES OF WATER; TAXATION.

- 427. Effect of creating artificial water course.
- 428. Duty to care for.
- 429. Conflict with highway.
- 430. Artificial lake.
- 431. Wells and reservoirs.
- 432. Taxation of water rights.
- 433. Place and manner of taxation.

**427. Effect of creating artificial water course.**—During the consideration of the question of the effect of the alteration of a water course,<sup>1</sup> it was seen that in case the navigation of a river was improved by the removal of obstructions from it, or the raising of the level of the water, the public had a right to use the river in its improved condition upon making a reasonable compensation for the advantages offered by the improvements. Likewise, if, for any reason, it became necessary to create an artificial channel for a water course, the public rights of navigation would attach to the artificial channel the same as they had to the natural one. It cannot be deprived of its right to navigate a water course by the mere fact that it has been found necessary or convenient to make the water flow in a new bed. This rule applies to cuts made by the government to straighten the channel of the river.<sup>2</sup> So, if, for his own purposes, a riparian owner changes the channel of a stream where it flows through his property, the public right to use the stream follows the new channel.<sup>3</sup> In order to permit the exclusion of the public from the use of the new channel the facilities furnished by the old one must be left in as good condition as formerly. And in case the new channel is merely additional to the old one, if the

<sup>1</sup> See *ante*, § 81.

<sup>2</sup> *Queen v. Betts*, 16 Q. B. 1022, 4 Cox C. C. 213; 22 Eng. L. & Eq. Rep. 240, note, 19 L. Q. B. N. S. 531.

<sup>3</sup> If a man cuts a canal and diverts a water course through his own land by damming up the ancient bed of the stream so that the water course flows through the canal for a period of more than twenty years by his permission and direction, and the public use the canal

during that time for the purposes of navigation, the latter acquire the right by dedication to the free use and navigation of the canal, of which the proprietor cannot deprive them, without legislative grant, by building a mill across the canal and restoring the waters to their ancient bed, although he owns all the lands through which the canal is cut. *Delaney v. Boston*, 2 Harr. (Del.) 489.

public is permitted to use the new one without objection the owner may be held to have dedicated it to the use of the public.<sup>4</sup> But the right to use the land of a riparian owner cannot be obtained by the mere fact that improvements attempted by a stranger have caused the water to cut a new channel over his property.<sup>5</sup> If the new channel created by the riparian owner becomes obstructed, the public has a right to force a way along the old one, causing no unnecessary injury.<sup>6</sup> The same rule does not apply in case of a mere improvement of the natural channel so as to render it navigable when it was not so before. The public has no right to use a stream which is not navigable in its natural condition; and, in case the riparian owner makes it navigable for his own purpose, he may exclude the public from the use of it in its improved condition.<sup>7</sup> But if one erects a dam across a navigable stream in such a way as to render it navigable by larger rafts than it would otherwise have been, he will not be exempt from liability for injuries to such rafts from the improper condition of his dam, or from other obstructions in the stream, by the fact that such rafts could not have been floated in the stream in its natural condition, where the statute requires those building dams to provide for the passage of such rafts, crafts, and boats as may navigate the river.<sup>8</sup> The riparian owner not having a right to take toll without a franchise cannot demand a toll for the use of the improvements furnished by him.<sup>9</sup> But if he excludes the public from the use of his improvement he may permit individuals to use it for compensation. The exaction

<sup>4</sup>*Weatherby v. Meiklejohn*, 56 Wis. 76, 13 N. W. 697; *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507.

So, where the owner of a dam suffers a break to remain in it, the effect of which is to make the floating of logs over the dam difficult, one wishing to use the stream for floating logs may use the break and the stream flowing therefrom, doing no unnecessary damage. *Whisler v. Wilkinson*, 22 Wis. 572.

<sup>5</sup>*Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507.

And if a person without right opens a cut or sluice on his own land, and diverts the waters of a stream from their natural course without any obstruction elsewhere, the public will thereby acquire no right to the use of the water as it flows over his land. *Ibid.*

<sup>6</sup>*Dwinel v. Peazie*, 44 Me. 167, 69 Am. Dec. 94.

<sup>7</sup>*Holden v. Robinson Mfg. Co.* 65 Me. 215; *Connecticut River Lumber Co. v.*

*Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090; *Whelan v. McLachlan*, 16 U. C. C. P. 102; *Boale v. Dickson*, 13 U. C. C. P. 337; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 528; *TenEyck v. Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536; *DeCamp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1014; *Bourke v. Davis*, L. R. 44 Ch. Div. 110, 62 L. T. N. S. 34, 38 Week. Rep. 167.

<sup>8</sup>*Volk v. Eldred*, 23 Wis. 410.

<sup>9</sup>The right to take toll being a franchise which can be acquired only by a grant from the legislature, the owners of a dam and canal constructed on their own land for the improvement of the navigation of a public navigable stream cannot counterclaim for the use thereof in an action for damages from the obstruction of navigation,—especially where constructed without authority of the legislature. *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697.

of toll does not begin until he permits the public to make such use of the improvement as they desire for a fee levied upon all alike.<sup>10</sup>

**428. Duty to care for.**—The establishment of an artificial water course imposes upon the one responsible for it an added responsibility for keeping it in a safe condition. While the stream is left in its natural condition no one has a right to insist that it shall be kept in a condition different from that in which nature left it. But if, for his own convenience, a person undertakes to maintain it in a new direction, or in a more confined space, he must take due care that it shall do no injury. Thus, one who purchases land and improves the same on the line of an artificial waterway constructed by a municipal corporation has a right to rely upon that corporation to perform its duty of keeping such artificial water way in repair and condition to carry all the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his land by waters from such waterway.<sup>1</sup> But the state does not, by changing the course of a stream to accommodate the route of a canal, undertake to keep the banks effecting the diversion in repair, so as to be liable in case they are permitted to become weak so that flood water following the old channel injures property along its banks, if no more injury was done than would have been done if the channel had not been changed.<sup>2</sup> The creation, by people in a neighborhood, of an artificial channel to conduct water for drainage purposes may impose upon them the same obligations with respect to its obstruction that would have existed in case of a natural stream.<sup>3</sup> So, where the founder of a village procures a right to take water for its use from a neighboring stream, and the water is taken through the village in an artificial trough, owners of land along its course are bound to keep their respective portions of it in such condition of repair that the usual amount shall be transmitted to the other proprietors below, and in its usual state of purity.<sup>4</sup> Prescriptive rights may be acquired in an artificial condition of the water.<sup>5</sup>

**429. Conflict with highway.**—The laying out of a highway through

<sup>10</sup>*Duinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507.

<sup>1</sup>*Willson v. Boise City* (Idaho) 55 Pac. 887.

<sup>2</sup>*Stone v. State*, 138 N. Y. 124, 33 N. E. 733. The court says the state was under no obligation to maintain the guard bank in repair to protect lands which would have been flooded to the same extent if the improvement had not been made.

<sup>3</sup>See *ante*, § 282.

<sup>4</sup>*Fleming's Appeal*, 65 Pa. 444.

<sup>5</sup>A permanent change in the channel at the outlet of a lake, made by deepening it 2½ feet, will, after the lapse of twenty-four years and the erection of mills and factories thereon at large expense, be regarded as the natural channel; and the state, as an upper riparian owner, has no right to obstruct or prevent the flow of water through it. *Lakeside Paper Co. v. State*, 15 App. Div. 169, 44 N. Y. Supp. 281.

the country cannot be permitted to interfere with the industry of the people any more than is necessary; and therefore a citizen having occasion to carry an artificial water course across a highway must be permitted to do so provided it can be done without unduly interfering with the rights of the public, and provided also that he keeps the highway safe for travel. If the street is laid out over the artificial water course the public must treat the same as a natural course and bridge it, and are not entitled to obstruct or otherwise deprive the owner of the use of it.<sup>1</sup> But he cannot prevent the laying of a road across it.<sup>2</sup> And, in case it is maintained on public land, he may be required to bridge it and otherwise fit it for public use when the road is laid across it.<sup>3</sup> If a citizen undertakes to construct an artificial channel across a highway, he must bridge and keep it in safe condition for public travel.<sup>4</sup> After a road has once acquired the legal character of a highway it is not in the power of the Crown, by grant of the soil and freehold thereof for a mill site, to a private person, who undertakes to construct a ditch or raceway across the highway, thus to deprive the public of the use thereof.<sup>5</sup> The citizen has no absolute right to maintain an artificial waterway across a highway. It is a matter of grace, and the permission must be exercised in such a way as to do the least harm to the public. Since it is a mere permissive right it cannot ripen into an absolute one by prescription,<sup>6</sup>

<sup>1</sup>*Groton v. Haines*, 36 N. H. 388.

A ditch lawfully constructed in a city for the conveyance of water for milling purposes is not a nuisance merely because the growth of the city has rendered it necessary that the same be bridged at the street crossings, where, by reason of the acceptance by the city of the dedication of its streets subject to the right of way for the ditch, it is the duty of the city, and not the proprietors of the ditch, to construct such bridges. *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

An injunction will be granted restraining a city from summarily abating a ditch lawfully constructed in the city for the conveyance of water for milling purposes by a mere resolution declaring the same to be a nuisance because of the absence of bridges thereover at street crossings, without first lawfully ascertaining by judicial proceedings that the same was in fact a nuisance. *Ibid.*

<sup>2</sup>A ditch or canal by which water is conducted to a mill is not a building, fixture, or erection, within the meaning of a statute declaring that no public road shall be laid out through any

building, fixture, or erection for the purpose of trade or manufacture; but the road must be constructed in such a manner as not to obstruct the flow of the water. *People ex rel. Williams v. Kingman*, 24 N. Y. 559.

<sup>3</sup>*Boise City v. Boise Rapid-Transit Co.* (Idaho) 59 Pac. 716.

<sup>4</sup>*State v. Moore*, 23 Ark. 550; *Lewis-ton v. Booth* (Idaho) 34 Pac. 809.

As to the Duty to Maintain Bridges over Races, see § 323, *ante*.

Breach of the condition in an order permitting the damming of a creek on condition that a good and substantial bridge across the creek shall be built and kept up, by the mere failure of a transferee of the property to keep the bridge in repair, is not the subject of an indictment as an obstruction of the highway, as the condition, at most, only imposes a liability on the licensee, failure to perform which is not the subject of indictment. *Malone v. State*, 51 Ala. 55.

<sup>5</sup>*Reg. v. Hunt*, 16 U. C. C. P. 145.

<sup>6</sup>*Pierson v. Elgar*, 4 Cranch C. C. 454, Fed. Cas. No. 11,157; *Terre Haute & I. R. Co. v. Zehner*, 15 Ind. App. 273; 42

even as against abutting owners.<sup>7</sup> But if the right to maintain the water course has been acquired by its existence before the laying out of the highway, or otherwise, and the culvert has become stopped up, the owner may, upon the refusal of the surveyor of the district to clear it for him, do it himself, causing no unnecessary damage to the road; and he is not liable for leaving the culvert open, when there was no proper material at hand, belonging to the town, to cover it, he being under no obligation to supply new material.<sup>8</sup> On the other hand, a highway commissioner may, when necessary, shut off the water from a mill for the purpose of repairing a culvert through which the water, after leaving the wheel, passes in an artificial channel under the highway, without incurring liability to the mill owner for any loss sustained by him because of want of power.<sup>9</sup> As the duty imposed upon the county court to construct and repair highways is not imposed upon it as the agent of the county, its action in filling a mill-race for the purpose of protecting a county road does not render the county liable.<sup>10</sup>

*Mill ponds*.—An artificial condition of a water course which very frequently interferes with a highway is a pond created for furnishing power to a mill. According to the principles developed in the succeeding chapter, a mill owner has no right to raise a pond in such a way as to render the highway unsafe, or to make the water stand upon it. If he attempts to use a highway embankment as a part of his dam, he will be liable for the cost of making repairs on the highway rendered necessary by his neglect to maintain the dam in a safe condition.<sup>11</sup> But a corporation compelled to make compensation to private individuals for lands taken, before taking possession, by a provision in its charter conferring upon it the exclusive privilege of locking the falls of a river is not also compelled thereby to ascertain the extent of, and pay for the damages to, the roads and land overflowed, before constructing its dams.<sup>12</sup> If a dam is so negligently constructed that it bursts and washes out the highway, the owner will be liable to the township for the injury thereby inflicted on it.<sup>13</sup> On the other hand,

N. E. 756; *Warfel v. Cochran*, 34 Pa. 381; *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197.

<sup>7</sup>*Taylor v. Chicago, M. & St. P. R. Co.* 83 Wis. 636, 53 N. W. 853.

<sup>8</sup>*Groton v. Haines*, 36 N. H. 388.

<sup>9</sup>*Kerr v. Joslin*, 49 N. Y. S. R. 257, 20 N. Y. Supp. 929.

And unless a mill owner has acquired a right in an artificial outlet from his millpond which runs over a highway, by

prescription or contract, he cannot complain if it is closed by the proper authorities in the exercise of proper and suitable means of repairing the highway. *Drew v. Westfield*, 124 Mass. 461.

<sup>10</sup>*Swineford v. Franklin County*, 73 Mo. 279, Affirming 6 Mo. App. 39.

<sup>11</sup>*Brookfield v. Walker*, 100 Mass. 94.

<sup>12</sup>*Lebanon v. Oloott*, 1 N. H. 339.

<sup>13</sup>The fact that it will cost more to maintain a new road than it did an old

however, a public body specially constituted to lay out and widen roads and highways, which in discharge of its functions widens a turnpike, and in so doing necessarily destroys a milldam; and then, of its own volition, without obligation or legal power, builds another in place of it, which, proving insufficient, gives way under a freshet, to the consequent injury of the mill owner by suspending the operations of his mill,—is not liable in damages for such injuries.<sup>14</sup> In case the pond is rightfully maintained, it cannot be destroyed for the purpose of widening the highway, without making compensation to the owner.<sup>15</sup> But if, for the public safety, it becomes necessary to destroy the pond, the officials performing the work are not personally liable. Compensation must be sought under the statutes authorizing the exercise of eminent domain, if at all.<sup>16</sup> The destruction of a milldam by public officers in a time of freshet, to avert imminent injury to a highway and other property, is an act public and governmental in its nature, an exercise of the police power of the state, not a taking of private property under the right of eminent domain; and the owner is therefore neither entitled to compensation for his destroyed property, nor, in the absence of a statute imposing liability, to recover of the municipality damages for his loss.<sup>17</sup> A town will not be enjoined from opening sluiceways into a mill pond to prevent the water overflowing a highway, where the remedy at law is adequate.<sup>18</sup>

**430. Artificial lake.**—The same rights may be created by a sale of property with reference to an artificial lake as in case of a sale with reference to a platted highway.<sup>1</sup> So, the raising of the level of a lake

road washed away by the bursting of a dam is a proper element of damage in an action on the case by a town against the owners of the dam. *Monroe v. Connecticut River Lumber Co.* 68 N. H. 89, 39 Atl. 1019.

<sup>14</sup>*Wheeler v. Essex Public Road Board*, 39 N. J. L. 291.

<sup>15</sup>It is no defense to a mill owner's claim for a condemnation award against a public body which has taken and destroyed a dam in the public interest to widen a road, that it did so by license of the mill owner. *State ex rel. Wheeler v. Essex Public Road Board*, 40 N. J. L. 138.

<sup>16</sup>The owner of a milldam and privilege cannot sue a turnpike company alleged to be responsible for the destruction thereof, when the company is composed exclusively of officers of the government *ex officio* and having no per-

sonal interest therein. *Sayre v. North-Western Turnp. Road*, 10 Leigh, 454.

It is a good answer of accord and satisfaction by a public body to an application to compel the appointment of appraisers to assess damages for invading mill rights by destroying a dam, that the mill owner accepted as full compensation a new dam built by such body instead of the destroyed one, although their power to make such new construction did not legally exist. *State ex rel. Wheeler v. Essex Public Road Board*, 40 N. J. L. 138.

<sup>17</sup>*Aitken v. Wells River*, 70 Vt. 308, 41 L. R. A. 566, 67 Am. St. Rep. 672, 40 Atl. 829.

<sup>18</sup>*Wing v. Fairhaven*, 8 Cush. 363.

The sale of lots with reference to an artificial lake, representing that it is to be the property of the public, will amount to a dedication of it to the pub-



for the private benefit of the riparian owner will extend the public right of boating to the limits established by the higher level of the water.<sup>2</sup> The identity of a great pond is not lost by the raising of its level by a mill owner by means of a dam, under contract with the riparian owners.<sup>3</sup> The Wisconsin court has held that a person who floods his own land by artificially raising the level of the waters of a navigable lake so that such waters at their new level meet the line of a public highway, thereby vests in the public the title to the land submerged by such artificial condition, where it is so maintained by him for more than twenty years and the public uses and enjoys the lake in such new condition, there being in such situation no zone of private right between the street and the lake; but the public right is continuous from the street to the waters thereof, and from the waters to the street for wharfing and other privileges incident to such street as the shore of the lake.<sup>4</sup> The reason for that decision is not very apparent. The court seems to place its decision upon prescription. But there seems to be no prescriptive right in the case. In order to establish such a title the use must be not only adverse but as matter of right. The use of the water to its increased level does not involve the use of the soil under the water, which was the thing to which the court held that the public had acquired the title. The navigation right was attached to the water and belonged to the public as matter of right, and its enjoyment of its right was not adverse to the title of the owner of the soil. The same reasoning which was adopted by the court would lead to the conclusion that after the public had exercised their absolute rights upon a navigable water course for a period of twenty years, they had acquired title to the soil, which is, of course, absurd. There can be no conclusion of dedication in the case, because the condition of the water course was established for the benefit of the riparian owner, and not for any purpose connected with the public use; and the mere fact that he permitted the public to enjoy the increased facilities so long as they did not interfere with his rights cannot be held to have deprived him of his rights when he chose to exercise them.

**431. Wells and reservoirs.**—The same rule applies to the creation of reservoirs by the public that applies between individuals. Water

<sup>1</sup>*McClellan v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345.

<sup>2</sup>*Mcndota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185.

So, where the waters of a navigable lake and stream have been raised by a dam so as to overflow land of a riparian proprietor, the public will not be guilty

of trespass in going in boats over such land for the purpose of fishing or fowling. *Ibid.*

<sup>3</sup>*Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582.

<sup>4</sup>*Pewaukee v. Savoy*, 103 Wis. 271, 50 L. R. A. 836, 74 Am. St. Rep. 859, 79 N. W. 436.

collected in large quantities in an artificial reservoir above the general level of the surrounding country, as it is collected for the purpose of furnishing a municipal water supply, is a dangerous agency, so that a high degree of care is imposed upon the public to prevent injury by it. The question of the duty to care for water in reservoirs constructed for such supply is discussed, to some extent, in the section dealing with such reservoirs.<sup>1</sup> But it may be stated in this place that a municipal corporation is liable for damage resulting from water which it negligently permits to escape from its waterworks.<sup>2</sup> A water company constructing a water tower for the storage of water is bound so to construct the same that water shall not escape so as to injure the property of others.<sup>3</sup> The public may acquire prescriptive rights in a reservoir or well which they have used as a common watering place for the prescriptive period.<sup>4</sup> And the public authorities may acquire a right to control a well under authority of a public statute by the fact that the public has acquired a servitude in its use, although the soil and freehold is owned by a private individual.<sup>5</sup> A trough or cistern receiving the overflow from a spring which has been used by the public gratuitously for watering cattle and for the supply of water for domestic purposes for a period of over fifty years is a public well or work used for the gratuitous supply of water to the inhabitants of the district within which it is situated, within the meaning of a statute declaring that the local authority may cause all existing public cisterns, wells, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water.<sup>6</sup> A municipal corporation may regulate or appropriate to the public use a private well sunk in its highway, with or without its permission.<sup>7</sup> There is no private right to a watering place on a public highway and within the boundaries of another's land, which is enjoyed in common by the public, for which compensa-

<sup>1</sup> See *ante*, § 157.

<sup>2</sup> *Kane v. Philadelphia*, 196 Pa. 502, 46 Atl. 893.

<sup>3</sup> *Kankakee Water Co. v. Reeves*, 45 Ill. App. 285.

<sup>4</sup> The inhabitants of a locality, who have used the water of a well located on private property for the prescriptive period, have a right to go upon the land for the purpose of protecting and maintaining such well. *Smith v. Archibald*, 5 App. Cas. 489.

<sup>5</sup> *Dungarvan Union v. Mansfield* [1897] 1 Ir. Rep. 420.

<sup>6</sup> *Holmfirth Local Bd. v. Shore*, 59 J. P. 344.

<sup>7</sup> *Barter v. Com.* 3 Penr. & W. 253.

The owner of a prescriptive right to use water in a well situated in a public highway and who also claims a prescriptive right to a private way therein, when he is excluded from such road and access to the well by a fence placed by one who claims both as his property, is specially and peculiarly injured by such nuisance and he can, for that reason, maintain a private action for damages and for the abatement of the nuisance, in spite of an objection that he can have no prescriptive right to a private way in such highway. *Smith v. Putnam*, 62 N. H. 369.

tion can be recovered for the impairment of its convenient use by the construction of a railroad.<sup>8</sup> A mere grant of a right to maintain a railroad in a street gives no authority to erect and maintain a water tank therein.<sup>9</sup> In an Oregon case it was held that water tanks erected in streets for street sprinkling purposes by a private individual under a license from a city, which were not and have not by use become an actual nuisance cannot be removed by the city without rendering it liable for damages therefor, as such license, having been acted upon, and money expended on the faith thereof, cannot be revoked without compensation unless the structures constitute a nuisance.<sup>10</sup> The soundness of that decision may well be doubted. A municipal corporation holds its streets in trust for the public use and it has no authority to devote a portion of them which may be needed for public travel to the exclusive use of a private individual and authorize him to erect permanent structures therein which will interfere with the public enjoyment. Such being the fact, one who undertakes to act upon its license to place a structure there, acts at his peril and has no ground of complaint if he is required to remove his structure as soon as it is completed. His expenditures of money cannot give him a right which the city had no authority to confer.

**432. Taxation of water rights.**—There is an element of value in the right to make use of water, which is subject to taxation. The only question is as to how to ascertain the value which is subject to taxation and the method by which the tax shall be imposed. The question of the taxation of water which has been acquired for a municipal water supply and the works by which it is made available is a comparatively easy matter, and is considered in the chapter devoted to the question of municipal water supply.<sup>1</sup> The mere right to flow land for a reservoir does not constitute an easement liable to taxation.<sup>2</sup>

<sup>8</sup>*Gorgas v. Philadelphia, H. & P. R. Co.* 144 Pa. 1, 22 Atl. 715.

<sup>9</sup>*Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85.

So the erection of a water tank in a public street 35 feet from a church and of a passenger railroad station 60 feet therefrom, thereby enveloping the church in smoke and filling it with offensive odors and more or less smoke and cinders and disturbing the congregation by the incessant noises caused by the blowing off of steam, the ringing of bells and sounding of whistles and the backing of trains, constitutes a private nuisance for which compensation must be made or the nuisance removed. *Ibid.*

As to the right of a municipal corporation to place standpipes in the street, see *ante*, § 155.

<sup>10</sup>*Savage v. Salem*, 23 Or. 381, 24 L. R. A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

<sup>1</sup>See *ante*, § 169.

<sup>2</sup>*Fall River v. Bristol County*, 125 Mass. 567; *Cheshire v. Berkshire County*, 118 Mass. 386.

A mill owner maintaining a dam and pond and owning the right to flow other lands should not be separately taxed for the bed of the pond or the lands flowed, where the entire property is available chiefly as a water power and is included

But where a water company acquires title to, and takes possession of, the waters of a pond and a permanent dam and sluiceway connected therewith, it is properly taxable upon the dam and sluiceway as for real estate, where real estate for purposes of taxation includes all land and all buildings and other things erected on or affixed to the same. If the interest is merely an easement, one who is entitled to an easement of this character, including the right to maintain a permanent dam and sluiceway, and who is in enjoyment of these rights, is to be deemed as in possession of the real estate for the purpose of taxation.<sup>3</sup> The distinction seems to be that the mere possibility of creating a water power is not a species of property which can be taxed; but when this possibility has been made a reality, and has, for the purposes of use, been connected with some definite parcel of real property, it has given such property an added value which may be considered in fixing the value of the property for taxation and made an element in the total valuation which shall be given to the property. So, since riparian rights are incident to, and part of, the abutting shore property, and inseparable therefrom except at the instance and by the act of the owner, they are not subject to taxation independent from the shore property to which they belong.<sup>4</sup> Therefore, the right of a riparian owner on a navigable river to erect a dam on the bed of the stream and to use the power of its waters is, for purposes of taxation, real and not personal property.<sup>5</sup> Since water which has been stored in a reservoir for the purpose of use in seasons of drought gives an added value to the mills which are to be operated by it, it may be included in the appraised value of the land on which it is located.<sup>6</sup> A water power company which furnishes water to manufacturers who are taxed upon its value is itself taxed upon the value of the surplus which it is enabled to sell to third persons during a period of the year, in the shape of a tax on the productive value of the land employed to create the water power.<sup>7</sup>

**433. Place and manner of taxation.**— Since the water has no value except as it is capable of use, and the value arises only as it is put to use and in connection with the machinery by which it is turned into power, the question of the place and manner of taxing the power has

in the general appraisal as such. He may be taxed for land owned by him in fee, although used only for the purpose of flowing, provided the valuation is so made as to avoid a double assessment. *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

<sup>3</sup>*Flax Pond Water Co. v. Lynn*, 147 Mass. 31, 16 N. E. 742.

<sup>4</sup>*State v. St. Paul & D. R. Co.* 81 Minn. 422, 84 N. W. 302.

<sup>5</sup>*State v. Minneapolis Mill Co.* 26 Minn. 229, 2 N. W. 839.

<sup>6</sup>*Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

<sup>7</sup>*Lowell v. Middlesex County*, 6 Allen,

caused some difficulty. In many instances the water may be stored in one jurisdiction and used in another, or the reservoir may lie in two jurisdictions and the water may be used in only one; and the question arises whether they shall share the benefit of the tax collected, or whether it belongs only to the jurisdiction in which the power is used. The Maine court held that water power cannot be taxed where the dam is situated if the power is used elsewhere, since, until it is applied, it is potential, and not actual such as to be properly subject to taxation.<sup>1</sup> And to like effect the Massachusetts court has held that a water power created by a dam across a stream which divides two towns, which is used exclusively in one of them, is not subject to taxation by the other.<sup>2</sup> But the New Hampshire court holds that water power or rights in a reservoir are an interest in the land upon or by which they are created, and, whether appurtenant to the land or owned apart therefrom, are properly valued and taxed where such land is situated.<sup>3</sup> And that the place where water power is created and kept, and not the place where it is used, determines the *situs* for the purpose of taxation.<sup>4</sup> Under this rule, water power accumulated in a reservoir by artificial means, and let into a stream for the use of mills 20 miles below, is taxable at its fair value as part of the real estate at the outlet, although the mills, with the water power attached, may be taxed in the separate township in which they are situated.<sup>5</sup> So, the owner of a water power which is capable of being used in either of two towns cannot, by his election to use the power in one or other of the towns, or by any disposition of title or use of the water, alter the statutory provision that real estate, including land and all rights thereto and interests therein, shall be taxed in the town in which it is situated.<sup>6</sup> Connecticut has adopted this rule, and holds that water power created by a dam is taxable as real estate in the state where the dam exists, although it is transmitted to a use in an adjoining state.<sup>7</sup> Both these rules cannot be enforced without, in some in-

<sup>1</sup>*Union Water Power Co. v. Auburn*, 90 Me. 60, 37 L. R. A. 651, 37 Atl. 331.

<sup>2</sup>*Boston Mfg. Co. v. Newton*, 22 Pick. 22.

<sup>3</sup>*Winnepiseogee Lake Cotton & Woolen Mfg. Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849.

In an appraisal of water power, the capacity of one mill to benefit other mills of the same owner, although situated in another town, through its more advantageous position, in regulating the flow of water for them and thereby adding to their value, is an element of value

which is taxable, and does not result in double taxation when the mills, which have risen in value because of their improved water power, are also appraised and taxed at their augmented value.

<sup>4</sup>*Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562, 32 L. R. A. 621, 34 Atl. 241.

<sup>5</sup>*Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455.

<sup>6</sup>*Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562, 32 L. R. A. 621, 34 Atl. 241.

<sup>7</sup>*Quinebaug Reservoir Co. v. Union*, 73 Conn. 294, 47 Atl. 328.

stances, enforcing double taxation, and one should be chosen and made uniform. The value of the land on which the reservoir is located because of its natural adaptability to such use may have an added value, and, when the use has been made of it, that added value may be made the subject of taxation. But the stored water has no value until it is actually put to use, and it is of value then only as it enhances the value of the property where it is used; so that true principle would seem to indicate that the rule of the Massachusetts and Maine courts was the better one. Unused water power is merely a capacity of the land for improvement, and is not subject to taxation separate from the land;<sup>8</sup> and should be taxed by adding its value to the value of the real estate where it is used.<sup>9</sup> But the land and the value added to it by the fact that it has been devoted to the use of the reservoir do not cease to be taxable as real estate where located, by the fact that they have been devoted to the use of supplying water power for mills.<sup>10</sup> In determining the value of the power the cost of maintaining, repairing, and managing the reservoir should be deducted.<sup>11</sup> Water power is included in an exemption of the owner from taxation.<sup>12</sup> A river is a body of water within the meaning of N. H. Laws 1878, chap. 48, § 1, authorizing the taxation of logs lying in any body of water.<sup>13</sup>

<sup>8</sup>*Boston Mfg. Co. v. Newton*, 22 Pick. 22.

<sup>9</sup>*Lowell v. Middlesex County*, 152 Mass. 372, 9 L. R. A. 356, 25 N. E. 469.

<sup>10</sup>*Pingree v. Berkshire County*, 102 Mass. 76.

But a statute making storage reservoirs assessable for taxation in the town where situated, at a valuation not exceeding the fair valuation of land of like quality in the immediate vicinity, thereby excluding all increase of value by reason of the improvements or additions made for the construction and maintenance of the reservoir.—is unconstitutional. *Cheshire v. Berkshire County Comrs.* 118 Mass. 386.

<sup>11</sup>*Cocheo Mfg. Co. v. Strafford*, 51 N. H. 455.

<sup>12</sup>*State v. Blundell*, 24 N. J. L. 402.

But a corporation owning mills and water privileges, exempt by its charter from local taxation upon all its property, is nevertheless taxable on property owned by it not used for or applicable to any of the purposes of its incorporation; but in estimating for taxation the value of such property, the proximity of it to the water power may be considered, but not the water rents. *State v. Flavelle*, 24 N. J. L. 370.

<sup>13</sup>*Berlin Mills Co. v. Wentworth's Location*, 60 N. H. 156.

## CHAPTER XVII.

### UNSAFE STREETS AND PREMISES.

- 434. Liability for injury because of water in street.
- 435. Liability of municipal corporation for accumulation of ice in street.
- 436. Accumulation of ice on sidewalk.
  - 436a. Effect of fixing grade so as to attract water from abutting property.
  - 436b. Ice from water cast into street from abutting building.
  - 436c. Ice from temporary causes.
  - 436d. Act of private citizen.
- 437. Liability of abutting owner for causing ice to form on walk.
  - 437a. Water from roof.
- 438. Water flowing across highway.
  - 438a. Mill race.
- 439. Unsafe condition in street.
  - 439a. Adjoining street.
  - 439b. Prescriptive right to maintain unsafe condition in street.
- 440. Unsafe premises.
- 441. Negligent use of water.
- 442. Highway on ice.

**434. Liability for injury because of water in street.**—The duty to keep its highways free from the accumulation of water in such a manner as to render them unsafe is within the duty imposed upon a municipal corporation with respect to its highways in general. If the municipal corporation digs pits in the highway, and permits them to be filled with water in such a way as to be dangerous to children or animals, it may be held liable for deaths caused by drowning in them.<sup>1</sup> But in order to render the municipality liable it must be responsible for the creation of the unsafe condition,<sup>2</sup> or it must have

<sup>1</sup> A municipal corporation is liable for the drowning of a 5-year old child in a pit which it had excavated, while constructing a bridge, in a shallow stream, at a street crossing, and to which it had constructed a levee from the bank, thus affording an easy approach to the pit, which it left unguarded in the absence of the workmen, although knowing that children resided near and were accustomed to play in that vicinity; and into which the child fell while at play with-

out fault on the part of it or its parents, they not being aware of the existence of the pit,—especially as the work was done in July, at a time when children would naturally be attracted to the brook to play. *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155.

<sup>2</sup> A municipal corporation is not liable for the death of a child drowned in an uncovered hole or well of water dug by some unauthorized person in an unused part of a highway across a ravine be-

permitted it to exist for such a length of time as to charge it with negligence. Therefore, a municipality is not liable for the death of a child drowned in a hole which had been dug in an untraveled ravine, which it had not accepted or opened as a public street, although a plat of the surrounding property had been filed by the owner designating it as a street.<sup>3</sup> At least, if it does not appear that it has received notice of the existence of the hole, or that it has existed for such a length of time as would justify the presumption of notice. A municipal corporation is liable for damage resulting from its negligence in permitting water to accumulate and to extend to and over a sidewalk and a portion of a highway, and so to remain without proper safeguard against being entered directly from the street by a child.<sup>4</sup> But the liability of a city for the death of a child is not shown by the fact that the city maintained a well in its streets, with an opening level with the sidewalks, covered with a lid on leather hinges; and that the child, who was of tender age, was found in the well.<sup>5</sup> The liability extends to permitting the accumulation of surface water on or near the highway in such a way as to render it unsafe.<sup>6</sup> A municipal corporation may be found negligent in case its street commissioner, upon finding a gutter stopped and standing full of water, merely cleans out the gutter without removing the obstruction which prevents the flow of the water, so that the gutter again fills, obscuring the location of the curb, so that one attempting to cross the street falls in the gutter and is injured.<sup>7</sup> So, a city which permits rubbish, washed upon the surface of a street by reason of the insufficiency of a culvert, to remain for such length of time that its presence must have come to the knowledge of the officers of the city, will be responsible for injuries to travelers caused by such obstruction.<sup>8</sup> A village is chargeable with negligence where it permits a water company to obstruct a drain for over five years by means of a water pipe, whereby a street corner is frequently flooded and the crosswalk, which runs in a diagonal direction, is covered by muddy surface water,

tween a roadway and sidewalk properly maintained for travel, where the child, for his own amusement or other purpose, left the prepared traveled track and went upon such unused portion of the highway. *Goeltz v. Ashland*, 75 Wis. 642, 44 N. W. 770.

The fact of the existence of a private cesspool within the limits of a highway is not decisive of negligence on the part of the town. *Hoey v. Natick*, 153 Mass. 528, 27 N. E. 595.

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<sup>3</sup>*Carle v. De Soto*, 156 Mo. 443, 57 S. W. 113.

<sup>4</sup>*Bourman v. Omaha*, 59 Neb. 84, 80 N. W. 259.

<sup>5</sup>*Lehman v. Brooklyn*, 29 Barb. 234.

<sup>6</sup>*Murphy v. Indianapolis*, 83 Ind. 76; *Decker v. Scranton City*, 151 Pa. 241, 25 Atl. 36.

<sup>7</sup>*Bly v. Whitehall*, 120 N. Y. 506, 24 N. E. 943.

<sup>8</sup>*Hazard v. Council Bluffs*, 87 Iowa, 51, 53 N. W. 1083.



which renders the crossing dangerous.<sup>9</sup> But a city is not rendered liable to one sustaining personal injuries because of the neglect of an independent contractor, in grading a street, to remove surface water and sewage, by its failure to include in the contract for the improvement a provision that the contractor care for and remove all surface water, drainage, and sewage interfered with or impeded by reason of the grading of the street.<sup>10</sup> The same principle which renders a municipality liable for permitting the highway to be unsafe through the action of water renders a citizen liable who casts the water into the street in such a way as to render it unsafe.<sup>11</sup> The question of liability for the erection of embankments in the street so as to interfere with drainage has already been considered.<sup>12</sup>

**435. Liability of municipal corporation for accumulation of ice in street.**— The attempt to travel by ordinary means of locomotion over ice is always attended with more or less danger, and ice never forms a safe surface for a highway. Therefore, if the municipality permits water to accumulate in such a way as to form ice and render the surface of the street unsafe, it will be liable for the resulting injury. By reason of the fact that the bed of the street is mostly used for horses and vehicles, the risk of ice is not so great as upon the sidewalk, and the defect must be greater to cause an injury. But if the municipality permits such a use of the street as to render it unsafe by an accumulation of ice upon it, it will be liable for the resulting injury.<sup>1</sup> And a private individual is also liable in case his acts cause

<sup>9</sup>*Lloyd v. Walton*, 57 App. Div. 288, 67 N. Y. Supp. 929.

<sup>10</sup>*White v. New York*, 15 App. Div. 440, 44 N. Y. Supp. 454.

<sup>11</sup>An indictment would lie for the owner's failure to remove water collected upon the highway; or he might be liable in a civil action for an injury done to the embankment by his mill pond. *Reg. v. Fitzgerald*, 39 U. C. Q. B. 297.

A conviction of one for the overflow of a highway by means of a milldam maintained by him is right, although the road overflowed is in some places inclosed and cultivated, where it appears that the overflow is at other parts than those inclosed; and those who inclosed it were anxious that it should be opened and traveled, which was impossible owing to the overflow. *Reg. v. Lees*, 29 U. C. Q. B. 221.

In an action for unlawfully obstructing a highway by allowing waste water to flow in upon it, where it is neither

alleged nor proved that defendant is the owner or in control of the pond or reservoir from which the water backed up and covered the highway, an order abating such reservoir as a nuisance is erroneous. *Eaton v. People* (Colo.) 70 Pac. 426.

The common-law remedy in the nature of a criminal proceeding for obstructing a highway by turning waste water in and upon it is supplanted by Mills's Anno. Stat. § 3963, providing that all penalties therefor are to be recovered in an action in the nature of debt. *Ibid.*

<sup>12</sup>*Ante* § 101.

<sup>1</sup>A municipality is liable for injuries sustained by falling upon ice in a street, caused by a saloon keeper's being permitted to empty water through a pipe in large quantities, which froze over a large surface, creating a nuisance of which the city had notice and which it was its duty to abate. *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832.

the defect.<sup>2</sup> A water company which continues to use a pipe or tunnel conduit after it has become leaky so as to allow water to escape upon the highway to the danger of the traveling public does so at its own hazard; and if it permits the water to flow upon the highway at the seasons of the year when the natural and probable result will be the formation of ice and the creation of a condition dangerous to travelers, it will be liable for injuries resulting therefrom.<sup>3</sup> A prescriptive right to take water from a natural stream, crossed by a log dam of a given height, in a raceway alongside and culvert athwart a public street, to mills not operated in extreme cold weather, is not broad enough to sustain a defense against the town owning the highway and complaining, that by replacing the wooden dam with a stone one, higher and more impervious to water, and running the mills all through the winter, more water and ice obstructed the sluiceway and overflowed the road.<sup>4</sup>

**436. Accumulation of ice on sidewalk.**—The question of the liability of a municipal corporation for the unsafe condition of its streets because of snow or mere slipperiness from sleet or other causes is not within the scope of the present discussion; but there are many conditions which arise from the use of water, or the failure to provide against its finding its way upon the city walks, which may properly be considered here. A municipal corporation is liable for the accumulation of ice upon a sidewalk through its own negligence, in such a way as to render the walk unsafe; and in such cases the fact that the ice is smooth is no defense.<sup>1</sup> And this rule renders the municipality liable in case it constructs the walk in a defective manner, so as to cause injury; and a sidewalk constructed or permitted to remain in such a condition as to accumulate water which, in freezing weather, will cause dangerous ice, is usually regarded as defective, so that the municipality will be liable for injuries caused by it. As said in *Stanton v. Springfield*,<sup>2</sup> a way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality. It may be built at such an angle, and so exposed to the formation of ice, as to make passing over it in winter especially and unusually dangerous. In all of these cases it will be for the jury, under proper instructions, to decide, as a question of fact, whether the way is properly made and kept in proper repair. Depressions in the

<sup>1</sup>*Burt v. Utah Light & P. Co.* (Utah)

72 Pac. 497; *Renard v. Woonsocket*

*Bobbin Co.* 23 R. I. 581, 51 Atl. 209.

<sup>2</sup>*Burt v. Utah Light & P. Co.* (Utah)

72 Pac. 497.

<sup>3</sup>*Shreicsbury v. Brown*, 25 Vt. 197.

<sup>4</sup>*Magaha v. Hagerstown*, 95 Md. 62,

51 Atl. 832.

<sup>5</sup>12 Allen, 566.

walk, into which water flows and freezes into rough and uneven surfaces, may constitute a defect.<sup>3</sup> And this rule has been extended to permit a recovery where the ice was smooth and slippery, where the condition was plainly such as to constitute a defect.<sup>4</sup> In *Chamberlain v. Oshkosh*,<sup>5</sup> it was held that a hole or depression in a walk, into which the water flows and freezes, is not the proximate cause of injury from slipping and falling upon the smooth ice. That decision seems hardly to be warranted by true principle. The proximate cause is the one which is the efficient cause of the injury; and if the depression in the walk was, in view of the liability of water to freeze in it, such as to constitute a defect, it would seem that the only thing connected with the accident which could be regarded as the efficient cause was the defective condition of the walk, and for this the municipality should be held liable. If the improper construction of the walk causes the ice to form there in such a way as to make the walk dangerous the municipality is liable.<sup>6</sup> To hold the city liable, it must have had notice of the defective condition, if notice is a statutory prerequisite to its liability.<sup>7</sup>

**436a. Effect of fixing grade so as to attract water from abutting property.**— If the grade of the street is so fixed with relation to adjoining property that the water will naturally flow from such property onto the street, and accumulate in the form of ice, the municipality may be liable for injuries thereby caused to travelers, as for a defective street.<sup>1</sup> Thus, a town may be liable for injuries caused by ice on a highway, where, by reason of the relation of the road to a springy hillside and the direction of the slope of the road, the situation is such as

<sup>3</sup>*Upam v. Salem*, 162 Mass. 483, 39 N. E. 178.

<sup>4</sup>*McDonnell v. Philadelphia*, 12 Pa. Co. Ct. 672.

<sup>5</sup>84 Wis. 289, 19 L. R. A. 513, 54 N. W. 618.

<sup>6</sup>*Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231; *Conklin v. Elmira*, 11 App. Div. 402, 42 N. Y. Supp. 518.

An action will lie against a municipality for injuries sustained by slipping upon ice, where the sidewalk, from age and long use or improper construction, had sunken down so as to allow water to accumulate upon it, in consequence of which the ice which caused the accident was formed. *Cornwall v. Derochie*, 24 Can. S. C. 301.

A municipal corporation will be liable for the injuries caused by a fall on one of its sidewalks by reason of ice

forming in a gutter cut into the walk to carry off water flowing from the roof of an adjoining building, where the gutter stone has become raised and the channel broken, so that it permits the flow of water dammed back by the raised gutter stone to the walk, where it freezes. *Gilrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357.

On a similar principle, it has been held that a city undertaking to build and maintain sidewalks is liable for injuries caused by the cutting of a ditch through ice and snow across a sidewalk for the purpose of conveying water into the gutter. *Hall v. Manchester*, 40 N. H. 410.

<sup>7</sup>*Allen v. Cook*, 21 R. I. 525, 45 Atl. 148.

<sup>1</sup>*Morse v. Boston*, 109 Mass. 446; *Ney v. Troy*, 50 Hun, 604, 3 N. Y. Supp. 679.

to render the highway unsafe.<sup>2</sup> A municipal corporation is liable for injuries caused by a fall on ice which is caused by the flow of water from an alley across a sidewalk, which freezes in such form and proportion as to become dangerous to travelers, if it permits the formation to remain on the sidewalk for an unreasonable length of time.<sup>3</sup> But a municipal corporation is not bound to drain the surface water from a vacant lot under a sidewalk, or dam the water back to prevent its flowing over the walk, under penalty of being liable for injuries caused by a fall on ice formed from the water as it flows across the walk.<sup>4</sup> Whether the circumstances are such as to render the street defective and the municipality liable is a question for the jury.<sup>5</sup> The municipality is not liable if the ice was caused by the freezing of water flowing upon the walk by reason of the defective drainage of adjoining property, where it had not existed for any length of time and was so thin and smooth as not to cause an obstruction to travel.<sup>6</sup>

**436b. Ice from water cast into street from abutting building.—**

If a leader is constructed from the eaves trough of an adjoining building in such a way as to cast the water upon the walk, this may render the municipality liable for a defective street, or for ice resulting from an artificial cause. As said in *Olson v. Worcester*,<sup>1</sup> a ridge of ice on a sidewalk, caused by water flowing from a conductor pipe on an adjoining building, may be found to be a defect in the highway, for injury caused by which the municipality will be liable.<sup>2</sup> And this is especially true where a depression or gutter was constructed in the walk, so as to indicate that the abutting owner intended to drain the water from his roof across the walk permanently.<sup>3</sup> It has been held

<sup>2</sup>*Pinkham v. Topsfield*, 104 Mass. 78.

<sup>3</sup>*Scott v. Scranton*, 5 Lack. L. News, 73.

A municipal corporation will be liable for injuries to a traveler on a highway, caused by falling upon ice permitted to form from water leaking from a race adjoining the highway, and concealed by a light fall of snow, where the municipality was negligent in permitting the conditions to exist. *Clark v. Lockport*, 40 Barb. 580.

<sup>4</sup>*Tracey v. Poughkeepsie*, 46 Hun, 569.

A city is not liable for an injury caused by a fall on ice which formed on a sidewalk during the night, and was not removed at the time of the accident, about 1 o'clock P. M. of the following day, although the water came from springs and melting snow which was permitted to flow along an alley onto the sidewalk, where the alley was a pri-

vate way over which the city had no control. *Blakeley v. Troy*, 18 Hun, 167.

<sup>5</sup>*Shumway v. Burlington*, 108 Iowa, 424, 79 N. W. 123.

<sup>6</sup>*Landolt v. Norwich*, 37 Conn. 615.

<sup>1</sup>142 Mass. 536, 8 N. E. 441.

<sup>2</sup>*Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481; *Dean v. New Castle*, 201 Pa. 51, 50 Atl. 310; *Hall v. Lowell*, 10 Cush. 260; *Mosey v. Troy*, 61 Barb. 580.

If ice on a sidewalk is not only smooth and slippery but has remained for some time, and by the dripping of water from the eaves of an adjoining house has been rounded up and made uneven, so that a person cannot walk over it using due care without being in danger of falling, the jury will be warranted in finding the highway to be defective. *Hutchins v. Boston*, 97 Mass. 272 note.

<sup>3</sup>*Hughes v. Lawrence*, 160 Mass. 474,

that a municipal corporation is not responsible for injuries caused by water dripping from a building adjoining a sidewalk, in such a way as to freeze and render the walk unsafe.<sup>4</sup> And where an abutting owner maintained an awning across a sidewalk in such a way that water dripped from it and froze upon the walk in a ridge, the court held that he, and not the municipal corporation, should be liable for an injury resulting from a fall upon it.<sup>5</sup> There is no doubt that in either of these cases the abutting owner is liable for the condition he has caused. But how can the municipality escape liability for an unsafe condition of the street which it is under obligation to keep safe, merely because the unsafe condition was created by the abutting owner, where the condition was a permanent one and it had the absolute power to compel its removal? There can be no question that the municipality would be liable if it permitted the abutting owner to pile earth in the street in such a way as to render it unsafe, and there is no ground of distinction between such a case and permitting him to dispose of water which it was his duty to care for, by abandoning it in such a way as to render the highway unsafe. Whether or not the municipality is negligent in its dealing with conditions which confront it is for the jury.<sup>6</sup> Some courts have made a distinction between ice resulting from such a cause, which was smooth, and that which was uneven or broken into ridges, holding that there was no liability in the former case.<sup>7</sup> This distinction is an attempted application of the rule that there is no liability for a mere slippery condition of the streets due to sleet or freezing rain. But that rule is not

36 N. E. 485; *Fitzgerald v. Woburn*, 109 Mass. 204.

<sup>4</sup>*Kaveny v. Troy*, 108 N. Y. 571, 15 N. E. 726; *Hausmann v. Madison*, 85 Wis. 190, 21 L. R. A. 263, 39 Am. St. Rep. 934, 55 N. W. 167.

A charge that if the accumulation of ice on which the plaintiff fell resulted from the dripping from the eaves, plaintiff cannot recover against the city, but can if it resulted from an accumulation of snow on the walk, sufficiently covers a requested charge that, if the jury are unable to determine whether the ridge of ice causing the accident complained of was due to dripping from the eaves or to snow on the walk, plaintiff cannot recover. *Keane v. Waterford*, 20 N. Y. S. R. 340, 8 N. Y. Supp. 790.

But a village which permits the water dripping from the eaves of a bay window adjacent to the walk, where it freezes, to accumulate a ridge of ice several inches thick and 2 or 3 feet broad, and to so remain for ten days, is not, as

matter of law, free from negligence, although during such time no thaw occurred to make the ice readily removable. *Thompson v. Saratoga Springs*, 22 App. Div. 186, 47 N. Y. Supp. 1032.

<sup>5</sup>*Hanson v. Warren*, 2 Monaghan (Pa.) 595, 14 Atl. 405.

<sup>6</sup>*Todd v. Troy*, 61 N. Y. 506; *Darling v. New York*, 18 Hun, 340.

Whether reasonable care required a municipality to remove from its sidewalk ice upon which the plaintiff fell and was injured is a question for the jury, where the ice was formed by water dripping from the eaves and through the cornice of a building, and frozen upon the sidewalk, upon which a ridge had existed for ten days before the accident. *Morris v. Saratoga Springs*, 55 App. Div. 263, 66 N. Y. Supp. 821.

<sup>7</sup>*Billings v. Worcester*, 102 Mass. 329, 3 Am. Rep. 460; *Gavett v. Jackson*, 109 Mich. 408, 32 L. R. A. 861, 67 N. W. 517.

applicable to the case of water thrown across the walk from a conductor pipe. Such a pipe will cause ice to freeze at its outlet at every time of alternate freezing and thawing weather, and the very fact that there is not a general icy condition of the walks may make the local condition all the more dangerous, because the traveler is not on his guard. If the ice has a pitch to it, either because of the slope of the walk, or because it forms more thickly at one side than at the other, the very smoothness may constitute its most dangerous character. The liability should depend, not upon the question whether the ice was smooth or rough, but upon whether, under all the circumstances of the case, the existing condition should be regarded as a defect which the municipal corporation was under obligation to correct. The true rule was applied in *Ayres v. Hammondsport*,<sup>8</sup> where it was held that a village which permits a walk to remain in an uneven and slanting condition, so that water dropping from the eaves trough of a building causes an accumulation of ice thereon at times when the rest of the walk is dry, is liable to one not aware of the dangerous condition of the walk, who is injured by falling thereon. The mere fact that the ice was smooth will not absolve the municipality from liability if it is found to be an obstruction to travel.<sup>9</sup> If an obstruction caused by a discharge of water from a leader pipe on to the sidewalk, where it froze, has existed for a sufficient time to charge the city with notice of the defect, its liability is not affected by the allowance of a reasonable time for the owner to clean the walk or by the fact that he has, theretofore, promptly cleaned the walk.<sup>10</sup>

**436c. Ice from temporary causes.**— The question of the liability of a municipal corporation for injuries caused by ice which has been formed on the walk by temporary causes will depend upon its connection with the formation of the ice, or its method of dealing with it after notice of its formation, or with the thing which caused its formation after receiving notice of the fact that it is likely to cause it. If the municipality or its agent is guilty of negligence in creating conditions which cause the water to flow onto the walk and freeze, the municipality is liable.<sup>1</sup> But one injured by falling on an icy sidewalk at a point where the gutter overflowed cannot recover against the city where no negligence is charged other than that the slope of the

<sup>8</sup> 11 N. Y. S. R. 706, 7 N. Y. Supp. 174. found negligent if its servants, in cleaning the snow from a crosswalk, pile it

<sup>9</sup> *Stone v. Hubbardston*, 100 Mass. 49. upon a sewer grating in such a way that

<sup>10</sup> *Reich v. New York*, 12 Daly, 72. in a subsequent storm the water cannot

<sup>1</sup> A municipal corporation may be flow into the sewer, but spreads over

sidewalk was too great.<sup>2</sup> And a city is not liable for an injury resulting from the accumulation of ice on a sidewalk, caused by water being splashed over or escaping from a drinking fountain, when it has not been negligent in the construction or operation of such fountain, and there is no evidence that it permitted the ice to remain where it endangered passersby after receiving notice thereof.<sup>3</sup> So, the mere fact that a gutter or catch basin is temporarily obstructed so as to cause the water to flow onto the walk and freeze will not render the municipality liable if it is not negligent in failing to remove the condition after receiving notice of it.<sup>4</sup> But the municipality must be diligent in removing the condition after receiving notice of it.<sup>5</sup> And a village which collects water in a surface drain, and fails to provide a proper outlet for it, so that it forms a coating of ice on which a passerby is injured, is liable therefor; and it is a question for the jury whether the ice was produced by the overflow from the drain, or by some other agency.<sup>6</sup> The municipality may be liable for the negligent use of the hydrants connected with its water-supply system, by which ice is caused to form upon the walk and render it unsafe.<sup>7</sup>

**436d. Act of private citizen.**—The municipality cannot absolve itself from liability by the fact that the ice was formed by the act of a private citizen, if it permitted the act to be done with knowledge that it would create a defect in the highway.<sup>1</sup> But the municipality is not responsible for injuries caused by acts of citizens of which it has

the sidewalk and freezes, making the walk unsafe. *Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720.

A municipal corporation is negligent in permitting a catch basin to be clogged, and then flushing a hydrant in such a way that the water runs into the street and onto crossings, freezing and rendering them unsafe. *Chicago v. Smith*, 48 Ill. 107.

In *Kenyon v. Mondovi*, 98 Wis. 50, 73 N. W. 314, it seems to be assumed that it is negligence for which the city may be liable, to permit ice to form around a pump in a highway.

<sup>2</sup>*Rehrey v. Neuburgh*, 60 N. Y. S. R. 250, 28 N. Y. Supp. 916.

<sup>3</sup>*Metzger v. Chicago*, 103 Ill. App. 605.

<sup>4</sup>*Kannenbergh v. Alpena*, 96 Mich. 53, 55 N. W. 614; *Gram v. Greenbush*, 20 N. Y. S. R. 370, 3 N. Y. Supp. 76; *Stanke v. St. Paul*, 71 Minn. 51, 73 N. W. 629.

<sup>5</sup>*Decker v. Scranton City*, 151 Pa. 241, 31 Am. St. Rep. 757, 25 Atl. 36; *Woolsey v. Ellenville*, 155 N. Y. 573, 50 N.

E. 270. Affirming 84 Hun, 236, 32 N. Y. Supp. 543; *Gaylord v. New Britain*, 58 Conn. 398, 8 L. R. A. 752, 20 Atl. 365; *Manross v. Oil City*, 178 Pa. 276, 35 Atl. 959; *Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675.

<sup>6</sup>*Woolsey v. Ellenville*, 61 Hun, 136, 15 N. Y. Supp. 647.

<sup>7</sup>*Corbett v. Troy*, 53 Hun, 228, 6 N. Y. Supp. 381; *Powers v. Chicago*, 20 Ill. App. 178.

It is for the jury to say whether a municipal corporation had reasonable notice of the flowing of water from a fire plug in extremely cold weather, forming ridges of ice so as to render the street extremely dangerous, where the evidence showed that the city agent visited this fire plug every day during cold weather, and the street had been in that condition for 36 hours prior to the accident. *Powers v. Chicago*, 20 Ill. App. 178.

<sup>8</sup>*Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832.

no notice.<sup>2</sup> It may, however, be liable in case, after notice, it does not require the condition to be removed within a reasonable time.<sup>3</sup> Whether or not a city performs its duty by seeing that slippery ice on the sidewalk is covered with malt sprouts is a question of fact for the jury.<sup>4</sup>

**437. Liability of abutting owner for causing ice to form on walk.—**

One owning land abutting on a street is liable in case he constructs gutters or leaders in such a way as to cast water on the walk where it will freeze and render the walk unsafe.<sup>1</sup> And the liability is not modified by the fact that it is customary in the municipality to drain

<sup>1</sup>A city is not liable for injuries sustained by one who slipped upon a walk covered with ice due to the fall of water from a hydrant in the yard of a citizen, where the walk had been in such condition but three days, and the city had no notice of the defect, which was covered by a recent fall of snow. *Corey v. Inn Arbor*, 124 Mich. 134, 82 N. W. 804.

A municipality may not be held responsible for the consequences of such an extraordinary occurrence as the pumping of water on a street in large quantities by the wrongful use of one of its fire engines, because of which a gutter overflows and ice is formed on a crosswalk, if the gutter is sufficiently free from obstructions to carry away such water as accumulates from natural causes, unless guilty of negligence in failing to remedy the dangerous condition of the walk. *Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183.

A municipal corporation is not liable for the unsafe condition of a street by reason of water which has frozen there, through the act of a member of its fire department in thawing out a hydrant with its acquiescence. The act is one governmental and political in its character, and solely for the public benefit, and therefore is within the rule that the municipality cannot be made liable. The court says the fire department and its service are of no benefit or profit to the village in its corporate capacity. The case is rested upon the ground that the doctrine of *respondet superior* does not apply, the court saying the case is grounded solely upon the application of the doctrine of *respondet superior*, and can be maintained only by establishing the rule of master and servant. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762,

A municipal corporation will not be liable for the slippery condition of its walks caused by the freezing of water overflowing a gutter in which it had been pumped by a fire engine which was in use for a proper purpose and in a lawful manner. *Cook v. Milwaukee*, 27 Wis. 191.

<sup>2</sup>*Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859.

A municipality is liable for negligently permitting ice formed by the freezing of water discharged from a hydrant by a water company to remain on a crosswalk, although the water may have been lawfully discharged thereon by the water company. *Waltmeyer v. Kansas City*, 71 Mo. App. 354.

<sup>3</sup>*Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859.

Although the question of notice to the city of dangerous ice on the sidewalk is for the jury, where it froze during the night and in the morning was covered by the abutting owner with malt sprouts, which were swept off by boys about dark on the evening of the accident, yet, if the jury is not from the vicinage, it should not be permitted to draw the inference of notice from consideration of the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair." *Ibid.*

<sup>4</sup>*Davis v. Rich*, 180 Mass. 235, 62 N. E. 375.

In an action to recover for personal injuries sustained by a fall upon an icy walk, a nonsuit was improperly granted, in the absence of contributory negligence, where the evidence showed that the water had flowed over the walk for several days until it froze in ridges with a rough uneven surface. *Louis v. Eureka Club*, 56 N. Y. Supp. 66.



water from roofs and waste pipes across the pavement to the gutter.<sup>2</sup> This liability will attach to anyone who attempts to deal with water in such a way as to cause it to flow onto the walk and render the walk unsafe.<sup>3</sup> There is a New Jersey case which is out of harmony with the decisions elsewhere. In it the owner of a lot sloping towards a street erected a building thereon upon a wall, through which holes were left to allow the water to escape. The result was that water flowed from the holes across the walk and, in cold weather, formed ice. A traveler on the walk, having fallen upon such ice and having been injured, brought an action against the property owner, who was held not liable, on the ground that the altered transmission of surface water, caused by the erection of a building upon land over which it is accustomed to flow, affords no ground of action to a person who suffers injury by reason thereof.<sup>4</sup> This decision cannot be sustained on principle. The water was concentrated into channels, and cast directly upon the walk in such a way that injury must almost necessarily result in freezing weather. Such conduct must be regarded as a nuisance rendering the one creating it liable for the consequences. Had the ice been caused to form merely because of an alteration in the grade<sup>5</sup> between the street and the abutting property, the principle laid down in that case would have been applicable, and the abutting owner would not have been liable; but the principle is not applicable to the facts of the case. One owning a lot abutting on a public street in a city is not liable for the damages the municipality has been compelled to pay for injuries received by a person in consequence of ice accumulated about a pump in the sidewalk in front of his lot caused by the overflow and drip from the pump when used by such owner in common with others, in which he claimed no interest different from that of the city or public generally, and over which he exercised no exclusive control, but merely used in common with other citizens under a license from the municipality, and whose benefit from its existence was the same as that of others, differing only in degree, al-

<sup>2</sup>*Brown v. White*, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962.

<sup>3</sup>*Thuringer v. New York C. & H. R. R. Co.* 82 Hun, 33, 31 N. Y. Supp. 419; *Crocker v. Schureman*, 7 Mo. App. 358.

A water company is liable for its failure to remove from a crosswalk ice formed thereon by the freezing of water discharged by it from a hydrant, although the act of discharging the water may have been lawful. *Waltemeyer v. Kansas City*, 71 Mo. App. 354.

<sup>4</sup>*Jessup v. Bamford Bros. Silk Mfg.*

*Co.* 66 N. J. L. 641, 58 L. R. A. 329, 88 Am. St. Rep. 502, 51 Atl. 147.

<sup>5</sup>*Brown v. Wysong*, 1 App. Div. 423, 37 N. Y. Supp. 281.

An abutting owner is not liable for personal injuries from a fall upon ice on a driveway constructed across the sidewalk for the necessary use of the premises, accumulated from water flowing off his land onto the sidewalk. *Knoth v. Meltzer*, 3 Misc. 596, 23 N. Y. Supp. 342.

though he had once made some trifling repairs to the pump, and its position had once been changed, under the direction of the municipality, with his knowledge and consent, by moving it nearer his lot line.<sup>6</sup> An injury to a horse resulting from its slipping on ice forming in a highway is too remote to be attributed to the act of a person washing his van in the street, the water from which flowed in a gutter toward a grate leading to a sewer, but which, on account of the grating being obstructed by ice, flowed over the highway, forming the ice in question, where such person at the time of casting the water in the gutter did not know that the sewer grating was obstructed.<sup>7</sup> If the property owner has constructed a drain to cast water onto the walk, he is not relieved from liability for the injury by the fact that the water was actually put into the drain by his tenant.<sup>8</sup>

**437a. Water from roof.**—Negligently maintaining a leader from the roof of a building so as to discharge water onto the sidewalk, by which ice is accumulated thereon and the walk rendered dangerous, will render the property owner liable for injury caused thereby to pedestrians.<sup>1</sup> It is immaterial that the building is in possession of tenants, if the roof and leader are controlled by the landlord.<sup>2</sup> But a conductor pipe designed to carry water from a roof to the ground, if constructed with due care and proper precaution, cannot be deemed a nuisance, although discharging upon the sidewalk, if it is not prohibited by a municipal ordinance. And the fact that ice thereby forms on the walk and causes injury will give no right of action to an individual against the one in front of whose property it formed, where it carried water from the adjoining house, and he was in no way responsible for it, and had not been notified to remove the ice.<sup>3</sup> If the abutting owner maintains an awning in such a way as to cause ice to accumulate on the walk, he will be liable for injuries thereby caused.<sup>4</sup> An owner of property abutting on a street is not liable to a

<sup>6</sup>*Elkhart v. Wickwire*, 87 Ind. 77.

<sup>7</sup>*Sharp v. Powell*, L. R. 7 C. P. 253, 41 L. J. C. P. N. S. 95, 26 L. T. N. S. 436, 20 Week. Rep. 584.

<sup>8</sup>*Isham v. Broderick* (Minn.) 95 N. W. 224; *Brown v. White*, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962. *Contra*, *Gardner v. Rhodes*, 114 Ga. 929, 57 L. R. A. 749, 41 S. E. 63.

<sup>1</sup>*Tremblay v. Harmony Mills*, 171 N. Y. 598, 64 N. E. 501; *Holyoke v. Hadley*, 174 Mass. 424, 54 N. E. 889; *Leahan v. Cochran*, 178 Mass. 566, 53 L. R. A. 891, 60 N. E. 382; *Reedy v. St. Louis Brewing Assn.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859.

A lot owner who constructs a pipe to lead the water from his roof to a sidewalk will be bound to indemnify the municipal corporation against liability for injury by the presence on the walk of ice caused by the freezing of water. *New York v. Dimick*, 49 Hun, 241, 2 N. Y. Supp. 46.

<sup>2</sup>*Kirby v. Boylston Market Assn.* 14 Gray, 249, 74 Am. Dec. 682.

<sup>3</sup>*Wenzlick v. McCotter*, 87 N. Y. 127, 41 Am. Rep. 358, Reversing 22 Hun, 60.

<sup>4</sup>*Macauley v. Schneider*, 9 App. Div. 270, 41 N. Y. Supp. 519; *McConnell v. Bostelmann*, 72 Hun, 238, 25 N. Y. Supp. 390.

passerby injured by falling upon ice on the sidewalk, formed by water from a burst pipe leading to a storage tank, when the break is not caused by any defect in the pipe or by his negligence, although the water may have reached the sidewalk because pipes designed to carry rainwater were insufficient to carry it.<sup>5</sup> One who purchases a city lot with a pipe leading water from the roof in such a way that it flows upon the sidewalk, but which was constructed in a usual and proper manner, will not, in case he makes no change in the premises, be liable for injuries caused by a fall upon ice upon the walk, which may have been produced from other causes as well as by the water from the pipe.<sup>6</sup> A statutory provision that in no case shall the water from leaders be allowed to flow upon the sidewalk, and forbidding such flooding under a penalty, is applicable to buildings erected before the passage of the statute.<sup>7</sup>

**438. Water flowing across highway.**—If the municipality attempts to conduct water across the street, or to lay out the street over a water course, it is bound to take notice of the fact that such a combination is very likely to render the highway unsafe, and to take the necessary steps to see that no injury is caused to travelers because of the presence of the stream within the limits of the highway. If it negligently attempts to make water flow across a highway in an open gutter, it will be liable for injuries caused thereby.<sup>1</sup> And if it attempts to cover the stream it will be liable in case the passageway proves insufficient, by reason of which the water tears out the earth of the highway leaving it unsafe; and the same is true if the passageway which was originally left is permitted to become obstructed.<sup>2</sup> The municipality is not liable for injuries caused by the sudden and extraordinary rise of a stream flowing across it.<sup>3</sup> But if, at the time of an accident, the condition of a highway from the rise of the water of a creek was such as might reasonably have been expected by town authorities having knowledge of the previous defects in the highway and of the nature of the creek, it was incumbent on the town, either to close up the road until repaired, or provide means for warning per-

<sup>1</sup>*Reedy v. St. Louis Brewing Assn.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859.

<sup>2</sup>*Moore v. Gadsden*, 93 N. Y. 12.

<sup>3</sup>*Fire Department v. Wendell*, 13 Daly, 427.

<sup>4</sup>*Navarre v. Benton Harbor*, 126 Mich. 618, 86 N. W. 138.

<sup>5</sup>*Cook v. Barton*, 66 Vt. 65, 28 Atl. 631; *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

a hole in a highway due to, and 5 rods away from, a culvert not large enough to carry off water from a side ditch, are too remote to make a municipality answerable under the Vermont statutes imposing liability for damages caused by insufficiency or want of repair of culverts and sluices. *Ford v. Braintree*, 64 Vt. 144, 23 Atl. 633.

<sup>6</sup>*Hopkins v. Rush River*, 70 Wis. 10, 34 N. W. 909.

But personal injuries occasioned by

sons traveling thereon in the exercise of ordinary care of the danger.<sup>4</sup> Notice to town officers that a culvert under a highway will be insufficient to carry the water in time of flood is not sufficient notice of a defect in the highway which results from a flood, so as to permit one whose horse is injured by the defective highway to hold the town responsible therefor.<sup>5</sup> The owner of a mill pond may be liable if he constructs his dam in such a way as to cause the water to flow across the highway and render it unsafe.<sup>6</sup>

**438a. Mill race.**—If the owner of a mill attempts to maintain a race across a highway he is bound to maintain it in such a way that it will not render the highway unsafe for travel. If he permits the race to become a nuisance the permission to maintain it may be revoked.<sup>1</sup> And he will be liable for any injuries which travelers may receive from the defective condition of the highway because of his race.<sup>2</sup>

**439. Unsafe condition in street.**—If a municipal corporation constructs a drain or cistern in the highway it must use due care that it shall not cause injury to persons rightfully using the highway. If, by reason of the carrying out of a plan for drainage, a street is left in an unsafe condition, the municipality must exercise ordinary care to restore it to a condition safe for travel.<sup>1</sup> So, if an open drain is left in the highway, in such relation to the sidewalk or to the traveled portion of the roadway and of such a character as to depth and

<sup>4</sup>*Wiltse v. Tilden*, 77 Wis. 152, 46 N. W. 234.

So a town will be liable for injuries caused by a defect in a road caused by a sudden freshet, if the surveyor could, after receiving notice of the defect, by diligently using the means at his command or within his reach have put a force immediately upon the road which was competent to make the necessary repairs after the injury to the road and before the accident. *Clark v. Corinth*, 41 Vt. 449.

Where a woman drove upon a causeway when she was aware of the fact that the water in the stream had risen so as to cover and submerge it, leaving nothing visible above the surface of the water to indicate its location, the condition of which she had viewed before driving upon it, she was guilty of contributory negligence; and the owners of the causeway are not liable for the loss of her life by reason of their negligence in not maintaining a railing along the side of the causeway. *Fox v. Glastenbury*, 29 Conn. 204.

<sup>5</sup>*Pendleton v. Northport*, 80 Me. 598, 16 Atl. 253.

<sup>6</sup>In an action to recover for an injury done to horses, caused by their falling into a hole made in the public highway by the water overflowing a milldam and tearing up the road, a declaration which alleged the nonfeasance of defendants in failing to fill up the hole or fence it around, but which did not allege malfeasance in erecting or continuing the dam, was insufficient, since the defendants would not be liable for an omission or neglect to repair a highway, as that was not their duty; but they would be liable as for a nuisance if their milldam caused a break or chasm in the highway. *Nellis v. Wilkes*, 1 U. C. Q. B. 46.

<sup>1</sup>*Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43.

<sup>2</sup>*Branan v. May*, 17 Ga. 136; *Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Hay v. Cohoes Co.* 3 Barb. 42.

<sup>3</sup>*Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244.

quantity of water carried that it is a menace to travel, the municipality will be liable in case injury is caused by it to a traveler.<sup>2</sup> And the municipality is bound to keep a covered drain across a street, which is used as a public crosswalk, in repair so that persons using it will not fall into it.<sup>3</sup> And if the ditch runs across the street and makes it unsafe for travelers it is liable.<sup>4</sup> The mere fact that an open ditch is maintained is not alone sufficient to make the city liable.<sup>5</sup> The question of liability depends upon the further question whether or not, under all the circumstances of the case, the ditch was of such a character as to render the highway unsafe for the use to which it was intended to be put.<sup>6</sup> If the liability is claimed on the ground of nonrepair of a ditch which, if repaired, would be safe, the municipality must have had notice of the defect or it must have existed so long as to charge the municipality with notice.<sup>7</sup> The question of notice to the municipality is for the jury.<sup>8</sup> The fact that the municipality did not construct the ditch will not relieve it from liability if it rendered the highway unsafe, and the municipality had notice of it.<sup>9</sup> The rule holding the municipality liable for defective condition applies in case of cisterns in the highway which render it unsafe.<sup>10</sup> The placing of hydrants and catch-basins connected with the

<sup>2</sup>*Hinckley v. Barnstable*, 109 Mass. 126; *Fairbury v. Rogers*, 98 Ill. 554; *Goucher v. Sioux City*, 115 Iowa, 639, 89 N. W. 24; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

It is gross negligence on the part of a municipal corporation to leave a ditch in a street bordering on a narrow sidewalk filled with water to the depth of nearly 5 feet, situated in the midst of a dense population, without any guards of any kind to prevent children or other persons falling into it, and which has been there so long that the municipal officers must have been perfectly familiar with its location and existence; and it will be liable for the drowning of a child therein. *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378.

<sup>3</sup>*Champaign v. Patterson*, 50 Ill. 61.

<sup>4</sup>*Salem v. Webster*, 192 Ill. 369, 61 N. E. 323.

<sup>5</sup>*Walton v. York County*, 30 U. C. C. P. 217.

<sup>6</sup>But the maintenance of a gutter or ditch about 1 foot or 18 inches deep, constructed along a road for the purpose of carrying off surface water, and plainly visible, does not render the road unsafe, or entitle a bicyclist to recover for injuries sustained from riding along the edge of the gutter which gave way,

throwing him from his machine. *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128.

A gutter beside a sidewalk, 4 feet wide and not over 2 feet deep, made to carry off surface water, is not such an alluring object to children that a city is liable for injuries to children playing in it, in case it fails to make provision against such injuries. *Rome v. Cheney*, 114 Ga. 194, 55 L. R. A. 221, 39 S. E. 933.

<sup>7</sup>*Market v. St. Louis*, 56 Mo. 189.

<sup>8</sup>*Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

<sup>9</sup>*Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

<sup>10</sup>*Memphis v. Lasser*, 9 Humph. 757.

A municipal corporation is liable in damages for the drowning of a child four years old in a tank constructed and maintained by such municipality in a public street, and which it allowed to get out of repair so that the same was partially uncovered and open on one side, making it possible for a child to climb or fall therein, although it might be reasonably safe and secure for all persons of more mature years; and the fact that such tank had been out of repair for three months prior thereto will create a presumption of notice to the city

water supply and drainage systems may render the highway unsafe, so as to render the municipality liable for injuries caused by them.<sup>11</sup> A post hydrant constructed by the municipal agents so near the highway that the hub of a passing vehicle may strike it, the danger being so slight as to escape the attention of the travelers, renders a way defective so that the municipal corporation is liable for any resulting damage.<sup>12</sup> If, during the construction of a sewer, the trench is left in such a condition that the sides cave in and injure persons upon the highway the municipality is liable.<sup>13</sup> So, if, by reason of the highway crossing a stream, conditions are such as to render it unsafe unless barriers or lights are maintained, the municipality is bound to maintain them.<sup>14</sup> A railway company which, where its road crosses

of its condition. *Chicago v. Major*, 13 Ill. 349, 68 Am. Dec. 553.

<sup>11</sup> A city which so constructs a sewer basin in the highway that surface water flowing toward it will wash away the earth and make a deep impression is liable to one injured thereby, when the wheel of his wagon sinks therein, where the hole has existed for at least six weeks. *Lehmann v. Brooklyn*, 30 App. Div. 305, 51 N. Y. Supp. 524.

But the death of a child by its falling into a gutter in the street and being washed into the opening into a sewer under the sidewalk is such an unusual occurrence that a city is not liable for such death, because of its failure to place a grating over the opening, where a grating would have obstructed the water and damaged property. *Rome v. Cheney*, 114 Ga. 194, 55 L. R. A. 221, 39 S. E. 933.

The grating over a sewer entrance in a public highway with a space between the bars and rim wide enough to receive a horse's foot will render the way defective. *Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912.

A municipal corporation which maintains a catch basin in a highway in such a manner that the cover is liable to be floated off by heavy rains will be liable to one who falls into it while the cover is off from such cause. *Post v. Boston*, 141 Mass. 189, 4 N. E. 815.

A municipal corporation is liable for injury to a person, received from falling, in the nighttime, into a sewer man-hole in a public street nearly in the line of a sidewalk, without guards or lights, left open while being cleaned under the supervision and authority of the municipal corporation. *Kankakee v. Linden*, 38 Ill. App. 657.

<sup>12</sup>*St. Germain v. Fall River*, 177 Mass. 551, 59 N. E. 447.

<sup>13</sup>*Aurora v. Seidelman*, 34 Ill. App. 285.

Where a sewer caves in and leaves a depression in a street 12 feet in length, and the street is negligently left by the city in that condition for two months, when a person is injured by the caving-in of the sewer near the depression, the city cannot, in an action by the person injured, successfully defend on the ground that it did not have notice of the defect in the sewer, where it appears that, had the city repaired the street at the place of the depression, it would have discovered the defect which caused the injury. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

<sup>14</sup> A municipal corporation is liable for the drowning of a person in a slip or canal permitted by it to be excavated within its limits, and over which it had erected a bridge of less width than the abutting street, but which had failed and neglected to erect any protection in the course or bend from the sidewalks to the bridge to prevent persons proceeding in that direction from falling into it if they continued in a direct line from the sidewalk to the slip,—especially as the condition of the water in such slip, which was charged with noxious gas, enhanced the danger to a person falling therein. *Chicago v. Gallagher*, 44 Ill. 295.

Where a public sidewalk is continued by private parties for their own benefit in front of their property so far as the edge of a deep creek, so that strangers are likely to be injured by walking off the bank in the dark, it will be the duty of the municipality to place a barrier at the termination of the walk to pre-

a highway, constructs an open culvert of square timber at a place where a sloping drainage ditch formerly ran, is liable to one who, while walking along the road and crossing the railway, falls into the culvert and is injured, since it was the duty of the railway company to restore the highway to its former state, at least to such an extent as not to impair its usefulness or unnecessarily make it more dangerous, which they failed to do by constructing an open culvert which could have been covered without difficulty.<sup>15</sup> An action for damages, and not an injunction, is the proper remedy for maintaining a large open sewer in a street running through a section of unimproved property.<sup>16</sup>

**439a. Adjoining street.**— If the highway runs alongside of a water course or so near to it that there is danger of travelers on the highway being precipitated into the water, the municipality must maintain barriers to prevent such a catastrophe.<sup>1</sup> So, a municipal corporation is bound to maintain a railing or guard along the side of the highway, which is constructed on the bank along a river side in such a way that its use is dangerous, and the shying of a horse may precipitate persons attempting to use the road into the adjacent river.<sup>2</sup> When the highway and the water are nearly of the same level, and the depth of the water is not sufficient to cause injury, no barrier need be erected.<sup>3</sup> A town is not bound to maintain barriers outside the limits of the highway for the protection of those who leave the highway to water their horses in an adjacent pond, so as to prevent accidents

vent such accident. *Kinney v. Tekamah*, 30 Neb. 605, 46 N. W. 835.

It is the duty of a municipal corporation, in the exercise of its power to light the swing bridges within its limits, to provide sufficient light to enable persons using the same to guard against the dangers of falling into the river while a bridge is open to allow a vessel to pass. *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Chicago v. Wright*, 68 Ill. 586.

<sup>15</sup>*Fairbanks v. Great Western R. Co.* 35 U. C. Q. B. 523.

<sup>16</sup>*Cooper v. Cedar Rapids*, 112 Iowa, 367, 83 N. W. 1050.

<sup>1</sup>*Welsh v. Argyle*, 85 Wis. 307, 55 N. W. 412; *Fay v. Lindley*, 33 N. Y. S. R. 539, 11 N. Y. Supp. 355; *Davis v. Snyder Turp.* 196 Pa. 273, 46 Atl. 301; *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922.

When by dedication of a private owner a public street comes to a municipality, with a raceway adjoining it on such owner's land, in existence at the time

of dedication, it is the duty of the public authorities to guard the highway against dangers to travelers from such raceway: and the owner of the latter is not answerable on indictment for nuisance by increasing the capacity of the raceway without guarding it himself,— at least where the enlargement would be efficaciously safeguarded by the original protection which the public was bound to furnish. *State v. Society for Establishment of Useful Mfrs.* 46 N. J. L. 274, Reversing 42 N. J. L. 504.

<sup>2</sup>*Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733.

<sup>3</sup>But a town, although not liable for the failure of its highway commissioners to erect a barrier between the road and the waves of a lake along which it runs, is responsible where a team, scared by a wave which washed upon the road, shied off into a swamp on the other side, which was not protected by a barrier, and ran away, to the injury of the plaintiff. *Roblee v. Indian Lake*, 11 App. Div. 435, 42 N. Y. Supp. 326.

from venturing too far into the pond.<sup>4</sup> An abutting owner may be liable to indictment for cutting a ditch so close to a highway as to render it unsafe.<sup>5</sup>

**439b. Prescriptive right to maintain unsafe condition in street.—**

The creation of an unsafe condition by means of water cast into, or permitted to stand in, the street, is a public nuisance and, as shown by a note to *Leahan v. Cochrane*,<sup>1</sup> the overwhelming weight of authority is that no length of time will legalize or enable a person to acquire the right by prescription to maintain a public nuisance, or bar the right of the public to abate it. Under this rule there is no right to maintain an irrigating ditch in the streets of a city in such a way as to constitute a nuisance.<sup>2</sup> Nor can the right be acquired to maintain a mill race in a street in such a way that it will render the street unsafe.<sup>3</sup> Nor can a prescriptive right be obtained to maintain a ditch across a highway.<sup>4</sup> In *Kellogg v. Thompson*,<sup>5</sup> the court intimated that no prescriptive right could be acquired to turn a stream from its original channel into an artificial channel along the highway so as to constitute a public nuisance. And after a highway has been laid out, the abutting owner cannot perfect a prescriptive right to discharge water from a spout on his building into the highway so as to render it unsafe.<sup>6</sup> A prescriptive right cannot be obtained to set back water on a sidewalk.<sup>7</sup> And the same rule is true with respect to the damming back of water upon any portion of the highway.<sup>8</sup> And the power to obtain a prescriptive right to commit this kind of an injury does not seem to be given by a statute permitting the acquisition of title to public property by inclosing and maintaining adverse possession of it.

**440. Unsafe premises.—**If the municipality owns real property to which the public has access, it must keep it free from dangerous ponds or other reservoirs filled with water which will render them dangerous to the public. Thus, a municipal corporation is liable for the drowning of a child of tender years in a pond of water of great depth upon

So, even though a local authority is not liable for its acts of nonfeasance in failing to construct a fence or guide post between a dike and a highway liable to be flooded, it is liable for acts of misfeasance in taking down an existing fence which had become out of repair, where a traveler shortly afterward lost his way during a flood, and fell into the dike and was drowned. *Whyler v. Bingham*, 70 L. J. K. B. N. S. 207 [1901] 1 K. B. 45, 83 L. T. N. S. 652, 64 J. P. 771.

<sup>1</sup>*Com. v. Wilmington*, 105 Mass. 599.

<sup>2</sup>*State v. Day*, 52 Ind. 483.

<sup>3</sup>53 L. R. A. 891.

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<sup>4</sup>*Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 39 Pac. 943.

<sup>5</sup>*Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197.

<sup>6</sup>*Lewiston v. Booth* (Idaho) 34 Pac. 809.

<sup>7</sup>66 N. Y. 88.

<sup>8</sup>*Holyoke v. Hadley Water-Power Co.* 174 Mass. 424, 54 N. E. 839.

<sup>9</sup>*State v. Phipps*, 4 Ind. 515.

<sup>10</sup>*Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902; *New Salem v. Eagle Mill Co.* 138 Mass. 8.



a city lot bounded on two sides by public streets and on a third side by a public alley, with a roadway running across the pond between openings in the fences which invited approach, where logs and timbers floated about upon the water, attracting boys who had for some time been in the habit of playing in it, and of which attractiveness to children and its dangerous character the city authorities had been notified.<sup>1</sup> So, a municipal corporation is liable for injury resulting from its neglect to exercise proper care of a well or pool of water upon public grounds, by reason of which a child is drowned.<sup>2</sup> But if the property is properly fenced and cared for, the municipality is not liable;<sup>3</sup> and if the pond is upon property owned by private individuals, the fact that it is left unfenced and open to public use does not render the municipality liable to care for it; and therefore a city is not liable for the drowning in a pond of a child who waded in beyond his depth in his efforts to capture a bird that had escaped from him, where such pond, formed by the filling of an old gravel pit belonging to the city, stood out in the commons some distance from any highway, although within the city limits, and was used as a bathing and fishing place, and which possessed no secret danger, such as a great depth of water near the bank; and the child was attracted to the pond by seeing some children fishing there and voluntarily waded in some 10 feet after the bird.<sup>4</sup> And where water is accumulated on private property because of the raising of the grade of abutting streets the municipality is not liable for the drowning of a child who goes there to play upon it.<sup>5</sup> And the fact that the pond extends partly into the highway is immaterial if the accident does not happen within

<sup>1</sup>*Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, Affirming 53 Ill. App. 189.

In an action against a municipal corporation for the drowning of a child in a pond of water upon city property, the city is estopped from denying its duty as to such pond, where it had passed an ordinance declaring pits or ponds of that character a nuisance, and such ordinance is admissible in evidence as tending to show negligence on the part of the city. *Ibid.*

<sup>2</sup>*Berthold v. Philadelphia*, 154 Pa. 109, 28 Atl. 304.

<sup>3</sup>An action is not maintainable to recover for the death of a child drowned in a reservoir, owned by the city, so constructed that the top was 25 feet above the street level and surrounded by a high fence, although there was a hole under the fence by which children could

enter the sloping grounds surrounding the reservoir. *Peninsular Trust Co. v. Grand Rapids* (Mich.) 92 N. W. 38.

<sup>4</sup>*Schauf v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42.

<sup>5</sup>*Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528, Affirmed in 50 Neb. 804, 70 N. W. 363; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531, 66 Am. St. Rep. 506, 72 N. W. 316; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 56 Am. St. Rep. 543, 36 S. W. 659.

So, a municipal corporation will not be liable for the death of a boy drowned in a hole washed out alongside a sewer running over private property, where the hole was 50 or 60 feet from a highway and separated therefrom by an embankment surmounted by a fence, and there was no express or implied invitation for the public to go upon the premises, although persons had been accustomed

the limits of the highway.<sup>6</sup> But if the pond is created by the negligence of the municipality it may be held liable for the injury. Therefore, a city negligently maintaining an insufficient culvert in the street, which causes the water to dam up above it, is liable for the death of a child seven years of age, who is attracted by the water and falls therein and is drowned.<sup>7</sup> The rule that the municipality is not responsible for injuries which happen on private property, to which the negligence of the municipality has not contributed, has led the Minnesota court to hold that a municipal corporation will not be liable for the death of a child which falls into a stream which has been covered and transformed into a sewer, near the head of the sewer, so that it is carried into the sewer and drowned, although a platted, but unopened, street crosses the stream a few feet from the end of the sewer, on the ground, either that railings were not placed so as to prevent children from going to the head of the sewer from the street, or that a grating was not placed at the entrance to the sewer to prevent children from being carried into it.<sup>8</sup> A municipal corporation which, under requirement of statute, attempts to maintain a bathing place in a river is not an insurer of the safety of the place, and is under no obligation to the public before the place is thrown open for general use; and even after it is thrown open the municipality need not mark changes in the depth of the water. But the municipality is not free from all responsibility in the matter. The bounds of its liability are not yet fixed. In *McGraw v. District of Columbia*<sup>9</sup> the court said that we do not understand that a municipal corporation, even if the duty had been imposed upon it of establishing and maintaining a bathing beach, cannot be held responsible for its safety, and the safe use of it by those who are likely to have recourse to it, in the same manner as streets and highways are to be rendered safe, or even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the municipal-

to use the premises as a footpath without objection. *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887.

A municipal corporation will not be liable for the death of a child by drowning in a pond, although the pond adjoins a public street and is located on a platted tract of land containing blocks and streets which is not yet opened, but is crossed by footpaths; and the pond is covered by a crust of garbage and manure on which vegetation is growing, and no guards or railings are placed near the pond; where the pond is used only for a dumping place for garbage

and manure and is not a fit place for travel, and the child, for purposes of its own, attempts to cross the crust, which breaks, precipitating it into the water below. *Dehanits v. St. Paul*, 73 Minn. 385, 76 N. W. 48.

<sup>6</sup>*Arnold v. St. Louis*, 152 Mo. 173, 48 L. R. A. 291, 75 Am. St. Rep. 447, 53 S. W. 900.

<sup>7</sup>*Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

<sup>8</sup>*Nutting v. St. Paul*, 73 Minn. 371, 76 N. W. 61.

<sup>9</sup>3 App. D. C. 405, 25 L. R. A. 691.

ity, might have to be maintained in a condition of safety. If the owner of a park which has been opened for public recreation maintains a bathing place in it, he must not put in peril those who attempt to make such use of it.<sup>10</sup> A railroad company is not negligent in permitting a ridge due to a covered water way to remain near its tracks at a crossing, where it is not an obstruction to the safe use of the crossing under usual and ordinary circumstances, and where it led to the plaintiff's being thrown from his buggy only because of the rapid speed of his runaway horse.<sup>11</sup> One who enjoys, under a contract with a city, the privilege or franchise of receiving the revenues from the public market which he has undertaken to keep in repair, is not liable for the death, by drowning, of a child who fell into a well on the premises, in the absence of fault on the part of such lessee.<sup>12</sup> A water company is liable for the death of a boy drowned, without negligence on his part, in a deep reservoir maintained on its grounds and attractive to children, who, to its knowledge and with its acquiescence, resort thereto for fishing and to play, where it takes no reasonable precautions to avoid accidents.<sup>13</sup>

**441. Negligent use of water.**—Water may be so negligently used in or near a public highway as to render the highway unsafe and the municipality liable for the resulting injury. Thus, if a municipality attempts to maintain a waterworks system, and permits the water to leak from the conduits so as to undermine the highway and render it unsafe, it will be liable for the resulting injuries.<sup>1</sup> If it permits water to escape from its hydrants with a hissing noise which frightens horses, it will be liable for injury.<sup>2</sup> But where the persons making use of the water are not agents of the municipality, it is not liable unless it permits the negligent acts to continue after having notice of them. Therefore, where the fire department is an independent body and not the agent of the city, no liability attaches to a municipality for an injury arising from the negligent testing of a fire department hydrant supplied by waterworks owned by the city, from which it derives no revenue, for use for fire purposes, in such a manner as to frighten a horse passing on the highway, when such hydrant is under the control of, and is operated by, officers not acting as agents

<sup>10</sup> See *post*, chapter XXXII.

<sup>11</sup> *Myers v. Chicago, M. & St. P. R. Co.* 101 Fed. 915.

<sup>12</sup> *Weymouth v. New Orleans*, 40 La. Ann. 344, 4 So. 218.

<sup>13</sup> *Price v. Atchison Water Co.* 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450.

<sup>1</sup> *Hand v. Brookline*, 126 Mass. 324.

This is put upon the ground that for negligence in constructing works from which they are to receive profit, towns are just as liable for injuries as private corporations or individuals.

<sup>2</sup> *Baker v. North East*, 151 Pa. 234, 24 Atl. 1079.

or servants of the corporation, but as public officers whose duties are defined by general law, and when from the use of such hydrant the city derives no special benefit in its corporate capacity.<sup>3</sup> Conversely, the municipality is liable if the highway is rendered unsafe by water thrown by its own agents.<sup>4</sup> In *Welsh v. Rutland*,<sup>5</sup> however, it was held that in the control of its fire department, a municipal corporation is a mere instrumentality for the administration of public government and the collection and disbursement of public moneys raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of its officers. This doctrine is undoubtedly true so far as the governmental duty of the fire department in extinguishing fires is concerned. But in the case in which the Vermont court attempted to apply the doctrine, an employee of the fire department had been sent to thaw out a hydrant and did it so negligently as to render the highway unsafe. This was merely a ministerial act, and the result of it—that is the unsafe highway—was something for which the municipality was liable; and it would seem to make no difference with respect to that liability whether the defect was caused by a negligent act of the street department, or of the fire department. It would seem that the court applied a wrong principle to the decision of the case, and that the case is not well grounded. A water company which uses its plant so negligently as to make the highway unsafe is liable for the resulting injury.<sup>6</sup> As will be seen in a subsequent chapter,<sup>7</sup> the owner of a building who makes negligent use of the pipes through which water is conducted into it is liable for injury thereby done to neighboring property. This rule is equally applicable to negligent injuries inflicted by a municipality, but in order to render the municipality liable it must have been responsible for the condition of the property. Therefore a municipal corporation without authority to buy or sell land on which public schools are built, which cannot control their use, has no custody of them, and which did not erect them, and is not vested with power to repair them, is not liable either as

<sup>3</sup>*Edgerly v. Concord*, 62 N. H. 8, 59 N. H. 78.

<sup>4</sup>*Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

<sup>5</sup>56 Vt. 228, 48 Am. Rep. 762.

<sup>6</sup>*Bayley v. Wolverhampton Waterworks Co.* 6 Hurlst. & N. 241; *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L. R. A. 90, 50 Pac. 877.

In the latter case it is said that the fact that a municipality confers upon a water company the right to place its

hydrants in the streets, and to open them for the purpose of flushing its mains gives the company no license or right to flush its mains in such a manner as unnecessarily to impede travel or imperil the safety of those passing and repassing over the street, the license to flush carrying with it the obligation to do so with reasonable care and a due regard for the rights of others.

<sup>7</sup>See *post*, chapter XXXII.

the creator or continuer of a nuisance, where property is destroyed by water which flowed from a leak in the water pipes of a school building.<sup>8</sup>

**442. Highway on ice.**— When streams are frozen over they make very convenient highways which in some localities are used for some months of the year. These highways are to be regarded as natural ones, and neither the municipal corporation nor the county through which they run are bound to keep them in repair. In a sense, those who attempt to use them assume the risk of their condition. But individuals knowing of the use to which they are being put will not be permitted to do anything which will imperil the lives of travelers, without plainly marking the dangers for which they are responsible.<sup>1</sup> But it was said in *Woodman v. Pitman*<sup>2</sup> that the occupation of a navigable river within the limits of a city, where a way is not commonly used across the river or where a ferry is not established by law, for the purpose of a winter way, would be, at this day, of such insignificant importance, and so useless and valueless in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever.

<sup>8</sup>*Terry v. New York*, 8 Bosw. 504.

<sup>2</sup>79 Me. 456, 10 Atl. 321.

<sup>1</sup>*French v. Camp*, 18 Me. 433, 36 Am. Dec. 728.

## CHAPTER XVIII.

### NUISANCES; OFFENSES.

- 443. Introduction.
- 444. Public or private nuisance.
- 445. Pond or artificial water course as a nuisance.
  - 445a. Right of individual to complain.
- 446. Pollution of stream.
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- 448. Water in street.
- 449. Liability of municipality.
- 450. Abatement of nuisance by indictment.
- 451. Remedy by injunction.
- 452. Other modes of abatement.
- 453. Rights of property owner.
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**443. Introduction.**—The question of technical nuisances because of the manner of dealing with water courses and the erection of structures in them and upon their beds is so much a part of the discussion of rights of navigation, the ownership of beds and shores, riparian rights, and the alteration and destruction of water courses, that it was not expedient to separate it from its proper connection and treat it in a chapter by itself. Therefore, all such matters will be found in their appropriate places in connection with the particular rights in relation to which the nuisance was claimed. All, therefore, that is reserved for this place is the question of nuisance in its more popular sense, as including those acts which affect health or comfort, or the profitable enjoyment of property. The decisions which are founded on some relation to the question of waters are not sufficient to furnish a complete presentation of the law of nuisances. For the general principles upon which such law is based, and their more perfect elaboration, reference must be made to some work dealing only with that subject. In this place we can take up only the cases which have applied the law of nuisances to conditions created by some dealing with water.

**444. Public or private nuisance.**—In order to determine the proper mode of proceeding to abate a nuisance, it is necessary to determine

whether it is public or private. In *Com. v. Webb*,<sup>1</sup> Judge Daniel said that to maintain a public prosecution for a nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected and sends forth noisome and unwholesome smells, it is essential to allege and prove that the obstruction placed in the creek produced the stagnation of the waters and corrupted the air in or near a public highway, or in some other place in which the public have a special interest. He further said that to constitute a public nuisance the act done or duty omitted must affect injuriously some thing or right in which the community as a body politic have a common interest, and the facts producing this injury and connecting it with such special public right or interest must be alleged and proved. This does not give an adequate idea of a public nuisance. The idea of the judge, that to be public the nuisance must affect some place or thing in which the public have a special interest, has not been acted on by other courts which have dealt with the question; and in fact a little consideration shows that that cannot be the true test. Should that test be adopted, no redress could be had for a nuisance which might affect the health of a whole community in such a way that no individual would be permitted to bring an action to redress the wrong; and, at the same time, no place in which the public, as such, had an interest might be affected so that it could be redressed by the public. The true rule is that a nuisance is public, not only under the circumstances mentioned by Judge Daniel, but also when it affects the health, comfort, or welfare of all the persons living in its vicinity.<sup>2</sup> A better conception of the law upon the subject appears in *State v. Gaines*,<sup>3</sup> where the court held that the erection and maintenance of a milldam, overflowing much ground and rendering the atmosphere impure and the neighborhood unhealthy, is a nuisance, rendering its owner liable thereby to indictment at common law; and such owner is not exempt therefrom by virtue of a special act of the legislature authorizing him to erect the dam in question without being subject to the penalty of another act of legislature, requiring owners of mills to cut down and remove the standing or decayed timber therein, and making an omission so to do an indictable offense. The courts have

<sup>1</sup> 6 Rand (Va.) 726.

<sup>2</sup> *Coalter v. Hunter*, 4 Rand (Va.) 58, 15 Am. Dec. 726; *State v. Rankin*, 3 S. C. N. S. 438, 16 Am. Rep. 737; *Board of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 465, 35 N. E. 443.

Under an indictment charging that a pond into which filth is discharged is a nuisance which endangers the health of,

and is a detriment and an annoyance to the whole community, it is not necessary to show definitely and absolutely that everyone in the community is personally annoyed and inconvenienced, or that the health of the community had already suffered injury. *West v. State* (Ark.) 71 S. W. 483.

<sup>3</sup> 3 Humph. 39.

found more difficulty in defining the rights of the individual than they have those of the public. There has been a tendency on the part of some of the courts to hold that a nuisance must be either public or private, and that, if it affects enough people to be public, a private citizen has no right to maintain an action on his own behalf to redress it. But the later and better doctrine is that the same act may amount to a nuisance which is both public and private, and that the public may proceed to redress its wrongs so far as they are affected; and at the same time a private citizen may maintain an action so far as he has sustained an injury which is peculiar to himself. He will not be permitted to champion the public cause and maintain an action to abate a nuisance in which he has no interest otherwise than as one of the public; but if he has a peculiar grievance he may maintain an action. In *Wesson v. Washburn Iron Co.*<sup>4</sup> Judge Bigelow said that if the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as a canal or public landing place, or a common watering place on a stream or pond of water, a mere deprivation or obstruction of the use, which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to anyone, furnishes no right of action in favor of any individual, although he may suffer inconvenience or delay in greater degree than others from the alleged obstruction or hindrance. The private injury in this class of cases is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. And in application of that doctrine in *Jones v. Chanute*,<sup>5</sup> it was held that residents of property abutting on an open sewer into which filth is drawn so as to constitute a nuisance cannot maintain an action for its abatement, where a large number of persons are affected by it, since the nuisance is public and cannot be abated at the suit of private individuals. The court in making that decision failed to keep in mind the different circumstances which may render a nuisance public. The nuisance may be public in one case because the act constitutes an interference with a public right, for the redress of which no individual has a right to proceed. In another case the nuisance is public because it affects so many individuals that the state, as *parens patriæ*, is bound to take notice of it and proceed to abate it. But in such case each individual may proceed to recover the damages

<sup>4</sup> 13 Allen, 95, 90 Am. Dec. 181.

<sup>5</sup> 63 Kan. 243, 65 Pac. 243.



for the special injury to him. If a citizen is made ill or suffers special injury by sickness in his family, or if the value of his property is specially affected, he has such an interest as will entitle him to maintain an action; and in such cases the public may proceed by indictment for the abatement of a nuisance, and an individual may maintain an action for the injuries which have been specially inflicted on him.<sup>6</sup> These principles will be found permeating the cases which have dealt with the abatement of nuisances arising out of the manner of dealing with water, and will become more clearly apparent as the discussion proceeds.

**445. Pond or artificial water course as a nuisance.**—To be in its best condition water must not be allowed to stand, but must be kept in motion. Therefore, if a dam is placed across a flowing stream to create a pond to supply water power, the conditions are such that in case care is not taken the pond may develop into a nuisance. A mill pond is not a nuisance *per se*.<sup>1</sup> But the stagnant water is likely to become offensive of itself. And the alternate raising and lowering of the height of water uncovers portions of the bed in such a way that the sun may cause malarious emanations to arise from it; and, in addition, the pond is very likely to accumulate *débris* and filthy matter which may be a menace to health.<sup>2</sup> Under these circumstances the public have a right to proceed to abate the pond whenever it in fact becomes a nuisance. An express grant by the legislature of the right to maintain the pond will not imply the right to maintain it in such a way as to constitute a nuisance, and in case it is permitted to become such the public may proceed to abate it.<sup>3</sup> The right

<sup>6</sup>*Com. v. Clarke*, 1 A. K. Marsh. 323.

<sup>1</sup>*New Castle v. Raney*, 130 Pa. 546, 6 L. R. A. 737, 18 Atl. 1066.

<sup>2</sup>A milldam becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country and stagnates and becomes dead in pools, where the air along the highways and around the dwellings is infected with noxious and unwholesome vapors, and the health of the adjoining country is sensibly impaired. *Douglass v. State*, 4 Wis. 387.

<sup>3</sup>*Luning v. State*, 1 Chand. (Wis.) 178, 2 Pinney (Wis.) 215, 52 Am. Dec. 153.

Leave granted to erect a mill under statutes authorizing the construction of mills is no bar to an indictment for a public nuisance created by its construction, where the statute provides that no inquest opinion or judgment of the court thereupon shall bar any public

prosecution or private action which could have been had or maintained if the said act had never been made, other than prosecutions and actions for such injuries as were actually foreseen and estimated upon such inquiry. *Com. v. Faris*, 5 Rand (Va.) 691.

The commonwealth, as well as individuals, may prosecute an indictment against the owner of a milldam for keeping up and continuing such dam, if the same, by the stagnation of the waters occasioned thereby, annoys the health of the neighborhood, notwithstanding such mill and dam are erected in pursuance of a statute requiring a jury to inquire, among other things, whether, in their opinion, the health of the neighborhood would be annoyed by the stagnation of the waters, and, if it appears that such would be the case, the court is expressly prohibited from giving leave to build such mill and dam,

to maintain a nuisance cannot be acquired by lapse of time.<sup>4</sup> And the court will not presume a lost grant of a right to maintain it.<sup>5</sup> But so long as private property is not actually taken or destroyed the legislature may expressly authorize the maintenance of a pond which may prove a nuisance to persons living in the neighborhood.<sup>6</sup> In fact, so far as the interests of the public are concerned, there is nothing to prevent the legislature from permitting the maintenance of a dam in such a way as to constitute a nuisance, if it wishes to do so; and therefore the owner of a dam cannot be indicted for the creation of a nuisance affecting public health, by the maintenance thereof at a designated height, in a particular manner and at a particular place specified by an act of the legislature authorizing the construction and maintenance thereof, in the absence of any condition in the grant that no nuisance shall be created thereby, as the legislature, having itself determined the place, height, and manner of construction thereof, must have had in view all the consequences to follow from the doing of the act authorized.<sup>7</sup> Although a dam is erected by authority of law and may not be abated as a nuisance, nevertheless its owners, who in certain seasons permit it to retain the water, and in the summer draw the water out of the pond so that vegetation decays in its bed, may be enjoined from so operating the dam as to create a public nuisance.<sup>8</sup> The one in possession of the property may be held responsible for the nuisance although he is a mere agent for others.<sup>9</sup> And the court will not refuse to abate the nuisance upon the

where, by a later section of the same act, it is provided that such inquest of the jurors and opinion of the court shall not bar any prosecution or action which any person would have had in law had such act never been passed, other than for such injuries as were actually foreseen and estimated by the said jury. *Com. v. Clarke*, 1 A. K. Marsh. 323.

<sup>4</sup>*State v. Rankin*, 3 S. C. N. S. 438, 16 Am. Rep. 737; *Queen v. Brewster*, 8 U. C. C. P. 208; *Douglass v. State*, 4 Wis. 387; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *State v. Holman*, 104 N. C. 861, 10 S. E. 758; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *State v. Phipps*, 4 Ind. 515; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160.

<sup>5</sup>*Folsom v. Freeborn*, 13 R. I. 200.

<sup>6</sup>*Neaderhouser v. State*, 28 Ind. 257; *Butler v. State*, 6 Ind. 165.

An indictment for creating or maintaining a nuisance cannot be sustained against canal trustees for erecting a

feeder dam as part of a canal, under authority of law, and without any act of wantonness on their part, although such dam may in fact be a nuisance,—especially where one of the trustees is appointed by, and represents, the state. *Butler v. State*, 6 Ind. 165.

<sup>7</sup>*Stoughton v. State*, 5 Wis. 291.

<sup>8</sup>*Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197.

<sup>9</sup>*State v. Bell*, 5 Port. (Ala.) 365.

But the widow and children of the deceased owner of a milldam, erected and maintained by him for more than twenty years, and which becomes their property by descent, cannot be convicted of maintaining a public nuisance under a statute providing that "whoever builds, erects, continues, or keeps up any dam or other obstruction to any stream of water, and thereby produces stagnant water which is manifestly injurious to the public health and safety, shall be fined," etc., where the evidence shows that no suit of any kind had been brought against the decedent in rela-

ground that, when the dam was erected, the water was pure and no nuisance existed, and the present condition has arisen from the growth of the population in the neighborhood and their pollution of the water.<sup>10</sup> But the dam will not be removed if the nuisance can be abated by other means.<sup>11</sup> And the owner of the dam cannot be held liable if the nuisance was created by strangers.<sup>12</sup> If the dam occasions no greater nuisance than would have existed without it, the owner is not liable to criminal prosecution. And the question whether or not the conditions might be made more healthful in the absence of the dam is not an admissible test of nuisance if they in fact had not been made so.<sup>13</sup> But if the dam is the direct and proximate cause of the nuisance it may be abated.<sup>14</sup> So if the act of a person contributes essentially to the creation of the nuisance, as by the erection of a dam which renders the water stagnant, or produces its overflow, so as to cause it to gather in pools or eddies and become stagnant, or by raising it, so as to cause the decay of vegetable matter upon the banks of a stream, whereby unwholesome gases are developed, he is liable, even though natural causes combine with his act to produce the result.<sup>15</sup> If ponds are a public nuisance the legislature may direct the removal of the dams without providing compensation to the owners, since there is no property right in the maintenance of a nuisance; and this is especially true if compensation is provided.<sup>16</sup> Although a particular structure did not constitute a nuisance during the existence of other structures, it may be abated when it becomes a nuisance by the removal of such others.<sup>17</sup> The failure of a public board to perform its duty and clean a pond will not prevent the abate-

tion to the dam, and fails to show that the widow and children, or either of them, have done any act in relation to, or in connection with, the dam since his death. *Bruce v. State*, 87 Ind. 450.

<sup>10</sup>*Board of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 405, 35 N. E. 443.

So, in a criminal action for the maintenance of a nuisance in the form of a stagnant and offensive pond, the fact that much of the corrupting matter that entered the pond came from the premises of witnesses for the prosecution is no defense. *West v. State* (Ark.) 71 S. W. 483.

<sup>11</sup>*Shepard v. People*, 40 Mich. 487.

<sup>12</sup>*State v. Rankin*, 3 S. C. N. S. 438, 16 Am. Rep. 737.

<sup>13</sup>*Beach v. People*, 11 Mich. 106.

A statutory prohibition of the erection of any dam whereby the health of the neighbors shall be annoyed does not apply if the jury find the health of the

neighbors will be less or as little annoyed as in the erection of any dam, as it is uncertain that any such "annoyance" will follow. *Smith v. Waddill*, 11 Leigh, 532.

<sup>14</sup>*State v. Holman*, 104 N. C. 861, 10 S. E. 758.

<sup>15</sup>*Ft. Worth & D. C. R. Co. v. Scott*, 2 Tex. App. Civ. Cas. (Willson) § 140, p. 137.

<sup>16</sup>*Miller v. Craig*, 11 N. J. Eq. 175.

<sup>17</sup>That a municipal corporation has maintained a bridge abutment in the channel of a river in such a way as to interfere with the natural current of the stream and render the foundations of a building in the stream, which would otherwise be a nuisance, of no effect upon the current, will not prevent it from maintaining an action to enjoin the continuance of the foundation after it removes the bridge abutment. *Rochester v. Erickson*, 46 Barb. 92.

ment of it as a nuisance.<sup>18</sup> The fact that the pond was created before any persons lived in the neighborhood will not prevent its abatement where it becomes a nuisance as the country is settled.<sup>19</sup> If the pond interferes with a highway it is subject to abatement as a nuisance.<sup>20</sup> That the owner of the dam has acquired the right to maintain it as against individuals will not prevent its abatement as a public nuisance.<sup>21</sup> A ditch constructed under authority of law in a city to supply water for milling purposes is not a nuisance *per se* which the city can summarily remove and abate by a mere resolution of the council declaring it a nuisance, without a judicial determination establishing it to be one in fact.<sup>22</sup>

**445a. Right of individual to complain.**—As already indicated,<sup>1</sup> if an individual is specially injured by a nuisance he may maintain an action to recover his damages or to obtain its abatement. This principle is applicable to injuries caused by a mill pond. He may maintain an action to prevent the backing of water onto his land,<sup>2</sup> or injury to his health.<sup>3</sup> As said in *DeVaughn v. Minor*,<sup>4</sup> if one lives within the sphere of operation of a nuisance caused by a milldam about to be erected or commenced, affecting health, and the injurious consequences are not merely possible, but, to a reasonable degree, certain, he is entitled to preventive relief, even though the public would be likewise affected. So, he may maintain an action if the water is turned back on his mill wheel.<sup>5</sup> But to warrant an injunction it must be clear that the pond will be injurious to health, or will otherwise constitute a nuisance in fact.<sup>6</sup> The fact that the pond is not the sole cause of the ill health will not prevent its abatement if it

<sup>18</sup>*People v. Pelton*, 36 App. Div. 450, 55 N. Y. Supp. 815.

<sup>19</sup>*Queen v. Brewster*, 8 U. C. C. P. 209; *Douglass v. State*, 4 Wis. 387.

<sup>20</sup>*State v. Phipps*, 4 Ind. 515.

But to constitute the damming of a water course so as to turn the water upon a highway a public nuisance, it must be shown that the traveling public are to some extent, at least, impeded, hindered, or obstructed in the use of the highway for the purpose of traveling over it. *State v. Smith*, 54 Vt. 403.

<sup>21</sup>*State v. Phipps*, 4 Ind. 515; *New Salem v. Eagle Mill Co.* 138 Mass. 8.

<sup>22</sup>*Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

<sup>1</sup>See *ante*, § 444.

<sup>2</sup>*Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396.

Whether or not an action for damages for the erection of a dam is barred by the statute of limitations does not af-

fect the right of the upper owner, whose lands are overflowed by back water from the dam, to maintain an action to abate the dam as an existing nuisance, if the right to maintain it has not been perfected. *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 866.

<sup>3</sup>*Holke v. Herman*, 87 Mo. App. 125; *Story v. Hammond*, 4 Ohio, 376; *Richards v. Daugherty*, 133 Ala. 569, 31 So. 934; *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Miller v. Trueheart*, 4 Leigh, 569.

The sickness of plaintiff's family, being properly set forth in the petition as due to the negligent and improper construction of a dam, is a proper element of damage. *Brown v. Chicago & A. R. Co.* 80 Mo. 457.

<sup>4</sup>77 Ga. 809, 1 S. E. 433.

<sup>5</sup>*Welton v. Martin*, 7 Mo. 307.

<sup>6</sup>*Holke v. Herman*, 87 Mo. App. 125; *Thomas v. Calhoun*, 58 Miss. 80; *Wilder*

was a contributing cause.<sup>7</sup> The right to maintain the nuisance even against individuals cannot be acquired by prescription.<sup>8</sup> Plaintiff in an action for damages alleged to be caused by sickness occasioned by the damming up of a stream of water by the embankment of a railroad company is entitled to recover the value of drugs used, if it is proved that the pond caused the sickness.<sup>9</sup> A stockholder in a corporation has a right to complain of a nuisance created by it in the maintenance of its mill pond to his injury.<sup>10</sup> It does not follow, as a consequence of the recovery of damages for injury to an owner's property and to himself and his family by the overflow of his premises from a milldam across a stream below, that the nuisance will therefore be abated; but it is discretionary with the court whether a removal of the dam shall be ordered upon the evidence adduced on the trial.<sup>11</sup> If the legislature has authorized the construction of a pond in such a way that it must inevitably constitute a nuisance, individuals affected by it cannot maintain an action against the owner of the dam for damages.<sup>12</sup> The remedy in such cases is to test the validity of the statute upon the ground that it is a taking or damaging of property for public use without compensation. While, in the absence of constitutional restriction, the power of the legislature is absolute, yet it is unthinkable that under any form of government the legislature should have the power to authorize a citizen to make a use of his property which will absolutely destroy the value of his neighbor's property. Such conduct is not legislation but confiscation, and there should be some method of correcting it. In the first place, the legislature should not be presumed to have intended to permit such a result, and if it is not expressly granted it should not be implied; so that, in case the pond can be maintained without constituting a nuisance, the owner should be compelled to maintain it in that condition; and in case it cannot, then the destruction of the adjacent property should be held to be a taking for which compensation must be made. In one case it was held that equity will not restrain a riparian proprietor from erecting a dam and flowing his own land for the public convenience when any injurious effects will be confined to a private individual, whose interest must necessarily give way to that of the many, unless he can make it manifestly ap-

<sup>7</sup>*Strickland*, 55 N. C. (2 Jones Eq.) 386; *Eason v. Wattier*, 25 Or. 7, 34 Pac. 756.

<sup>8</sup>*Richards v. Daugherty*, 133 Ala. 569, 31 So. 934.

<sup>9</sup>*Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

<sup>10</sup>*Central R. & Bkg. Co. v. Wood*, 51 Ga. 515.

<sup>11</sup>*Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397, Affirming 34 Hun, 341.

<sup>12</sup>*Cromwell v. Lowe*, 14 Ind. 234.

<sup>13</sup>*Union Canal Co. v. O'Brien*, 4 Rawle, 359.

pear that so great a difference exists between his injury and the public convenience as bears no comparison, and the erection will be followed by irreparable mischief.<sup>13</sup> That decision is so fundamentally at variance with the modern ideas of right and justice that it cannot be regarded as law at the present time.

**446. Pollution of stream.**—As streams flow of their own force, they are agents for the dissemination of disease little inferior to the air itself, in case the filth which becomes a source of disease is placed in them. Therefore, the preservation of the public health and the public good require that individuals shall have no right to place in the stream matter which will be deleterious to the public health; and such acts on the part of the individual constitute a public nuisance. As stated in *Paragon Paper Co. v. State*,<sup>1</sup> the pollution of a stream by the discharge therein of offal and other impurities from a factory, rendering the water impure and unfit for domestic use for a considerable distance, killing fish and rendering the atmosphere offensive from the noxious odors arising therefrom, is a public nuisance for the maintenance of which the owner may be prosecuted.<sup>2</sup> And the pollution of the stream may be prevented in any way by which that result can be effected.<sup>3</sup> Even if the person guilty of creating the nuisance has acted under authority of the municipal corporation, that fact will not protect him from liability, since the municipality cannot authorize the creation of a nuisance.<sup>4</sup> So, the fact that the municipality has not provided means for the disposition of the filth

<sup>12</sup>*Atty. Gen. ex rel. Bradsher v. Lea*, 38 N. C. (3 Ired. Eq.) 301.

<sup>13</sup>19 Ind. App. 314, 49 N. E. 600.

<sup>2</sup>Pollution of the water of a river by means of refuse from a sawmill so as to destroy the fish therein, is a nuisance. *People v. Truoke Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

It is a nuisance to cast urine into a spring of water near a public highway, out of which many persons in the vicinity and travelers along the road are accustomed to use water. *State v. Taylor*, 29 Ind. 517.

To deposit human excreta in a natural water course, in close proximity (12 miles on a creek) to a source of supply from which water is used for domestic purposes, is a public nuisance, and it should be so declared by the court. *Com. v. Yost*, 11 Pa. Super. Ct. 323.

<sup>4</sup>*Board of Health v. Casey*, 18 N. Y. S. R. 251, 3 N. Y. Supp. 399; *Belton v. Central Hotel Co.* (Tex. Civ. App.) 33

S. W. 297; *Belton v. Baylor Female College* (Tex. Civ. App.) 33 S. W. 680.

One of the proprietors of a mill will be liable for criminal prosecution for creating a nuisance by the discharge from the mill of refuse matter so as to pollute the waters of a canal, although the proof does not show that he had knowledge of the fact that such matter was allowed to be discharged from the mill therein, where he lived in the vicinity and the condition of things complained of had existed for more than two years, so as to create a presumption of knowledge. *Mergentheim v. State*, 107 Ind. 507, 8 N. E. 568.

<sup>1</sup>*Belton v. Baylor Female College* (Tex. Civ. App.) 33 S. W. 680; *State ex rel. Board of Health v. Hutchinson*, 39 N. J. Eq. 218, Affirmed in 39 N. J. Eq. 569.

In *Burch v. State*, 7 Ohio N. P. 379, the court, in refusing to pass upon the question whether permission by the trustees of a township to drain sewage into a stream would, in law, in a prose-

is immaterial.<sup>5</sup> The municipality is not bound to keep streams within its limits clean, and it cannot be held liable for a nuisance created in such stream by individuals.<sup>6</sup> Statutes usually forbid the creation of nuisances by the pollution of water courses, and they will be construed to effect the objects for which they were intended.<sup>7</sup> The right to maintain the nuisance cannot be acquired by prescription.<sup>8</sup> To render the one committing the act subject to indictment, he must create a public nuisance, and not merely one affecting a single individual.<sup>9</sup> A municipal board of health may make rules to prevent the pollution of streams within their jurisdiction, and seek the aid

cution by the public on a criminal charge for unlawfully corrupting the stream, be a complete defense, remarks that, if a complete defense in such a prosecution, it would not, however, be a bar to a recovery for damages at the personal suit of any neighbor injured, nor in an action in equity to enjoin them from doing that which was a private nuisance, doing special injury to the person or property of any neighbor.

<sup>5</sup>*Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568.

<sup>6</sup>*Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172.

<sup>7</sup>A navigable river is a public place within the meaning of a statute making it unlawful to cause offal or filth to be collected or remain in any place, to the damage or prejudice of others or the public. *State v. Wabash Paper Co.* 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949.

The object of a statute making it unlawful for any person or persons to erect, maintain, or keep a slaughterhouse on the banks of a stream or to throw offal or carcasses therefrom into the stream or upon its banks when the stream flows through a city or incorporated village, being to preserve the purity of the stream through the city or village, a slaughterhouse which does not render the stream impure within the corporate limits would not be within the prohibition of the law. *Oberich v. Gilman*, 31 Wis. 495.

A general statute making that a public nuisance which "annoys, injures, or endangers the comfort, health, repose, or safety of three or more persons" is not impliedly repealed in so far as it makes it a public nuisance to pollute the waters of a stream by corralling animals near thereto, by a subsequent statute making it unlawful to befoul the waters of any stream used by any city, town,

or village for domestic purposes within a specified distance therefrom by the washing of sheep therein or the corralling of sheep or other animals near thereto, the refuse from which would naturally flow into the stream. *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87.

<sup>8</sup>*Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Bowen v. Wendt*, 105 Cal. 236, 37 Pac. 149; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 83; *Kelley v. New York*, 6 Misc. 516, 27 N. Y. Supp. 164; *People v. Pelton*, 36 App. Div. 450, 55 N. Y. Supp. 815. Affirmed in 159 N. Y. 537, 53 N. E. 1129; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Platt Bros. v. Waterbury*, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Bloomington v. Costello*, 65 Ill. App. 407; *Litchfield v. Whitenack*, 78 Ill. App. 304; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664; *Brookline v. Mackintosh*, 133 Mass. 215.

<sup>9</sup>A riparian owner cannot be indicted for a public nuisance for pollution of a stream to the injury only of a lower riparian proprietor, which is a water-supply company taking the water for domestic purposes, but without powers of eminent domain and therefore unauthorized to divert the waters for sale. *Com. v. Yost*, 197 Pa. 171, 46 Atl. 845.

But an indictment charging one with polluting the waters of a river, rendering them unwholesome and impure to the injury of three persons named in the indictment residing along the river, charges a public or common nuisance under Iowa Code, § 4089, which provides that "the corrupting or rendering unwholesome or impure the waters of any

of courts to enforce them.<sup>10</sup> But a board of health must act formally, and not arbitrarily or without a proper hearing, in proceeding to abate a nuisance.<sup>11</sup> Equity will not restrain the pollution of a public stream to the injury of public health unless the complaint rests upon facts appreciable by the ordinary citizen, and not merely upon theoretical belief.<sup>12</sup> The action may be maintained either in the jurisdiction where the injury occurs or where the pollution is effected.<sup>13</sup> If the condition of the stream is such that the casting of polluted matter into it constitutes a nuisance only at certain seasons of the year, the court may render a judgment which will permit the use of the stream when it can be done without creating a nuisance.<sup>14</sup> If the injury is caused by a county which is not subject to suit, the remedy is for its abatement against the officials who create the nuisance, and not against the county.<sup>15</sup> But a municipal corporation being subject to suit for acts committed by it may be sued for the damages resulting from its acts which constitute a nuisance.<sup>16</sup>

**447. Stagnant water generally.**—As appeared while we were discussing the question of drainage,<sup>1</sup> a citizen has no right to maintain his property in such a condition that it will constitute a public nuisance. If it is located below the level of the surrounding country so that water stands upon it, or if he makes excavations in it which become filled with stagnant water, which is a menace to public health, he may be required to drain it at his own expense for the purpose of abating the nuisance.<sup>2</sup> But the remedy for such condition is

stream of water or pond" is a nuisance. *State v. Smith*, 82 Iowa, 423, 48 N. W. 727.

<sup>10</sup>*Bell v. Rochester*, 33 N. Y. S. R. 739, 11 N. Y. Supp. 305.

<sup>11</sup>*Com. v. Yost*, 197 Pa. 171, 46 Atl. 845.

<sup>12</sup>*State ex rel. Board of Health v. Bergen County*, 46 N. J. Eq. 173, 18 Atl. 465.

<sup>13</sup>*State v. Herring*, 21 Ind. App. 157, 69 Am. St. Rep. 351, 48 N. E. 598; *State v. Wabash Paper Co.* 21 Ind. App. 167, 49 N. E. 653, 51 N. E. 949; *Com. v. Lyons*, 1 Clark (Pa.) 497.

<sup>14</sup>*Belton v. Brylor Female College* (Tex. Civ. App.) 33 S. W. 680.

<sup>15</sup>*Leffrois v. Monroe County*, 162 N. Y. 563, 50 L. R. A. 206, 57 N. E. 185.

<sup>16</sup>*Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9.

But a municipal corporation is not liable for damages to fish nets in a lake from garbage carried into them by the ordinary currents and movements of the

waters thereof, where it was so disposed of under a contract requiring it to be dumped therein at least 15 miles from the city, and reserving no right to the city to control the mode or manner of its performance, or the place where it should be dumped, but only the right to suspend the work and relet it for improper and imperfect performance. *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030.

<sup>1</sup>See *ante*, §§ 172 *et seq.*

<sup>2</sup>Under a statute authorizing cities to pass by-laws compelling the draining of "grounds, yards, vacant lots, cellars, private drains, sinks, cesspools, and privies," and to assess the owners with the costs thereof if done by the council on their default, and to charge the owners of property drained into common sewers with a reasonable rent for the use of the same, a by-law enacting that "all grounds, yards, vacant lots, or other properties abutting on any street" should be drained is not objectionable as



the drainage of the property, and not a criminal proceeding against him for the abatement of the nuisance, for, as said in *Roberts v. Harrison*,<sup>3</sup> the accumulation of water due solely to natural causes, and not contributed to by any act or negligence of the owner of the premises on which it accumulates, by the evaporation of which and by the decaying of large masses of vegetable matter, noxious and deleterious gases are emitted which are injurious to the public health, does not constitute a nuisance for which such owner will be answerable. The court in that case adds that he cannot be required to abate such a nuisance. But the courts are continually compelling the amelioration of just such conditions, and there seems to be no reason why the individual should not be compelled to do so. He has absolutely no right to own property which is a menace to public health.<sup>4</sup> A municipality cannot, however, require citizens to dispose of water turned onto their property by it.<sup>5</sup> If necessary to remove the nuisance the property

including other properties than those mentioned in the statute, as, if it be attempted to enforce the by-law as against any kind of property not mentioned in the statute, the owner or occupier may raise the question that neither the statute nor by-law touches him. *McCutchon v. Toronto*, 22 U. C. Q. B. 613.

<sup>3</sup> 101 Ga. 773, 65 Am. St. Rep. 342, 28 S. E. 995.

<sup>4</sup> Under a statute making it the duty of the board of health to cause the removal of all nuisances which may have a tendency, in its opinion, to endanger the health of citizens, its determination that a pool of stagnant water is a nuisance is conclusive. *Kennedy v. Board of Health* 2 Pa. St. 366.

So, under a statute enacted for the public health and safety, and declaring that the board of health of each town shall have all the powers necessary and proper for the preservation of the public health and the prevention of the spread of malignant diseases, and that it shall be its duty to examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in its judgment shall endanger the health of the inhabitants,—such board has power to decide conclusively, during an epidemic of contagious diseases likely to have been caused by noxious exhalations from decaying matter, that brush placed on the muddy bottom of a river for the purpose of growing oysters was a nuisance and to remove it.

*Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

A board of health may, for the purpose of abating a nuisance consisting of an overflowing cesspool on private property, connect the pool with a common sewer, and, in order to do so, enter upon the property and lay the necessary drain pipe. *Conway v. Russell*, 151 Mass. 581, 24 N. E. 1026.

It is a question of fact whether or not agents of a board of health acted in good faith in connecting a cesspool with a public sewer under orders of the board, where they laid the connecting pipes on the surface of the ground, and filled the lot to raise the ground above the pipe, removing structures on the land and entering and injuring the house, delaying a long time in completing the work, and preventing the landowner from interfering with the work by threats and intimidation. *Ibid.*

<sup>5</sup> *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17.

A city may not tax a lot owner to pay for the abatement of a nuisance which was caused by the act of the city in so constructing a street as to cause the water to flow and remain upon the lots, where no compensation has been made for the damage. *Weeks v. Milwaukee*, 10 Wis. 242.

But in *Smith v. Milwaukee*, 18 Wis. 372, it is said that the right of the lot owner is in the nature of an equitable defense, resting upon the injustice of such a use of a proceeding at law; that

owner may be required to fill the property to grade.<sup>6</sup> In a suit to recover expense incurred in removing a nuisance, when prosecuted against a person on the ground that he caused the same, but who was not heard and had no opportunity to be heard upon the question before the board of health, he is not concluded by the findings or adjudications of the board, and may contest all the facts upon which his liability is sought to be established.<sup>7</sup> And the public authorities cannot charge the property owner with any greater expense than is necessary to abate the nuisance.<sup>8</sup> Nor can it destroy property or interfere with its use any more than is necessary.<sup>9</sup>

**448. Water in street.**—The ponding of water in a highway to the injury of abutting property constitutes a nuisance the same as though it was on private property. Therefore, where the municipality in grading its streets leaves large and dangerous holes which become filled with stagnant water, it will be liable to abutting property owners injured thereby.<sup>1</sup> But in order to entitle the abutting owner to recover he must prove special injury.<sup>2</sup> And where a portion of a street has been washed away so as to discommode the abutting property owner, he may compel its restoration by mandamus.<sup>3</sup> Citizens

the owner would have to make his election among his various remedies. If he should recover his damages at law, the assessment might be enforced. If he neglects to resort to his equitable remedy in time, he may be held to have waived it, and be confined to his legal remedy.

<sup>1</sup>*Independence v. Purdy*, 46 Iowa, 202; *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

But the owner of city lots has the right to maintain their surface at any grade that he may desire so long as he creates or maintains no nuisance by so doing, and the city may not order the lots to be raised to a level higher than necessary for the purpose of preventing water standing upon them to the injury of the public, for the purpose of abating the nuisance of such standing water, and must give notice to the owner before raising the lot to any degree. *Bush v. Dubuque*, 69 Iowa, 233, 28 N. W. 542.

<sup>2</sup>*Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650.

<sup>3</sup>A board of health after condemning a brook as a nuisance may abate it and incidentally make a permanent improvement calculated to prevent a recurrence of the nuisance, provided the work bears a necessary relation to its abatement; but it cannot construct, at large ex-

pense, a drain sufficient to drain an entire swamp area, and levy arbitrary assessments therefor upon adjacent properties, making the nuisance a pretext. *Haag v. Mt. Vernon*, 41 App. Div. 366, 58 N. Y. Supp. 581.

<sup>4</sup>A municipal corporation having power to abate nuisances cannot cause the filling up of a slip or canal within its limits upon the ground that it has become a nuisance by the casting into it of filth which it might have prevented, where the nuisance might have been removed by the cleaning of the slip. *Babcock v. Buffalo*, 56 N. Y. 268.

<sup>5</sup>*San Antonio v. Mullaly*, 11 Tex. Civ. App. 596, 33 S. W. 256.

In such a case the measure of damage is the difference between the market value of the property immediately before and immediately after the acts causing the injury. *Ibid.*

<sup>6</sup>*Allen v. Paris*, 1 Tex. App. Civ. Cas. (White & Willson) § 885, p. 506.

<sup>7</sup>*Hammar v. Corington*, 3 Met. (Ky.) 494.

But an abutting landowner who does not own to the center of the street cannot obtain an injunction against a municipal corporation to restrain the turning of a stream along the street, if it is not shown that the street would thereby be permanently obstructed.

will be enjoined from casting polluted water into the street so as to constitute a nuisance to abutting property.<sup>4</sup> And a lot owner may be prohibited from permitting water to flow into the street from springs on his property.<sup>5</sup> But the master is not responsible in such cases for the acts of his servants.<sup>6</sup> The creation of pools of stagnant water in a street by the temporary occupation of it by a railroad company while altering its tracks may be considered in estimating the injury caused to the abutting owner by such occupation.<sup>7</sup> A ditch on a railroad right of way for the drainage of surface water therefrom, dug so near the line of a street as to encroach upon the street by the erosion of the soil of its banks, may be abated as a nuisance and recovery had for damages in an action by an owner of the lots abutting on the opposite side of the street, whose use of the lots for hotel purposes is materially interfered with.<sup>8</sup> Water tanks erected in streets for furnishing water for street sprinkling purposes by a private individual under authority from a municipality, at places designated by its officers, are not public nuisances *per se*.<sup>9</sup> A nuisance having been created in a highway by the closing of a drain because of misuser by its licensee, a municipal corporation cannot require the licensor to submit to a further misuser to secure its abatement.<sup>10</sup>

**449. Liability of municipality.**—The liability of a municipal corporation for a nuisance created by it is the same as that of individuals. But it cannot be held liable merely because a nuisance exists within its limits. Thus, no recovery can be had against a municipality for

*McMahon v. Council Bluffs*, 12 Iowa, 268.

And a municipality is not liable in damages to the owner of a lot fronting on a street, for its failure and neglect to construct barriers to protect such street from being washed into a river along the banks of which it runs, by reason of which the same became so narrow as to render approach to such owner's lot difficult and dangerous, where such municipality had never assumed control of the street or regarded it in any way as coming under the control of the city council, and it had been in that condition for a long time prior to the acquisition of the territory by such city, and had been partly or wholly abandoned as a public highway. *Maysville v. Stanton*, 12 Ky. L. Rep. 586, 14 S. W. 675.

<sup>4</sup>*Smith v. Fitzgerald*, 24 Ind. 316.

<sup>5</sup>The power of a municipal corporation to pass an ordinance prohibiting lot owners from permitting the water

from any flowing well or spring thereon to flow upon the streets or alleys of the city is implied from its express power to control the streets and enforce sanitary regulations, and is not a "taking of private property" so as to render the ordinance unconstitutional, but merely a regulation of its use so as not to impair the usefulness of the public streets and jeopardize the public health. *Skaggs v. Martinsville*, 140 Ind. 476, 33 L. R. A. 781, 49 Am. St. Rep. 209, 39 N. E. 241.

<sup>6</sup>*Sloan v. State*, 8 Ind. 312.

<sup>7</sup>*McKeon v. New York, N. H. & H. R. Co.* 75 Conn. 343, 61 L. R. A. 730, 53 Atl. 656.

<sup>8</sup>*Reinhart v. Sutton*, 58 Kan. 726, 51 Pac. 221.

<sup>9</sup>*Savage v. Salem*, 23 Or. 381, 24 L. R. A. 787, 37 Am. St. Rep. 688, 31 Pac. 832.

<sup>10</sup>*Crosland v. Pottsville*, 126 Pa. 511, 18 Atl. 15.

a mud hole on land, caused by the accumulation of surface water in a depression left thereon by the owner thereof on refilling an excavation made by him for the purpose of connecting a private sewer constructed by him with a private sewer on adjoining land so as to get access through the latter to a city sewer, not done by authority of any ordinance or direction of any city official, except that it was acquiesced in by one alderman.<sup>1</sup> No action lies directly against a city by a contractor to recover the amount of an assessment made upon a lot for work done in abating a nuisance created by the grading of streets, on the ground that the collection thereof might be enjoined by the owner, where it does not appear that he has elected to avail himself of such equitable remedy, and he might elect to sue at law for the damages occasioned by the nuisance, in which case there would be no objection to the enforcement of the assessment.<sup>2</sup> Nor is the municipality liable for nuisances committed in its streets, merely because it authorized the doing of acts which might have been done without creation of a nuisance.<sup>3</sup> A city which by legislative enactment annexes territory from the county, upon which is a nuisance occasioned by the collection of surface water in a large ditch and conduits and discharging the same upon private land, and which within two months after notice, there being no evidence of what would be a reasonable time therefor, effectually removes the nuisance, is not liable for its maintenance, to the owner of the land alleged to be injured thereby.<sup>4</sup> In case the officials of a county commit acts which amount to a nuisance, the remedy is against them and not against the county, unless there is statutory authority to bring action against the county for the redress of such wrongs. The county being a subdivision of the state enjoys its exemption from liability to suit,

<sup>1</sup>*Richards v. Waupun*, 59 Wis. 45, 17 N. W. 975.

<sup>2</sup>*Smith v. Milwaukee*, 18 Wis. 63.

<sup>3</sup>A city which, by ordinance, has granted a franchise to an electric street railway company is not liable for injury sustained by a property owner whose premises were flooded, after a sudden storm, from water which ran into a hole dug in a gutter in front of his premises, by the company, for the purpose of erecting a pole. *Tatman v. Benton Harbor*, 115 Mich. 695, 74 N. W. 187.

Where a water station is erected, without the consent of the city but with its knowledge, so that it encroaches on the street and constitutes a nuisance, but which does not interfere with or

annoy the citizens of the city in the use of the street, the city is not liable for the damages done to a building by the negligent use of the water at the station, because of its failure to abate the station as a nuisance, under a statute which confers upon it exclusive control and power over its streets, alleys, and public grounds and highways, and authority to abate and remove encroachments or obstructions thereon. In such a case, liability cannot attach to a municipal corporation for a mere failure to exercise its governmental powers. *Greenville v. Britton*, 10 Tex. Civ. App. 79, 45 S. W. 970.

<sup>4</sup>*Rychlicki v. St. Louis*, 115 Mo. 662, 22 S. W. 908.

unless it is removed by legislation.<sup>5</sup> The hardship from this rule is more apparent than real, because the officers who commit the wrong may always be compelled to redress it, and they are personally liable in damages for the acts which they commit. Under this rule the county is not liable for a ditch constructed by its officials, which becomes a nuisance.<sup>6</sup> Nor where a drainage ditch is constructed in such a manner as to constitute a nuisance to abutting property by reason of its continued overflow onto the adjoining land.<sup>7</sup> And the same rule applies to the diversion of water courses,<sup>8</sup> and to the construction of culverts to carry a ditch under a highway, which is so small that it backs the water onto adjoining property.<sup>9</sup>

**450. Abatement of nuisance by indictment.**—The creation of a public nuisance is a criminal offense for which an indictment will lie at common law.<sup>1</sup> That form of procedure must contain all the technical accuracy required of common-law indictments generally.<sup>2</sup> And the allegation and proof must agree strictly.<sup>3</sup> The indictment must be

<sup>5</sup>*Schussler v. Hennepin County*, 67 Minn. 412, 39 L. R. A. 75, 64 Am. St. Rep. 424, 70 N. W. 6; *Lefrois v. Monroe County*, 162 N. Y. 563, 50 L. R. A. 206, 57 N. E. 185.

<sup>6</sup>*Dashner v. Mills County*, 88 Iowa, 461, 55 N. W. 468.

<sup>7</sup>*Green v. Harrison County*, 61 Iowa, 311, 16 N. W. 136; *Nutt v. Mills County*, 61 Iowa, 754, 16 N. W. 536.

<sup>8</sup>*Fenton v. Salt Lake County*, 3 Utah, 423, 4 Pac. 241.

<sup>9</sup>*Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757.

<sup>1</sup>To sustain an indictment for a nuisance created by the maintenance of a milldam lawfully erected, it is not necessary to show that the particular structure complained of produces an effect more injurious to the public health and enjoyment of life than is common to such structures, but only that it so injuriously affects public health as to be in fact a public nuisance. *Douglass v. State*, 4 Wis. 387.

A court of general criminal jurisdiction is not deprived of its jurisdiction of an indictment for a nuisance created by a dam erected under a private statute authorizing the same, which provides that such dam shall be a nuisance which may be abated if a proper lock is not maintained therein, and prescribes the manner in which another designated court shall ascertain whether it injures or endangers the health of the inhabitants, and directs its abatement by that

court in that case, where such statute neither expressly takes away the former court's criminal jurisdiction nor attempts to confer criminal jurisdiction on the latter. *State v. Bell*, 5 Port. (Ala.) 365.

<sup>2</sup>An indictment for maintaining a milldam as a common nuisance is defective and insufficient as not locating the dam with sufficient certainty, where it is described as "a certain milldam in, about, and across a certain stream of water in said county, called Elkland river." *Wood v. State*, 5 Ind. 433.

<sup>3</sup>An indictment for maintaining a dam in such a way that it became a nuisance by reason of the collection in the pond of animal and vegetable substances brought down the stream, which became nauseous and offensive and corrupted the water, is not sustained by evidence which shows that the injury resulted from the alternate rise and fall of the water in the pond, or from the action of the sun upon the vegetable substances growing in the shallow water of the pond. *People v. Townsend*, 3 Hill, 479.

Upon a conviction for the offense of erecting and maintaining a dam constituting a nuisance, a judgment ordering the abatement of the nuisance is improper, since the maintenance and continuance of a nuisance are distinct offenses. *Munson v. People*, 5 Park. Crim. Rep. 16.

brought in the jurisdiction where the nuisance is located.<sup>4</sup> If the statutes provide for the punishment of such offenses, information may be filed the same as for other statutory offenses.<sup>5</sup> An acquittal upon an indictment for maintaining a nuisance resulting from the erection of a pond is not a bar to an indictment found upon a similar charge nine years afterward.<sup>6</sup>

**451. Remedy by injunction.**— Where the remedy at law is not adequate to provide successfully for the abatement of a nuisance, resort may be had to equity for that purpose. A municipal corporation, or the officers charged with the ministerial duty of preserving the health of the community, may resort to injunction when the remedy by indictment or similar proceeding to abate the nuisance might be inadequate. Injunction is available on behalf of the municipality to secure the abatement of drains, sewers, and cesspools maintained by citizens in such a manner as to menace the public health.<sup>1</sup> Under the New York statutes, municipal boards of health may maintain suits to enjoin the creation of nuisances within the limits of the municipality which are dangerous to health.<sup>2</sup> An injunction is also available to restrain the pollution of streams and water courses to the injury of public health.<sup>3</sup> Conversely, the municipality will be enjoined

\*Indictment does not lie for the maintenance of a dam constituting a public nuisance, in a county other than that in which such dam is located, although injury therefrom may result in another county, giving a private right of action therein for the damages sustained, in the absence of legislation providing therefor, where such dam is not located on or within 100 rods of the boundary line so as to bring it within a provision that offenses committed on or within 100 rods of the boundary line of two counties may be prosecuted in either county. *Re Eldred*, 46 Wis. 530, 1 N. W. 175.

<sup>1</sup>An information sufficiently charges an offense under Neb. Crim. Code, § 228, forbidding damming or obstructing a water course causing an artificial pond producing stagnant waters which shall be manifestly injurious to the public health or safety, when it alleges the erection and maintenance of a dam in a stream, whereby an artificial pond is raised and stagnant water is produced whereby the air was and now is corrupted, offensive, and unwholesome, and manifestly injurious to public health and safety. *State v. Kendall*, 38 Neb. 817, 57 N. W. 525.

In a prosecution for a public nuisance

in the erection and maintenance of a milldam across a stream, proof of possession of the dam in connection with a mill, under a claim of right through successive grantees from the original builder of the dam, who constructed the same under a legislative grant, is competent as showing a sufficient title thereto as against all persons except the owners of the banks against which the dam abuts, although no title by deed is shown. *Neaderhouser v. State*, 28 Ind. 257.

<sup>2</sup>*People v. Townsend*, 3 Hill, 479.

<sup>3</sup>*State ex rel. Board of Health v. Hutchinson*, 39 N. J. Eq. 218; *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Hutchinson v. State*, 39 N. J. Eq. 569; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 276; *Bell v. Rochester*, 33 N. Y. S. R. 739, 11 N. Y. Supp. 305; *Board of Health v. Casey*, 18 N. Y. S. R. 251, 3 N. Y. Supp. 399.

<sup>4</sup>*Board of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 465, 35 N. E. 443, affirming 71 Hun, 140, 24 N. Y. Supp. 625.

<sup>5</sup>*North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 52 Pac. 168; *Brookline v. Mackintosh*, 133

from creating or maintaining a nuisance where it is an injury to health or property and there is no adequate remedy at law.<sup>4</sup> But equity will not interfere in such cases if there is an adequate remedy at law.<sup>5</sup> And the injunction will not be granted where the evil anticipated is uncertain and contingent, and cannot arise for several years.<sup>6</sup> The remedy may be used to enjoin the municipality from polluting a water course.<sup>7</sup> But where the fault of the municipality is in not providing drainage as required by statute, the remedy is by mandamus, and not by injunction to restrain the pollution of the stream with sewage.<sup>8</sup> Injunction also lies against acts of the municipality which constitute a nuisance by being an injury to navigation.<sup>9</sup> The proceeding in equity should not, as a rule, be on the part of the Attorney General on behalf of the public. As said in *Atty. Gen. v. Hane*,<sup>10</sup> the Attorney General is not authorized, except in unusual cases, to proceed as relator for the state at his own instance, and by information in chancery sue a private person to abate a milldam on the ground of its being hurtful to health. As a general rule, the public must prosecute in such a case, if at all, at the common law, and afford the defendant an opportunity to have the question decided by a jury. And in *Mississippi & M. R. Co. v. Ward*,<sup>11</sup> it was said that a bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the Crown to abate or enjoin the nuisance as a preventive

Mass. 215; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664; *Atty. Gen. ex rel. Raleigh v. Hunter*, 16 N. C. (1 Dev. Eq.) 12; *Atty. Gen. v. Ntecard*, 20 N. J. Eq. 415, 21 N. J. Eq. 340; *Atty. Gen. v. Blount*, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

*Viok v. Rochester*, 46 Hun. 607; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Stoddard v. Saratoga Springs*, 127 N. Y. 281, 27 N. E. 1030; *Beach v. Elmira*, 22 Hun. 158; *Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496; *Butler v. Thomasville*, 74 Ga. 570; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109, Approved, *Moody v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703; *Flower v. Low Leyton*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. N. S. 621, 36 L. T. N. S. 760, 25 Week. Rep. 545.

*Iron Works v. Borough*, 3 Lanc. L. Rev. 107; *Olapp v. Spokane*, 53 Fed. 516.

*Morgan v. Binghamton*, 102 N. Y. 500, 7 N. E. 424.

*Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 435; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528. But, as in other cases, the injunction will be denied if there is an adequate remedy at law, or a case for equitable relief is not made out. *Newark Aqueduct Board v. Passaic*, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55, Affirming 45 N. J. Eq. 393, 18 Atl. 106; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Atty. Gen. v. Gee* L. R. 10 Eq. 131, 23 L. T. N. S. 299; *Biltz v. Ashland*, 3 Pa. Co. Ct. 412.

*Glossop v. Heston & Isleworth*, L. R. 12 Ch. Div. 102, 49 L. J. Ch. 89, 40 L. T. N. S. 736, 28 Week. Rep. 111.

*Breed v. Lynn*, 126 Mass. 367; *Haskell v. New Bedford*, 108 Mass. 208; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1000; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Yolo County v. Sacramento*, 36 Cal. 193.

<sup>10</sup> 50 Mich. 447, 15 N. W. 549.

<sup>11</sup> 2 Black, 485, 17 L. ed. 311.

remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, damage he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts on behalf of all others. The erection of a dam will be enjoined if it appears that a nuisance will probably result.<sup>12</sup> And its continuance will be enjoined whenever the interest or happiness of individuals or the community may require the nuisance to be abated.<sup>13</sup> But a court of equity will not order the removal of a milldam on the ground that it is a nuisance, producing sickness and rendering the neighborhood nearby permanently unhealthy, where there is conflicting testimony as to whether or not the overflow from such dam caused the sickness claimed, and that a removal thereof would relieve such sickness, or that the cause of such sickness might not be otherwise removed; but in such cases courts of equity will refuse to interfere until the right is established, and the nuisance is made manifest by the verdict of a jury at law.<sup>14</sup> Equity will not restrain the erection of a water mill required for public convenience merely because it will affect the health of a single family or of a few individuals, and when full compensation can be made for injury caused by the flowage.<sup>15</sup> The fact that a pond is maintained in violation of a municipal ordinance will not prevent the municipality from maintaining a suit to abate it.<sup>16</sup> And equity will not interfere if there is an adequate remedy at law.<sup>17</sup> Nor when the right of the complainant is capriciously insisted on.<sup>18</sup>

**452. Other modes of abatement.**—When a nuisance is created within the limits of a municipal corporation so as to constitute a menace to the health of its citizens, an executive board may be given power to abate the nuisance summarily, regarding the rights of the property owner and not destroying the property unnecessarily.<sup>1</sup> A general statute authorizing the destruction of a public nuisance by the boards of health of cities, and further providing for the appointment

<sup>12</sup>*Atty. Gen. ex rel. Raleigh v. Hunter*, 16 N. C. (1 Dev. Eq.) 12.

<sup>13</sup>*Maxwell v. Boyne*, 36 Ind. 120.

<sup>14</sup>*Lassater v. Garrett*, 4 Baxt. 368; *New Castle v. Raney*, 130 Pa. 546, 6 L. R. A. 787, 18 Atl. 1060.

An injunction will not, before a jury has passed upon the facts, be granted to restrain the operation of a grist mill the alternate ebb and flow of the water below which, in the usual course of its operation, is alleged to have produced sickness in the neighborhood and in the family of the complainant, where the evil complained of has been going on for

several years, and it is apparent from the affidavits in the case that very conflicting testimony exists as to the facts. *Nelms v. Clark*, 44 Ga. 617.

<sup>15</sup>*Daughtry v. Warren*, 85 N. C. 136.

<sup>16</sup>*Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197.

<sup>17</sup>*Rockland v. Rockland Water Co.* 86 Me. 55, 29 Atl. 935.

<sup>18</sup>*Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

<sup>1</sup>*State v. McCulla*, 16 R. I. 196, 14 Atl. 81; *Dingley v. Boston*, 100 Mass. 544; *Cobb v. Boston*, 109 Mass. 438, 112 Mass. 181; *Phillips v. Middlesex Coun-*



of such boards in cities, does not authorize the abatement of a dam as a public nuisance by a board of health appointed under the charter of a particular city.<sup>2</sup> The authority of the board does not justify arbitrary action or the doing of anything not necessary for the public health or welfare.<sup>3</sup> If property does not constitute a nuisance, the board has no power to interfere with it.<sup>4</sup> Under the statute relating to proceedings by local boards of health against persons creating a nuisance, proceedings must be instituted by the officers of the locality where the nuisance originates; hence, the board of health of the district wherein noxious matter is discharged into a river must proceed, and not the board from a district lower down the river, although the pollution results in the creation of a nuisance at such lower point.<sup>5</sup> The imposition of a penalty by statute for maintaining a dam in such a way as to constitute a nuisance does not take away the right of abatement, unless that remedy is made exclusive.<sup>6</sup> If private property is interfered with without right, its owner is entitled to damages.<sup>7</sup> The board cannot summarily determine whether or not the thing complained of constitutes a nuisance.<sup>8</sup> And the property owner may enjoin wrongful interference with his property.<sup>9</sup>

*ty*, 122 Mass. 258; *Phillips v. Middlesex County*, 127 Mass. 262; *Cambridge v. Munroe*, 126 Mass. 496; *Bancroft v. Cambridge*, 126 Mass. 438; *Read v. Cambridge*, 126 Mass. 427; *Farnsworth v. Boston*, 121 Mass. 173; *Cavanagh v. Boston*, 139 Mass. 426, 433, 434, 52 Am. Rep. 716, 1 N. E. 834; *Laurence v. Webster*, 167 Mass. 513, 46 N. E. 123; *Nickerson v. Boston*, 131 Mass. 306; *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71, 73; *Hannibal v. Richards*, 82 Mo. 330; *Brown v. Bussell*, L. R. 3 Q. B. 251, 9 Best. & S. 1, 37 L. J. M. C. N. S. 65, 16 Week. Rep. 511; *St. Helens Chemical Co. v. St. Helens*, L. R. 1 Exch. Div. 196, 45 L. J. M. C. N. S. 150, 34 L. T. N. S. 397; *Huse v. Amesbury Bd. of Health*, 163 Mass. 240, 39 N. E. 1023.

Town authorities have power to abate a nuisance caused by a mill and machinery run by water, on the report of the board of health, under a charter by which all nuisances are under the supervision of the town authorities and a board of health is created whose duty it is to report nuisances, whereupon they may be summarily abated, although an earlier general act especially provides for the abatement of that particular class of nuisances by proceedings before the ordinary, the passage of such general act not preventing the legislature

from granting broader powers to such authorities. *Montezuma v. Minor*, 70 Ga. 191.

*Shepard v. People*, 40 Mich. 487.

A board of health having power to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger to health has no authority to require a railroad company to construct openings in its embankments for the flow of the water of a lake to prevent stagnation, without notice to the railroad company and giving it an opportunity to be heard. *People ex rel. New York C. & H. R. R. Co. v. Board of Health*, 58 Hun, 595, 12 N. Y. Supp. 561.

*Montezuma v. Minor*, 73 Ga. 484.

*Reg. v. Cotton*, 1 El. & El. 202, 28 L. J. M. C. N. S. 25, 5 Jur. N. S. 311, 7 Week. Rep. 62.

*Renwick v. Morris*, 3 Hill, 621.

*Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201.

*Rogers v. Barker*, 31 Barb. 447.

*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 23 L. R. A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; *Clark v. Syracuse*, 13 Barb. 32.

But an injunction will not be granted a mill owner to restrain city authorities from summarily abating his mill pond, determined by them, upon report of the

The remedy is by certiorari, and not by prohibition, if town authorities having jurisdiction of the abatement of a nuisance occasioned by a mill and machinery run by water do not follow the law in administering it to the facts of the case.<sup>10</sup> A municipal corporation, and not its board of health, is the proper plaintiff in an action to recover the cost of removing a nuisance consisting of a stagnant pond, if the board of health has not expended its own money in removing the nuisance, and had no funds in its hands for the purpose.<sup>11</sup> The fact that a board of health authorized to remove nuisances when necessary for the preservation of the public health did not remove a nuisance,—in this case brush placed on the bottom of a river for the purpose of growing oysters,—until in the winter, after an epidemic of disease had subsided, did not make its act illegal, it having refrained from removing it during the summer through fear that by so doing the poisonous effluvia would be greatly increased, and there also being danger of a recurrence of an epidemic during the following summer.<sup>12</sup> Without statutory authority, neither a municipal corporation nor its board of health has power to erect a dam on the land of one person to abate a nuisance on adjoining land.<sup>13</sup> A decree authorizing the raising of a dam to a certain height and requiring the removal from the pond of all timber within a certain time, on penalty of having the same abated as a nuisance for failure so to do, cannot, for such failure, be enforced by a process issued by the clerk of the superior court to the sheriff, commanding him to pull down the dam and abate the same as a nuisance.<sup>14</sup>

**453. Rights of property owner.**—The dangers attending the continuance for a short time of a nuisance of the class which we are now considering are not such as to require immediate action on the part of the authorities, nor to abrogate the constitutional provisions

board of health, to be a nuisance affecting the health of the community, where the charter and ordinances gave such authorities full power, upon the recommendation of the board of health, to abate nuisances. *Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201.

It is said in that case that "it would be a great wrong upon the people living in crowded cities to hold that in every case of nuisance, affecting perhaps the lives of hundreds or thousands of inhabitants, city authorities would have to go through a long and tedious trial before the court and jury, before they could abate or abolish a nuisance."

<sup>10</sup>*Montecuma v. Minor*, 70 Ga. 191.

Where no appeal is allowed, certiorari

is the proper remedy to review a decision by a board of health requiring the opening of spaces in a railroad embankment for the flow of the water of a lake to prevent stagnation and injury to health, which will involve large expenses to the railroad company and which was made without granting it any hearing. *People ex rel. New York C. & H. R. R. Co. v. Board of Health*, 58 Hun, 595, 12 N. Y. Supp. 561.

<sup>11</sup>*Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650.

<sup>12</sup>*Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

<sup>13</sup>*Caranagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834.

<sup>14</sup>*Wall v. Woolbright*, 71 Ga. 256.

as to due process of law. The municipal authorities cannot be permitted to act arbitrarily upon their own knowledge and judgment, but the one who is alleged to be maintaining the nuisance is entitled to notice and an opportunity to be heard before his property is summarily destroyed or the alleged nuisance abated.<sup>1</sup> So, equity will not order a dam to be taken down until the owner has been heard.<sup>2</sup> If, however, the nuisance is of such a character that there can be no difference of opinion as to its being in fact a nuisance, the principle is applicable which was adopted in *Salem v. Eastern R. Co.*<sup>3</sup> where it was held that previous notice to landowners is not necessary of proceedings of the board of health for the removal of a nuisance consisting of a stagnant pond, since such proceedings belong to the class of police regulations to which all individual rights of property are held subject. The nature and object of those proceedings is such that it is deemed to be most for the general good that previous notice shall not be essential to the right of the board of health to act for the public safety. Any notice or demand to remove the nuisance is sufficient which puts the owner of the property on inquiry.<sup>4</sup> Where a statute providing for the abatement of a nuisance, consisting of stagnant water, requires notice to persons interested before proceedings for abatement shall be taken, such notice must be given before an assessment can be laid on the property owner.<sup>5</sup> A resolution passed by a township board of health directing that a notice be served upon landowners, requiring them to fill up a ditch which partially drains several lakes and abate the nuisance and menace to health thereby occasioned, which notice was served upon but one person, does not justify the board of health in filling up the ditch,—especially where the proceeding was due to an understanding between a lower mill owner who would be benefited by such action, and the board of health.<sup>6</sup>

**454. Jurisdiction over offenses.**—Suits for the punishment of offenses committed upon or against water ways must, in general, be brought within the jurisdiction where they are committed. So far as the jurisdiction between independent nations is concerned, it has already been considered.<sup>1</sup> With respect to jurisdiction within a state, the jurisdiction of the county courts depends upon the boundaries of

<sup>1</sup>*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 23 L. R. A. 481, 37 Am. St. Rep. 522, 35 N. E. 320. *Middlebrooks v. Mayne*, 96 Mass. 431; *Grace v. Board of Health*, 135 Mass. Ga. 449, 23 S. E. 398.

<sup>2</sup>*Van Bergen v. Van Bergen*, 2 Johns. Ch. 272. 490.

<sup>3</sup>98 Mass. 431.

<sup>4</sup>*Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Salem v. Eastern R. Co.* 98

<sup>5</sup>*Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612.

<sup>6</sup>See *ante*, §§ 7, 8.

the county within which they are located, and that question has already been considered.<sup>2</sup> The cases illustrating the application of the rule show that, if a county is bounded by a river, its courts have no jurisdiction of an offense committed on the opposite bank;<sup>3</sup> but that the courts of counties bordering upon a water course may be given concurrent jurisdiction over the stream.<sup>4</sup> Counties and towns bordering on a sea coast or lake have no jurisdiction over the water beyond their limits, but their jurisdiction may be extended to the borders of the state if the legislature sees fit to make the extension.<sup>5</sup> In case a municipal corporation extends to the shore, its jurisdiction will extend as the shore grows by accretion.<sup>6</sup> So, for jurisdictional purposes, land forming a bar in a river is within the county from which it is separated only by a slough, and not in that from which it is separated by the main channel of the river, where the condition is not changed in that respect since the creation of the counties, of which the river generally was made the boundaries.<sup>7</sup> Tex. Rev. Stat. art. 1198, which subjects everyone who is liable to suit to be sued in the county in which he has his domicile, annuls the technical rules of common law regarding transitory and local actions; and where the lands of a plaintiff situate on the bank of the Rio Grande river are injured by an overflow caused by an obstruction placed in the bed of the river by defendant on the Texas side, the defendant is properly sued in the county in Texas which borders on the river where the obstruction was placed, the defendant being a resident of that county.<sup>8</sup>

<sup>2</sup> See *ante*, § 425.

<sup>3</sup> The courts of a county bounded by a river have no jurisdiction of a crime if committed on the opposite bank of the river in another county at a point where the river is more than  $\frac{1}{2}$  a mile wide, either under § 3720 of the Alabama Code, providing that when an offense is committed on the boundary of two or more counties or within a quarter of a mile thereof the jurisdiction is in either county, as jurisdiction thereunder extends only to a quarter of a mile from its own shore; or under § 27 of the Code, providing that such counties have jurisdiction over the river in question on the part of each to the water's edge opposite its own territory, as jurisdiction thereunder extends only to the margin of the river. *Jackson v. State*, 90 Ala. 590, 8 So. 802.

<sup>4</sup> *State v. McDonald*, 109 Wis. 506, 85 N. W. 502; *State v. Davis*, 25 N. J. L. 386.

The courts of a county bounded by a river have, under the Alabama statutes, jurisdiction to punish the violation of a statute against gambling, where such violation occurred on a ferryboat anchored in the middle of the river between that and the adjoining county. *Dickey v. State*, 68 Ala. 508.

<sup>5</sup> *Mahler v. Norwich & N. Y. Transp. Co.* 35 N. Y. 352, Reversing 45 Barb. 226.

<sup>6</sup> *Luke v. Brooklyn*, 43 Barb. 54.

<sup>7</sup> *Vogelsmeier v. Prendergast*, 137 Mo. 271, 39 S. W. 83.

<sup>8</sup> *Armendias v. Stillman*, 54 Tex. 623.



**PART III.**  
**RIGHTS BETWEEN INDIVIDUALS.**



# PART III.

## RIGHTS BETWEEN INDIVIDUALS.

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### I. WHAT IS A WATER COURSE.

**455. Elements of problem.**—The question, What is a water course? has given the courts much trouble. There are several characteristics of a water course, some of which may be present in some cases, and others in other cases, and one or more of the distinguishing characteristics may be lacking in a particular case, and yet not destroy the character of the stream as a water course. Courts, in dealing with particular cases, have found as a fact that a water course did or did not exist, and have mentioned the fact which appealed to them most

strongly in making their decision, and apparently made their decision because that fact did or did not exist, while the thing mentioned by them was only one of numerous elements; so that, in another case, an exactly opposite conclusion was reached upon the question of fact, although conditions as to the element named were the same. In most cases there is little difficulty in determining whether or not a water course exists, as a question of fact. The characteristics of a water course are as easily recognized as are those of most physical objects, and if the question is left to be decided by the jury as a question of fact, as it should be,<sup>1</sup> there will be little difficulty in any case. There are, however, certain definitions which have been given by the courts which may aid the jury, more or less, in arriving at their conclusion. Courts have been occasioned much embarrassment in arriving at their conclusions by the attempt to bring matters of drainage and of water courses within the same rule. A water course is a thing in a class by itself. Certain rights attach to it on behalf of riparian owners and the law has certain rules applicable to it which are designed to promote the largest use of it by the greatest number of persons. On the other hand, the question of drainage is a matter by itself, and depends upon the maxim *Sic utere tuo ut alienum non lædas*. Some rules with respect to drainage are the same as those with respect to water courses, and others are entirely distinct, and it only creates uncertainty with respect to the law applicable to both to attempt to put them in the same class. This attempt was needless, but was apparently made necessary by the fact that a few early cases in this country refused to recognize any right of drainage, so that, in order to preserve drain ways and protect individual property from destruction by being rendered wet and unfit for use, it seemed to be necessary to establish the existence of a water course to carry the drainage away. Of course, in most cases, this attempt failed, as it should have done, because a water course is not necessary to drainage, as will be seen when we come to consider the question of drainage.<sup>2</sup> Eliminating the question of drainage from the problem, its solution becomes easy, for a water course, considered solely by itself, must be such as to have those physical characteristics which give rise to the rights of riparian owners, and there can be no water course where the flow of water is of such a character that no valuable rights attach to it. With this principle in mind, we will examine the various characteristics which have been held to distinguish a water course, and attempt to draw

<sup>1</sup>*Vernum v. Wheeler*, 35 Hun, 55.

<sup>2</sup>See *post*, chap. xxix.

from them a definition which may aid the jury in arriving at an intelligent conclusion.

**455a. Swale or ravine as water course.**—Most of the discussion noticed in the preceding section was rendered necessary by the confusion of water courses with the right of drainage, and with the attempt to establish ravines and swales, through which the surface water was accustomed to drain, as water courses, for the purpose of establishing a right to such drainage. Of course, it cannot be contended that a depression or natural drain way, which merely carries the water in rainy seasons, is a water course. It presents none of the characteristics of a water course except that at times water flows in it; but it is not valuable for the promotion of any riparian right, and the only thing that it is valuable for is drainage. Eliminating that element which has no place in any discussion of what is or what is not a water course, and no one would contend that such a depression was a water course. There is, however, a difference in the swales themselves. In many instances, in a section of country which was formerly covered with woods which have been cleared away, the swale is the bed of a stream which used to run more or less continually, but which gradually dried up as the land was cleared, and which now contains water only when the land is well saturated. In such cases the spring which formerly was strong enough to maintain a running stream and which is still strong enough to do so at certain seasons of the year may be found, and if such are the facts the further fact that at some portions of the year the bed becomes dry does not destroy the character of the water course. But in the absence of such source a swale, ravine, or gully, which, because of its form, facilitates the drainage of the country at certain seasons of the year, is not a water course.<sup>1</sup> In *Los Angeles Cemetery Asso. v. Los Angeles*,<sup>2</sup> it is said that to constitute a water course there must be a stream usually flowing in a particular

<sup>1</sup>*Gregory v. Bush*, 64 Mich. 37, 8 Am. Kan. 214, 37 Am. Rep. 241; *Kansas St. Rep.* 797, 31 N. W. 90; *Rice v. City & E. R. Co. v. Riley*, 33 Kan. 374, *Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 6 Pac. 581; *Hoyt v. Hudson*, 27 Wis. 9 N. E. 139; *Jeffers v. Jeffers*, 107 N. 661, 9 Am. Rep. 473; *Robinson v. Y. 650*, 14 N. E. 316; *Jones v. Wabash*, *Shanks*, 118 Ind. 125, 20 N. E. 713; *St. L. & P. R. Co.* 18 Mo. App. 251; *Jones v. Wabash, St. L. & P. R. Co.* 18 *Murray v. Dawson*, 19 U. C. C. P. 314; Mo. App. 251; *Middlesborough Town Dean v. Gray*, 22 U. C. C. P. 202; *Co. v. Helwig*, 14 Ky. L. Rep. 430; *Shields v. Arndt*, 4 N. J. Eq. 234; *Kansas City & E. R. Co. v. Riley*, 33 Kan. Rep. 519; *Chicago, E. & W. R. Co. v. 374*, 6 Pac. 581; *Wagner v. Long Island R. Co.* 2 Hun, 633; *Butler v. Peck*, 16 Ohio St. 343, 88 Am. Dec. 452; *Bangor 135*; *Benson v. Chicago & A. R. Co.* 78 *v. Lansil*, 51 Me. 525; *Abbott v. Kansas Mo. 514*; *Hagge v. Kansas City S. R. City. St. J. & C. B. R. Co.* 83 Mo. 271, Co. 104 Fed. 391.  
53 Am. Rep. 581; *Gibbs v. Williams*, 25 <sup>2</sup>103 Cal. 461, 37 Pac. 375.

direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary cause. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rains or melting snow, and is discharged through them from a higher to a lower level, the ravines being at other times destitute of water. Such a depression or swale is not within the meaning of a law permitting the casting of water into water courses.<sup>3</sup> Or within the meaning of a law requiring the bridging of water courses.<sup>4</sup> The influence which the irrelevant matter of drainage has had upon this subject is illustrated by an Illinois case which held that if the conformation of the land is such as to give the surface water flowing from one tract to the other a fixed and determinate course, so as uniformly to discharge it upon the surrounding tracts at a fixed and definite point, the course thus uniformly followed is a water course within the meaning of the rule applicable to that subject.<sup>5</sup> So, in a Minnesota case, it was held that in a broken and bluffy country like that part of southeastern Minnesota adjacent to the Mississippi river and its tributaries, intersected by long, deep ravines surrounded with high bluffs, down which large quantities of water from rain and melting snow rush with the rapidity of a torrent, often attaining the volume of a small river and usually following a well-defined channel, it would be manifestly inappropriate and unjust to apply the rules of the common law applicable to ordinary surface water, for in many respects such streams partake more of the nature of natural streams and must be governed by the same rules, to a certain extent at least; and no one has the right to obstruct or divert such waters so as to cast them upon the property of others to their injury.<sup>6</sup> In *Earl v. De Hart*,<sup>7</sup> in which the water natu-

<sup>3</sup>*Byrne v. Keokuk & W. R. Co.* 47 Mo. App. 383.

<sup>4</sup>*Carroll County v. Bailey*, 122 Ind. 46, 23 N. E. 672; *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. 713.

<sup>5</sup>*Lambert v. Alcorn*, 144 Ill. 313, 21 L. R. A. 611, 33 N. E. 53.

<sup>6</sup>*McClure v. Red Wing*, 28 Minn. 191, 9 N. W. 787, Approved in *Taubert v. St. Paul*, 68 Minn. 519, 71 N. W. 664.

<sup>7</sup>The doctrine of *Earl v. De Hart*, received some support from the reasoning in *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480.

So, the Oregon court has held, that a natural, well-defined channel or ravine through which water is accustomed to flow annually in the spring, connected with a river, partakes more of the nature of a natural stream than of ordinary overflow or surface water,—at least to the extent that its outlet cannot be dammed up and the waters thus diverted or interfered with to the injury of land through which they flow. *Mace v. Mace*, 40 Or. 586, 67 Pac. 660, 68 Pac. 737

rally flowed from complainant's lot across defendant's, along a ditch occasioned by water following a slight natural depression in the surface of the ground, the New Jersey court said that it constituted an ancient, natural water course, and defined a water course as follows: "If the face of the country is such as necessarily collects in one body so large a quantity of water after heavy rains and the melting of large bodies of snow as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient water course." But in *Bowlsby v. Speer*,<sup>8</sup> where there was a slight hollow or depression in which surface water ran, the court held that it was not a natural water course, and limited the doctrine of *Earl v. De Hart* to the facts as shown in that case, which were said to have established a grant by implication or lapse of time of the privilege to discharge the water in the manner claimed. The court further said that there was no significance in the fact that there was an appreciable channel for the surface water, into which it naturally ran; that on every hillside numbers of such small conduits could be found, but it would be highly unreasonable to attach to them all the legal qualities of water courses. In *McKinley v. Union County*<sup>9</sup> it is said that the accuracy of the definition in *Earl v. De Hart* was not questioned by *Bowlsby v. Speer*. All this discussion related to the matter of drainage. No one contended that in any of these cases there was a water course which was of any value to anybody except as an outlet for surface water. To establish a right to such an outlet it is not necessary to establish the existence of a water course, and, therefore, all the discussion as to whether or not a water course existed was immaterial. A water course must be a stream of such a character as to give persons owning land upon it the right to have it maintained for the benefits which will flow to them from the advantages of a natural flowing stream, and the question of the disposition of surface water must be considered under another head, and by different rules.

**456. Necessity of channel.**—Perhaps the most prominent among the characteristics which have been regarded as necessary to constitute a water course is a channel with well-defined bed and banks. Some courts have gone to the extent of holding that this is a distinguishing characteristic, and that without it there can be no water course, but

<sup>8</sup> 31 N. J. L. 354, 86 Am. Dec. 216.

<sup>9</sup> 29 N. J. Eq. 171.

that if they are present the water course exists.<sup>1</sup> And it has even been held that it is not sufficient that the waters customarily and naturally flow in a known direction and course, if there are no banks and channels in the soil.<sup>2</sup> Conversely, where there was a channel a water course has been held to exist, although it carried nothing but water from rain and melting snow.<sup>3</sup> And under the same circumstances, no water course exists if the channel is absent.<sup>4</sup> Again, it has been held that that cannot be called a definite channel which has no visible banks or margins within which the water can be confined.<sup>5</sup> That this cannot be the characteristic upon which the water course depends is very obvious. It is common experience to find water issuing from a spring which, because of the character of the soil and grass, finds it impossible to cut a channel, and yet which flows in a constant direction and over considerable stretches of country, in some instances, and which is valuable for watering stock and for other uses to which water courses can be put, and which must be protected as such. As said in *New York, C. & St. L. R. Co. v. Hamlet Hay Co.*<sup>6</sup> streams which, by reason of the level character of the country and a strong growth of native grass, are shallow and sluggish, with no well-defined banks, are, nevertheless, water courses quite the same as if they flowed within rocky and unchangeable banks. And the California court has confined the necessity of a channel within very narrow limits, by holding that if water flows periodically in a depression, it flows in a channel, notwithstanding the fact that when it ceases to flow the distinctive appearances that it had ever flowed there would soon disappear.<sup>7</sup> And the inadequacy of the presence or absence of channel to determine the existence of a water course is shown by the fact that in some cases a channel may exist while there is no water course. And thus, in *McGillivray v. Millin*,<sup>8</sup> it was held that a slight depression in the land of an upper proprietor, over which water formed by rain and melting snow passed onto the land of an adjoining proprietor, where it had

<sup>1</sup>*Lusk v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Beer v. Stroud*, 19 Ont. Rep. 10; *Ferris v. Wellborn*, 64 Miss. 29, 8 So. 165.

<sup>2</sup>*Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563.

<sup>3</sup>*Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41; *York v. Davidson*, 39 Or. 81, 65 Pac. 819.

<sup>4</sup>*Missouri P. R. Co. v. Wren*, 10 Kan. App. 408, 62 Pac. 7; *Chicago, K. & W. R. Co. v. Morrow*, 42 Kan. 339, 22 Pac. 413.

<sup>5</sup>*Williams v. Richards*, 23 Ont. Rep. 651.

The banks are part of a river, but the river does not include lands beyond them which are covered in times of freshet or extreme floods, or swamps or low grounds liable to overflow but capable of reclamation, or which, though too low for reclamation, may be used for cattle to range upon as natural or uninclosed pasture. *Paine Lumber Co. v. United States*, 55 Fed. 854.

<sup>6</sup>149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

<sup>7</sup>*Lusk v. Haggin*, 69 Cal. 255, 10 Pac. 674.

<sup>8</sup>27 U. C. Q. B. 62.

made a deep gully and through which it had passed to a pond, which pond was dry during the summer, grass growing over the greater part of it,—is not a water course so as to make the lower proprietor liable for obstructing it, although at one time he had permitted the upper proprietor to plow a short furrow upon his land and upon such depression for the purpose of facilitating the flow of the water.

**457. Source of supply.**—The source of the water which flows in a channel claimed to be a water course is a much more satisfactory test than is the presence or absence of channel. It has been said that to constitute a water course there must be something more than surface water.<sup>1</sup> This, however, is not strictly true, for the surface water may collect from so large an area of country and be so continuous in its flow that it takes upon itself the character of a water course.<sup>2</sup> But to constitute a water course there must be a supply which is permanent in the sense that similar conditions will always produce a flow of water, and that the conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream.<sup>3</sup> If the source of supply is in a spring which furnishes water at regular periods, and the flow is strong enough to assume the character of a stream, it is a water course.<sup>4</sup> Conversely, if no water flows except in times of rain, which occur at irregular periods, and the flow continues only long enough to dispose of the water which has fallen, or if the surface drained is so limited that the water

<sup>1</sup>*Pyle v. Richards*, 17 Neb. 181, 22 N. W. 370; *Barnes v. Sabron*, 10 Nev. 236; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715, 22 N. W. 284; *Town v. Missouri P. R. Co.* 50 Neb. 768, 70 N. W. 402; *Eulrich v. Richter*, 37 Wis. 228.

<sup>2</sup>*McKinley v. Union County*, 29 N. J. Eq. 171; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Deming v. Cleveland*, 22 Ohio C. C. 1; *Palmer v. Waddell*, 22 Kan. 352; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 10 N. E. 410; *Eulrich v. Richter*, 41 Wis. 318.

The term "water course" does not include water descending from the hills down the hollows and ravines without any definite channel only in times of rain and melting snow; but where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow and at regular seasons descends through long, deep gulleys or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which even to the casual glance bears the unmistakable

impress of frequent action of running water and through which it has flowed from time immemorial,—such a stream is to be considered a water course and to be governed by the same rules. *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

But water gathered along the surface of a highway and conducted for upwards of twenty years by artificial drains on each side, until they reach a point where they are connected by a culvert and from which point the water flows along a lane from which it cannot escape to the right or left, and along the lower side of which it flows during light rains and flooding the whole of the lane during heavy rains, constitutes a water course having a well-defined channel. *Briscoe v. Drought*, 11 Ir. C. L. Rep. 250.

<sup>3</sup>*Mann v. Retsof Min. Co.* 49 App. Div. 454, 63 N. Y. Supp. 752.

<sup>4</sup>*Pyle v. Richards*, 17 Neb. 182, 22 N. W. 370; *Wolf v. Crothers*, 21 Pa. Co. Ct. 627.



cannot assume the character of a stream, it is not a water course.<sup>5</sup> The stream need not flow continuously in order to constitute a water course.<sup>6</sup> As said in *Parke County v. Wagner*,<sup>7</sup> a water course is a living, permanent, or continuous stream of water, confined in a channel having a bed and banks, but not necessarily flowing all the time, or even a greater portion of the year, if in fact it has a supply of living water, although that supply need not be sufficient at all times or most of the time to flow the entire length of the channel, and need not necessarily empty into some other stream or body of water, but may sink into cavities or be absorbed by rapid percolation into a bed of gravel or soil. The channel which affords an outlet to the water of a pond is a water course.<sup>8</sup> A depression in the bank of a river, through which water escapes at times of high water, does not constitute a natural water course within the rule that such courses cannot be obstructed; and therefore the one who fills the depression so as to prevent the water from escaping through it is not liable for injuries to persons lower down the stream from flood water overflowing their property because of his act.<sup>9</sup>

**458. The water must flow.**—In order to constitute a water course the water must have a current. It cannot be stagnant, nor spread out so as to destroy the current. If the water spreads out so that the current becomes imperceptible or is lost, the water becomes a lake or pond, and is no longer a water course.<sup>1</sup> In *Trustees of Schools, v.*

<sup>5</sup>*Morrison v. Bucksport & B. R. Co.* 67 Me. 353; *Fryer v. Warne*, 29 Wis. 511.

But where sewage and rain water flowed through a channel by the side of a road to a certain point from which it flowed through a fixed and definite channel along a lane, it did not lose its character as a water course by the fact that the volume of the stream, being dependent upon the amount of rain fall, was occasional and temporary. *Briscoe v. Drought*, 11 Ir. C. L. Rep. 250.

<sup>6</sup>*Spink v. Corning*, 61 App. Div. 84, 70 N. Y. Supp. 143; *King v. Oxfordshire*, 1 Barn. & Ad. 301, 8 L. J. K. B. 354; *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; *Shields v. Arndt*, 4 N. J. Eq. 234; *Barnes v. Sabron*, 10 Nev. 236; *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370; *Morrissey v. Chicago, B. & Q. R. Co.* 38 Neb. 406, 56 N. W. 946, 57 N. W. 522; *Rose v. St. Charles*, 49 Mo. 509; *Reynolds v. McArthur*, 2 Pet. 417, 7 L. ed. 470.

<sup>7</sup>138 Ind. 609, 38 N. E. 171.

<sup>8</sup>*Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914.

Marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water, and the construction and maintenance of a dike to restrain the spreading of such overflow water over them is unlawful. *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

<sup>9</sup>*Singleton v. Atchison, T. & S. F. R. Co.* (Kan.) 72 Pac. 786.

<sup>1</sup>*Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243.

A body of water formed by the expansion of a small stream varying from 35 to 65 rods in width and with a length of 3 miles, which after heavy rains is covered with water, but during the season when the water disappears is a bog or marsh, here and there covered with water and a growth of wild rice, navigable in ordinary stages only with canoes and skiffs; and which is almost, if not wholly, without current, but which was meandered in the government survey,—is a lake, and not a water course, the title to the bed of which is in the estate, and not in the riparian pro-

*Schroll*<sup>2</sup> it is said that the distinction between a stream and a pond or lake is that, in the latter case, the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other. But the presence of some current is not enough, alone, to work an essential change in such essentially different things as a stream and a lake, for a current from a higher to a lower level does not necessarily make that a stream which would otherwise be a lake; nor does the swelling out of a stream into broad water sheets necessarily make that a lake which would otherwise be a river. But the mere fact that, because of the level character of the country, the stream spreads out at a particular place, so that the distinctive channel is lost, does not destroy its character as a water course if the current continues.<sup>3</sup> Nor does the fact that for a portion of its course the water flows under ground, so that the stream is lost.<sup>4</sup> In a sandy country the stratum of sand must be saturated with water before it will support a surface flow, and this water is as much a part of the water course as is the water flowing on the surface; and if the volume becomes insufficient to maintain both the surface and underflow, the stream may consist merely of the underflow.<sup>5</sup> But water oozing from a spring through soft and spongy ground, and flowing into a pond, does not constitute a stream within the meaning of a lease demising the pond of water and the water of the stream leading thereto; and the lessor is not liable for having sunk a tank on the ground adjoin-

priors. *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661.

<sup>2</sup> 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243.

<sup>3</sup> *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147.

Riparian rights attach to the ownership of land on a stream having a well-defined course, although at a place above such land it passes through a swamp where all definite channel is lost; and proprietors on the stream above the swamp are not entitled to divert the water. *Mansford v. Ross*, 4 New Zealand L. R. (S. Ct.) 290.

Water flowing upon and over an owner's land through a broad depression therein, from springs in adjacent hills, and which has flowed therein from time immemorial, is a natural water course which the owner has no right to obstruct by the erection of an embankment so as to divert it from such channel and throw it upon the land of another, although the water broadens out into a

marsh between his land and the spring. and, except during wet weather, the flow is very small, and at times does not reach his land, and the depression through which it flows is cultivated with the rest of the land; although during wet weather it forms a large stream. *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230.

<sup>4</sup> *Washington County Water Co. v. Garner*, 91 Md. 398, 46 Atl. 979; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

Waters flowing from a lake, upon and beneath the surface of lands until they are discharged in a creek, constitute a water course where they flow in a distinct and plainly marked channel where the ground is suitable for cutting a well-defined channel, although in other places between such lake and creek they spread over wide reaches of marsh and swamp lands and percolate the soil. *Case v. Hoffman*, 84 Wis. 438, 20 L. R. A. 40, 36 Am. St. Rep. 937, 54 N. W. 793.

<sup>5</sup> The underflow is the subterranean volume of water which slowly finds its way through the sand and gravel con-

ing the demised premises, thereby drawing off from the marshy ground such oozing water.<sup>6</sup> To constitute a water course the flow of the water must usually be in one direction and by a regular channel having both a source and mouth; and therefore a sluiceway left in filling in flats, through which the tide ebbs and flows, is not a water course to which riparian rights will attach.<sup>7</sup>

**459. Definition of water course.**—Having thus determined what are the material and what the immaterial characteristics of a water course, we are in a position to arrive at a definition which will be more serviceable than some which have been adopted. A water course must have the characteristics of a flowing stream. It must have source, outlet, and channel, but all of these are more or less uncertain and undefined. The distinguishing characteristic is the existence of a stream of water flowing for such a length of time that its existence will furnish the advantages usually attendant upon streams of water. The courts have attempted to describe this condition as a stream usually flowing in a definite channel, having bed and sides or banks, and usually discharging itself into some other stream or body of water.<sup>1</sup> In *Kislinski v. Gilboy*,<sup>2</sup> it is said that, in general, the channel and banks formed by the flowing of the water must present to the eye, on a casual glance, the unmistakable evidence of the frequent action of running water; mere drainage over the general surface of the land being very different from the flow of a stream across the premises of another. These definitions are rather more in the nature of limitations than definitions. The most satisfactory definition is that a water course is the condition created by a stream of water having a well-defined and substantial existence.<sup>3</sup> To constitute a water course the flow of water must possess that unity of character by which the flow on one

stituting the bed of the stream. *Platte Valley Irrig. Co. v. Buckers Irrig. & Mill. Co.* 25 Colo. 77, 53 Pac. 334.

<sup>6</sup>*McVab v. Robertson* [1897] A. C. 129, 66 L. J. P. C. M. S. 27, 75 L. T. N. S. 668, 61 J. P. 468.

<sup>7</sup>*Chamberlain v. Hemingway*, 63 Conn. 1, 22 L. R. A. 45, 38 Am. St. Rep. 330, 27 Atl. 239.

<sup>1</sup>*Luther v. Winnisimmet Co.* 9 Cush. 174; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Jones v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 251; *Wagner v. Long Island R. Co.* 2 Hun, 633, 5 Thomp. & C. 163, Appeal dismissed in 70 N. Y. 614.

<sup>2</sup>19 Pa. Super. Ct. 453.

<sup>3</sup>*Schlichter v. Phillipy*, 67 Ind. 204;

*Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 10 N. E. 410; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Eulrich v. Richter*, 37 Wis. 226; *Morrison v. Bucksport & B. R. Co.* 67 Me. 353; *Ashley v. Wolcott*, 11 Cush. 192.

When surplus water has flowed from an area of land in a channel with banks and clearly defined water course, through which, during certain months when there are heavy rains, water flows regularly, the channel must be said to possess the characteristics of a water course; and, when a railroad builds across it, some provision should be made for the uninterrupted flow of the water. *Toyn v. Missouri P. R. Co.* 60 Neb. 768, 70 N. W. 402.

person's land could be identified with that on his neighbor's land.<sup>4</sup> Judge Maclellan, of Ontario, said: "A water course must always have some point of commencement, and it may not be quite easy in every case to say just precisely where that point is. If a stream is traced up towards its source, a point will always be reached where it ceases to be definable by a bed and banks; but until that point is reached it must be a water course, whether its origin be a spring or several springs, or the rain or snowfall of a district collected naturally and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky, precipitated in the form of rain or snow; and the sole question in every case is whether the water thus precipitated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose lands it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water. In a country such as Ontario, where there are no mountain streams supplied by melting snow, and where there are long periods with but little rainfall, streams of considerable magnitude become nearly dry in summer; and yet, no one would hesitate to call them water courses.<sup>5</sup> If the water course exists, its character is not changed by being confined to an artificial channel.<sup>6</sup> And an artificial water course may acquire the character of a natural one by lapse of time.<sup>7</sup> As will readily appear, a water course is therefore entirely distinct from a mere drain way.<sup>8</sup> But the courts have not been able to keep the two distinct, and, to provide drainage where it was necessary, some of them have felt under the necessity of holding that there was a water course, apparently holding that there could be no right of drainage unless there was a water course by means of which it could

<sup>4</sup>*Briscoe v. Drought*, 11 Ir. C. L. Rep. 250. 64 N. E. 619; *Gale v. Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986.

A water course exists where "there was a quantity of water regularly passing, considerable except in drouths, in one, and only one, direction; not squandering and wandering over the surface as surface water does, but in a defined channel, over a bed between banks, through a channel cut by the waters long ago." *Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914.

<sup>5</sup>*Arthur v. Grand Trunk R. Co.* 22 Ont. App. Rep. 89, Affirming *Beer v. Stroud*, 10 Ont. Rep. 10.

<sup>6</sup>*Schwartz v. Nie*, 29 Ind. App. 329, *Herb*, 7 Robt. 222.

<sup>7</sup>*Reading v. Althouse*, 93 Pa. 400.

<sup>8</sup>*Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98; *Murphy v. Kelley*, 68 Me. 521.

A temporary injunction restraining the interruption by defendants of the flow of water through an artificial continuous canal running through the lands of both parties cannot be sustained on proof that the body of water which the defendants threaten to interrupt and divert is a water course. *Schaefer v.*

be effected. As has been seen,<sup>9</sup> the Minnesota court held that a ravine through which large quantities of surface water found an outlet was a water course; and in *Sheehan v. Flynn*<sup>10</sup> the court intimates that it would extend the doctrine of the *McClure Case*, relating to the use of ravine as water courses, to slight depressions in the surface of a prairie country, which drain large extents of territory of enormous quantities of surface water, although they have no well-defined channel or banks, but still are well-defined water courses for surface water.

**460. Recognition and termination.**—A land owner may, by his conduct, estop himself from disputing the existence of a water course. Thus, if, in making improvements upon land, provision is made for the passage of a water course, the landowner cannot, upon filling the passage, insist that no water course exists.<sup>1</sup> But the fact that the grantors of a riparian owner on a stream, the water naturally flowing in which was almost shut off by the depositing of *débris* therein by an extraordinary freshet, purchased the right of way through the channel of the creek, to flow to their lands, in connection with the natural flow of the stream, water brought therein by artificial means, does not show that the stream was no longer a natural water course.<sup>2</sup> The unity of a water course is preserved throughout its entire length.<sup>3</sup> A Canadian court has attempted to make a distinction between a river and creek as depending upon whether it is a simple stream, or is formed by the uniting of several streams.<sup>4</sup> But the true distinction would seem to depend upon size and navigable qualities, rather than upon the fact of its having tributaries or not. A water course may lose its character if the water ceases to flow in it for the prescriptive period.<sup>5</sup> The mere fact that the source of a stream has been obstructed so that the flow of water down the channel is controlled will not deprive it of its character as a natural water course.<sup>6</sup> A decree concerning a water course, describing it as a channel, speaking of the natural flow of water therein and of the natural channel, and enjoin-

<sup>9</sup> See *ante*, § 456a.

<sup>10</sup> 59 Minn. 430, 26 L. R. A. 632, 61 N. W. 402.

<sup>1</sup> *Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914.

<sup>2</sup> *Paige v. Rocky Ford Canal & Irrig. Co.* 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875.

<sup>3</sup> A water course begins where the water comes to the surface and continues to flow in a channel until it mingles with the sea. A mere difference of name between main stream and trib-

utary cannot change the rule of law. *Lehigh Coal & Nav. Co. v. Pocomo Spring Water Ice Co.* 7 Northampton Co. Rep. 350.

<sup>4</sup> *McHardy v. Ellice Twp.* 37 U. C. Q. B. 580, Reversed on grounds of statutory construction in 1 Ont. App. Rep. 628.

<sup>5</sup> *Ostrom v. Sills*, 28 Can. S. C. 485, Affirming 24 Ont. App. Rep. 526.

<sup>6</sup> *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370.

ing the obstruction of the flow of the water, settled conclusively that a natural water course existed.<sup>7</sup>

## II. RIPARIAN RIGHT.

**461. What are rights of riparian owner?**—A comprehensive statement of the rights of a riparian owner is that he has a right to have the stream remain in place and flow as nature directs, and to make such use of the flowing water as he can make without materially interfering with the equal rights of the owners above and below him on the stream. This prevents the upper proprietor from diverting the stream, consuming the water for other than natural uses, polluting the water, or interfering with the regular or natural flow of the current to such an extent as materially to injure the lower owner; and it prevents the lower owner from throwing the water back on the land of the upper owner. These various rights have been fully developed by the courts, and the decisions will be examined in subsequent sections.

**462. Riparian rights are property.**—The right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills or forests remain in place. There is no property right in any particular particle of water or in all of them put together. The advantages resulting from a stream of water depend upon the fact that the particles uniting in one mass maintain a perpetual course through the land, and these particles are, therefore, regarded as part of the common mass and subject to no man's ownership.<sup>1</sup> The extent of the property right is well ex-

<sup>1</sup>*Benson v. Connors*, 63 Iowa, 670, 19 N. W. 812.

<sup>2</sup>*Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 257; *Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781; *Rhodes v. Whitehead*, 27 Tex. 310, 84 Am. Dec. 631; *Fleming v. Davis*, 37 Tex. 173; *Druley v. Adam*, 102 Ill. 177; *Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603, 9 Am. St. Rep. 88, 15 Atl. 726; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Wyandanch Club v. Davis*, 33 App. Div. 598, 53 N. Y. Supp. 993; *Re Thompson*, 85 Hun, 438, 32 N. Y. Supp. 897; *Dilling v. Murray*, 6 Ind. 324; *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305.

The rental value of a riparian estate cannot be made upon the basis of a sale or diversion of the water, for the water does not belong to it. Riparian owners are entitled merely to the use of it as it

passes through their property. *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

In *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762, it is said that the riparian owner is entitled to the continuous flow of the stream as part and parcel of his estate, and not as an easement or incorporeal right issuing out of the land. He does not own the corpus of the water but, incident to his riparian right, has a right to appropriate a certain portion of it. It is only by some species of appropriation that one can ever be said to have title to the corpus of the water. The right of the riparian owner is to the continuous flow with a usufructuary right to the water, provided he returns it to the stream above his lower boundary, and the right to make a complete appropriation of some of it.

Though riparian proprietors on the

pressed in *Warder v. Springfield*,<sup>2</sup> where it is said that no riparian proprietor owns an integral part of, or has absolute property in, the waters of a stream, but each has only the use of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes. An upper proprietor cannot, therefore, except for such use, lawfully abstract, divert, or withdraw any portion thereof to the prejudice or injury of a lower proprietor. The rights of each therein are, however, largely measured by the necessities and character of his use thereof. If there is abundance and to spare, no rights are invaded if one, without destroying the stream, takes that only which others do not require or need. Such flow and use belong to the land through which it passes, as an incident, convenience, or easement which inseparably connects itself therewith as a part thereof, and frequently gives or adds value thereto; and is a private property right in the proprietor thereof within the protection of the constitutional provision that private property shall be forever held inviolate, subject to the public welfare, and shall not be taken for public use without compensation being first made. The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put. The right to the continued existence of these conditions is property,<sup>3</sup> to protect which the owner may resort to any or all the instrumentalities which may be employed for the protection of private property rights.<sup>4</sup> And the owner cannot be deprived of it without com-

outlet of a lake, who have built mills and factories thereon in the belief that a dam was to be permanently maintained therein, have an interest in and a right to all the waters tributary to the lake stored therein and so discharged as to give them a uniform supply of water during the year, yet they have no title to the water nor any right to divert or sell it. *Syracuse v. Stacey*, 169 N. Y. 231, 62 N. E. 354.

In proceedings to condemn land covered by water, where there is no question respecting the title to the water itself other than that which comes from the ownership of the land beneath, there is no recoverable claim other than the value of the land taken and the resulting damages to the other land of the owner. *Siedler v. Seely*, 8 Colo. App. 499, 46 Pac. 848.

<sup>2</sup> 9 Ohio Dec. Reprint, 855.

<sup>3</sup> *McCoy v. Danley*, 20 Pa. 85, 57 Am. Rep. 680; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73, 28 N. W. 726.

<sup>4</sup> *Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781; *McGord v. High*, 24 Iowa, 336.

As stated by Mr. Phear, flowing water when it exists in the shape of a defined stream assumes a character beyond that of a mere incident to the land upon which it lies, and becomes as a whole, from its commencement to its outfall, a distinct subject of property in itself; the stream, viewed in this light, apart from the water which constitutes it, is simultaneously a feature of every persons land through which it passes; as such, each landowner has full right to

pensation and due process of law.<sup>5</sup> The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private rights therein.<sup>6</sup> And the advantage of a flowing stream may be considered in fixing compensation for the abutting property when taken under the power of eminent domain.<sup>7</sup> Judge Dykman stated, a few years ago, that water power in this country has ceased to be valuable. The centers of trade have changed and steam power has superseded water power. Steam power can be planted at any place where it is required by business, while water power can only be utilized where it is found, and business must seek it there.<sup>8</sup> But such a contention can form no basis for a right arbitrarily to destroy the power, because not only is the water power still valuable and utilized in many places, but the facility with which it may be transformed into electricity and utilized long distances would, from the point of its generation, make the future possibilities of value in water power perhaps greater than anything which it has been in the past. The right to the flow of the stream is a property right, and the owner of it has the right to say whether he wishes to maintain its value as such; and in case others attempt to deprive him of it they should pay for the injury which would thereby be caused to him. While the water right is incorporeal, it is not personal property, but is a parcel of the estate itself, and therefore partakes of the nature of real estate,<sup>9</sup> and is not an easement; and is so far a part of the estate to which it is attached that it is an incident of, and will pass with, it.<sup>10</sup> The right is, therefore, incapable of fixed appropriation or conversion.<sup>11</sup> But while

enjoy it, but he must always remember that it exists for his neighbors as well as himself, and that when he does anything to imperil its continuity, he is, in fact, directly affecting the actual property of others, and not merely dealing with certain portions of water which belong to him at the moment, and will become the property of his neighbor only in the event of being allowed to pass on to him. *Phear, Water Rights*, 22.

<sup>5</sup>*Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611; *Deming v. Cleveland*, 22 Ohio C. C. 1; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Shenandoah Co.'s Appeal*, 2 W. N. C. 46; *Barclay R. & Coal Co. v. Ingham*, 36 Pa. 194; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 13 L. R. A. 679, 25 Atl. 718.

<sup>6</sup>*Deming v. Cleveland*, 22 Ohio C. C. 1.

<sup>7</sup>That property sought to be con-

demned under the right of eminent domain, is valuable for dairy purposes because of the flowing of a stream through it, cannot be excluded from the jury because a witness has stated that the stream was valuable as a natural outlet for offal, although a statute prohibits the casting of offal into streams. *St. Louis Terminal R. Co. v. Heiger*, 139 Mo. 315, 40 S. W. 947.

<sup>8</sup>*Re Thompson*, 85 Hun, 438, 32 N. Y. Supp. 897.

<sup>9</sup>*Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Hill v. Newman*, 5 Cal. 445.

<sup>10</sup>*Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24; *Archer v. Archer*, 84 Hun, 297, 32 N. Y. Supp. 410; *Vansickle v. Haines*, 7 Nev. 249; *Pine v. New York*, 103 Fed. 337; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73; *Stenger v. Tharp* (S. D.) 94 N. W. 402.

<sup>11</sup>*Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.



the government retains the ownership of land through which the stream flows, it may abolish the riparian rights in the stream.<sup>12</sup> The right to the continued flow is, however, not of such a character that it will become merged in case both upper and lower estates vest in one owner.<sup>13</sup> When the water has been separated from the stream and stored where it can be controlled by the owner, it becomes personal property.<sup>14</sup>

**463. Upon what does right depend?**—The right of the riparian owner is a natural right and depends upon the fact that the stream is furnished him by nature.<sup>1</sup> The law governing it is founded upon the individual rights of landed proprietors upon the stream.<sup>2</sup> When the question first came before the courts there was an inclination to hold that the right of the riparian owner depended upon the use which he had made of the water. In *Williams v. Morland*,<sup>3</sup> the action was for injuring plaintiff's banks by the manner in which the water was caused to flow past them, but the jury found that the banks were not injured and the court held that therefore the action was not sustained. But Bayley, J., said: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose."<sup>4</sup>

<sup>12</sup>*Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781.

<sup>13</sup>Unity of possession will not extinguish a water course so that in case of subsequent separation it may be stopped by the upper owner. *Shury v. Piggott*, 3 Bulst. 339, Popham, 169, Noy, 84, W. Jones, 145, Palm. 444, Latch. 153, Buller, N. P. 74.

Easements of necessity, so called, such as water-power mill privileges, are extinguished when the title to both dominant and servient estates unite in one owner, and are not revived as they were before their merger, but are recreated on separate conveyances by him, either by the express terms in the latter grants or by implication, so far as may be requisite for the beneficial enjoyment of the premises granted. *Miller v. Lapham*, 44 Vt. 416.

<sup>14</sup>*Dunsmuir v. Port Angeles Gas, Wa-*

*ter, Electric Light & P. Co.* 24 Wash. 104, 63 Pac. 1005; *People ex rel. Heyneman v. Blake*, 19 Cal. 579; *Parks Canal & Min. Co. v. Hoyt*, 57 Cal. 44.

<sup>1</sup>*Stokoe v. Singers*, 8 El. & Bl. 31, 26 L. J. Q. B. N. S. 257, 3 Jur. N. S. 1256, 5 Week. Rep. 756.

<sup>2</sup>*Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113.

<sup>3</sup>2 Barn. & C. 913, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579.

<sup>4</sup>In *Canham v. Fisk*, 2 Crompt. & J. 126, 2 Tyrw. 155, it was held that if land with water running through it is granted, the grantee acquires a right to the water which the grantor holding the upper tenement cannot cut off. But Bayley, B., said, if a man find water running through his land, he may appropriate it and thus acquire a title to the water.

But the view that the right depends upon use did not prevail, for it is fully established that the right is the same whether it is used or not, and that no right is gained by making use of the water, or lost by failure to do so.<sup>5</sup> The rule is well stated in *Sampson v. Hoddinott*,<sup>6</sup> where it is said all persons on the margin of a flowing stream have by nature certain rights to use the water of the stream whether they exercise these rights or not, and they may begin to exercise them whenever they will. By usage they may acquire the right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of the land owner higher up the stream unless the usage by which it was acquired affected the use which he himself made of the stream, or his power to use it, so as to raise the presumption of a grant and to render the tenement above a servient tenement.<sup>7</sup> The right does not depend upon appropriation or presumed grant from long acquiescence on the part of riparian owners above or below, but exists *juri naturi* as part of the land.<sup>8</sup> And it attaches to streams flowing through the public domain as soon as entry is made upon them for the purpose of acquiring title from the government.<sup>9</sup> The doctrine of prior use has, however, found some foothold in Massachusetts.<sup>10</sup> The right depends, not upon ownership of the soil under which the water flows, but upon lateral contact with the water.<sup>11</sup> And the right is not destroyed by the acquisition of an

<sup>5</sup> See *post*, § 534.

<sup>6</sup> 1 C. B. N. S. 611, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 230.

<sup>7</sup> *Saunders v. Newman*, 1 Barn. & Ald. 258, 19 Revised Rep. 312; Phear, Water Rights, 30.

In *Cox v. Matthews*, 1 Vent. 239, which was a case of ancient lights, Lord Hale said if a man has a water course running through his ground, and erects a mill upon it, he may bring his action for diverting the stream and not say ancient mill, and unless the upper proprietor has a prescriptive right to turn the water he cannot justify though the mill is newly erected.

In *Graham v. Burr*, 4 Grant Ch. (U. C.) 1, a bill to restrain a lower proprietor, who was owner of a mill erected above the plaintiff's, from damming back the water, the chancellor said: It is now well settled that every riparian owner is entitled to a natural flow of the waters without diminution or obstruction,—that mere appropriation confers no right. The proposition that every riparian owner is entitled to have the stream flow in its accustomed manner

involves two other propositions, (1) that each proprietor must have a right to apply the stream to those useful purposes for which it was by nature intended: (2) that no proprietor can have a right to apply it so as to produce injury to any other. Every mode of enjoyment, indeed, will be attended with some diminution of the quantity of water, or some variation of the current, but no mode of enjoyment, no diminution of the quantity of water, no retardation or acceleration of the current is regarded as an infringement of the common right unless attended by some material injury to some other proprietor.

<sup>8</sup> *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73.

<sup>9</sup> *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350, Overruling *Covington v. Becker*, 5 Nev. 281.

But a mere possessor of public land has no riparian rights in the streams running through it. *Lake v. Tolles*, 8 Nev. 285.

<sup>10</sup> *Fuller v. Chicopee Mfg. Co.* 16 Gray. 43.

<sup>11</sup> *Aaline v. Shaw*, 35 Fla. 305, 28 L. R. A. 391, 17 So. 411.

easement for a highway, railroad, or canal along the shore.<sup>12</sup> The right attaches to the fee, and not to the ownership of the easement. The right is similar to that of having a highway remain adjacent to property on which it abuts.<sup>13</sup> The right attaches only to natural streams and cannot be claimed with respect to artificial ones.<sup>14</sup> But the rights of riparian owners are not affected by confining the flow in an artificial channel.<sup>15</sup> The right attaches only to the riparian land and cannot be claimed for nonriparian land.<sup>16</sup> This must, of necessity, be the rule, because it is necessary to have some limitation upon the right to use the water from a stream, so as to leave enough for the use of riparian owners further down, or it might be entirely consumed near the origin of the stream. The right to use the water is primarily based upon the ownership of land adjoining the stream, and persons whose land is not in contact with the stream are in no sense riparian owners, and are not entitled to any rights in the use of the water as private individuals. The only things that they can claim are the right of navigation and to share in the public right of fishery, gathering ice, or such other rights as the public are entitled to. That being the rule, the only method of determining who are, and who are not, riparian owners is by following the rule established by nature, and

The ownership of land to the high-water mark of a river gives the right to object to any unauthorized interference with the flow of the river in its natural state. *Attrill v. Platt*, 10 Can. S. C. 425.

If an island creates two natural channels in a river, the owners of the island are riparian owners as well as the owners of the facing mainland. *Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927.

*Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 26 L. R. A. 378, 43 Am. St. Rep. 729, 38 N. E. 992, Affirming 71 Hun, 153, 23 N. Y. Supp. 927.

A canal company which acquires by condemnation a right of way for its canal along the high-water mark of a navigable stream does not deprive the former owner of his riparian rights. *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 308, 1 L. R. A. 133, 15 Atl. 227.

But where a railway company procures to be condemned for its use land abutting on a water course in such a way that it becomes the shore owner,

it acquires riparian rights belonging to such land, although the petition for condemnation makes no express mention of such rights. *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 42 N. W. 596.

*Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781.

*Sampson v. Hoddinott*, 1 C. B. N. S. 590, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 885.

The mere permissive use of the waste water from a lake or lagoon on upper premises by a lower owner, coming through a drainage ditch cut on such upper premises by the owners thereof and not flowing to or over the lower lands in a natural channel, gives him no riparian rights therein. *Green v. Carotta*, 72 Cal. 267, 13 Pac. 685.

*Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Finley v. Hershey*, 41 Iowa, 389.

*Stockport Waterworks Co. v. Potter*, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Ormerod v. Todmorden Joint Stock Mill Co.* L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532.

holding that that only is riparian land entitled to the benefits of the stream which is actually in contact with it.

**463a. What is riparian land?**— It being established that the right to use the water from the stream is dependent solely upon the ownership of land which is in contact with the stream, it becomes necessary to determine what, in fact, is riparian land. This question is not entirely free from difficulty. There are several things upon which the answer to the question might be made to turn. The first and most important is the natural configuration of the country through which the stream flows, so that all land within the watershed which lies in such a manner that the drainage from it finds its way into the stream might be regarded as riparian land. But a rule which would recognize such a vast extent of territory as riparian land would be almost as destructive of the right of the riparian owner as a rule which would permit anyone who could gain access to the water to make use of it. Such a rule not only would permit the consumption of the water near its source of supply, but it would result in conflicts between land owners as to rights of way and the construction of the necessary apparatus to make the water available. Another criterion for determining what is riparian land might be the land which is in possession of one person whose holdings actually extend so as to come in contact with the water. This test, in some cases, might be too broad, because part of the land might lie out of the natural watershed of the stream, and therefore be outside of the boundaries established by nature for riparian ownership. The criterion which most nearly meets the necessities of the case is the rule that all land must be regarded as riparian when it is within the natural watershed of the stream, the title to which is in one owner, and the boundaries of which have been established in accordance with the requirements of the conditions which will best serve the interests of individual land owners. Under ordinary circumstances the individual acquires title to such an amount of land only as he can reasonably care for and cultivate by his own efforts, with such paid assistants as his business ability makes it profitable for him to employ. In the original subdivision of a new country, and in the subsequent transfer of property from man to man, these considerations determine the size of individual holdings. And, for the purpose of establishing a general rule, the customs and habits of the individuals are those which must be relied upon. This rule gives the riparian owner the right to use the water upon all of that tract of land which custom has shown is best adapted in size to individual needs, as shown by the experience of the dwellers in the locality.

Land intended for mill purposes will be cut into different-sized lots from that intended for agricultural purposes, and the subdivisions for the accommodations of each will be different from those intended for town lots. The subdivision suggested by the needs of the individual is, therefore, what must be regarded as the bounds of the riparian property. This will exclude land which is purchased by corporations or individuals of large means and great business ability, which is added to the original subdivision lying upon the border of the stream, and which, in some cases, stretches away miles from the river banks. In one case it was held that those only are riparian lands that come in contact with, or are washed by the waters of the stream.<sup>1</sup> That rule is certainly too narrow, because it would prevent the use of the water anywhere except upon the immediate shore. Conversely, it has been held that the riparian right depends upon the physical condition of the country, all being riparian which is within the watershed of the stream.<sup>2</sup> The watershed should certainly form a limit beyond which the riparian rights cannot be claimed; but there is a question whether or not that limit is not too wide. Much may depend upon the character of the stream. A river of large volume might appropriately supply all the needs of the population living within its watershed, while a small stream could be used only by those living on its immediate banks. The most satisfactory rule is that the parcels of land should be regarded as riparian so far as their location with reference to the stream has indicated where their boundary should be fixed, so that all that parcel which is regarded as one tract should be regarded as riparian, leaving the question of the extent of the use which may be made of the water to the rules regulating the relative rights of owners on the stream. Under this rule the boundary of riparian land is restricted to land the title to which is acquired by one transaction.<sup>3</sup> And mere contact of a nonriparian tract of land with another tract which is riparian cannot extend to the former riparian rights appurte-

<sup>1</sup>*Buchanan v. Ingersoll Waterworks Co.* 30 Ont. Rep. 456.

<sup>2</sup>Under a claim alone of riparian right, the owner of land cannot, to the injury of another riparian proprietor, take water beyond the natural watershed of the stream for any purpose, as riparian rights cannot extend beyond the watershed of the stream, and lands so situated are not regarded as riparian. *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442.

But in *Standen v. New Rochelle Water Co.* 91 Hun, 272, 36 N. Y. Supp. 92,

it is said that the rights of riparian owners are not dependent upon the extent of watershed owned by them.

<sup>3</sup>*Lux v. Haggin*, 69 Cal. 424, 10 Pac. 674; *Bochner v. Big Rock Irrig. Dist.* 117 Cal. 19, 48 Pac. 908.

The riparian owner has no rights as such which can extend to nonriparian lands, and where the custom of the government is to grant its lands with reference to 40-acre units, such unit is the extent of the riparian right. *Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781.

nant to the latter, although both tracts are owned by the same person, where each tract is granted by a separate patent based upon a separate entry, so that they constitute distinct tracts of land.<sup>4</sup> The rules governing the rights must be uniform throughout one state. Different rules with regard to water rights cannot be made applicable in different portions of the state on the ground of difference of conditions, where the question as to which rule is applicable in a particular case must depend on the verdict of the jury.<sup>5</sup>

**464. Right to flow of stream.**— Taking up, now, the various rights which the riparian owner has in the stream, the first and most important is the right to the continued flow of the water in its natural condition. This right is fundamental, and one of which the riparian owner cannot be deprived. But the right is not absolute to have the water flow without any interference on the part of the owners above him. The stream is the common property of all who own land upon its banks, and each has a right to make such use of it as he can make without materially diminishing the equal rights of the others. Therefore, the riparian owner can insist only on having the remainder of the water flow to and through his land after the owners above him have made such reasonable use of it as they are entitled to make.<sup>1</sup>

*Boehmer v. Big Rock Creek Irrig. Dist.* 117 Cal. 19, 48 Pac. 908.

In Oregon it was held that a parcel of land, lying back of another which borders on a stream, when both have been acquired by one owner though by different conveyances and at different times, becomes riparian and may be irrigated by the owner. *Jones v. Conn.* 39 Or. 30, 54 L. R. A. 630, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068. That rule can hardly be adopted as one of general application. It might operate equitably in some cases, but it would open the door for a wider extension of riparian rights than is generally permissible. In the arid region of the west, however, where it is desirable to make as wide use of the water for irrigation purposes as possible and the water is useful for very little else it may be that the local conditions require an extension of the doctrine to that extent.

*Meng v. Coffey* (Neb.) 60 L. R. A. 910, 93 N. W. 713.

*Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Dickson v. Carnegie*, 1 Ont. Rep. 110; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265;

*Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834; *Society for Establishing Useful Mfrs. v. Low*, 17 N. J. Eq. 19; *Ten Eyck v. Delaware & R. Canal Co.* 18 N. J. L. 200, 37 Am. Dec. 233; *Plattsmouth Water Co. v. Smith*, 58 Neb. 579, 78 N. W. 275; *Howard v. Ingersoll*, 13 How. 426, 14 L. ed. 208; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Meng v. Coffey* (Neb.) 60 L. R. A. 910, 93 N. W. 713; *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 11 Am. St. Rep. 72, 6 So. 78; *Clark v. Rockland Water Power Co.* 52 Me. 68; *Mitchell v. Parks*, 26 Ind. 354.

Riparian owners below a dam constructed in aid of navigation past rapids are entitled to have the water which is not required for navigation returned to its accustomed channel in such manner and place that it will flow past their lands as it was accustomed to flow. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 90 Wis. 370, *sub nom*

The right to the flow of the water does not depend upon the length of the stream, but attaches to water issuing from a spring within a short distance of the boundary, as well as to a mighty river, if there is a distinct water course formed by the water.<sup>2</sup> It is immaterial whether the owner is making any use of the water or not.<sup>3</sup> The right of the riparian owner to the continued flow of the stream is limited by the right of the upper owner to make such reasonable use of the water as the character of the stream and common right in its water warrants.<sup>4</sup> It has been said that no proprietor can either diminish the quantity of water which will otherwise descend to the proprietor below, or throw the water back upon the proprietor above.<sup>5</sup> But that rule is too broad, for it would give the lower proprietor superior advantages over the upper, and in many cases give him, in effect, a monopoly of the stream.<sup>6</sup> The true rule is that no owner can claim a right in the stream which will be an unreasonable use of his interest in the common right.<sup>7</sup> The right of the riparian owner attaches only to the natural flow of the stream, and not to increased quantities which may be turned into the stream by the upper owner.<sup>8</sup> Therefore, the common use to which a riparian owner is entitled does not include the right to appropriate vested rights of pondage or flowage which have been acquired by other owners on the stream.<sup>9</sup> A lower owner by storing the water farther up the stream and using it for more than twenty years for his own benefit does not, because of the incidental benefit which he thereby confers upon other owners of the

*Patten Paper Co. v. Kaukauna Water Power Co.* 28 L. R. A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019; *Patten Paper Co. v. Green Bay & M. Canal Co.* 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.

<sup>2</sup>*Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066.

<sup>3</sup>*Vansickle v. Haines*, 7 Nev. 249; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

In *McLaren v. Cook*, 3 U. C. Q. B. 299, an action by one constructing a mill after the defendant had constructed the dam complained of, the court declares the principle to be well settled that nothing short of a grant or use for such a length of time as will support the presumption of a grant will entitle the proprietor of land on a stream to divert or pen back the water in such a manner as to occasion damage to those living above or below on the same stream, by disabling them from making any special use or appropriation of the water which would have been in their power if the stream had been allowed to flow in its

natural course. As soon as they have erected their mills or other works and suffered damage from the previous diversion or obstruction of the water, their right of action accrues.

<sup>4</sup>*Holden v. Winnipiseogee Lake Cotton & Woolen Mfg. Co.* 53 N. H. 552; *Coffman v. Robbins*, 8 Or. 278; *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

<sup>5</sup>*Wright v. Howard*, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Revised Rep. 169.

<sup>6</sup>*Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

<sup>7</sup>*Wright v. Howard*, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Revised Rep. 169; *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 43, 14 So. 167.

<sup>8</sup>*Muskoka Mill Co. v. Queen*, 28 Grant Ch. (U. C.) 563; *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 542.

<sup>9</sup>*Cornicell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001.

stream, invest them with the right to have such condition continue; and the court cannot permit one owner to store water in times of freshet, and then require him to let it down in dry times for the benefit of lower owners.<sup>10</sup>

**464a. Right to preserve flow.**— A large part of the value of a stream of water consists in its motion. So long as the flow is free and rapid, it remains clear and fit for the use to which the riparian owner desires to put it, and serves to carry the surface water away from the land. But if the flow is obstructed and becomes sluggish, the water loses its purity and becomes more or less unfit for domestic use, and the surrounding soil is saturated with water and unfit for cultivation. The lower owner has no right, therefore, to take active measures to dam the water back on the upper property.<sup>1</sup> But the question arises as to the rights of the upper owner in case the stream is filled with *débris*, silt, and sand by the operation of natural causes to such an extent that the water is dammed back on his land. If the stream leaves its channel upon the land of the upper owner, the lower owner has a right to enter upon the land and restore the stream to its ancient channel.<sup>2</sup> And the lower owner may remove obstructions which prevent the natural flow of water to his land.<sup>3</sup> And in case the water is diverted from the stream by the upper owner, the lower one has a right to restore the flow.<sup>4</sup> Under these circumstances, analogy would seem to require that, if the channel of the stream becomes filled so as to cast the water back on the upper property, the owner of that property have a right to remove the obstruction so as to protect his land from the change. In *Rood v. Johnson*,<sup>5</sup> the court holds that the upper owner has no right to do this because the accumulation of the sand in the stream is a natural result which neither person has a right to interfere with. The reason given in that case is not, however, sufficient to support the decision. But in *Withers v. Purchase*<sup>6</sup> the court held that whatever rights riparian proprietors have to scour a stream must be limited to removing obstructions which have been accidentally placed there, and does not entitle such proprietors to remove natural accretions formed by slow processes, for the purpose of restoring the flow of water to its former state as to velocity and direction. Even that decision does not seem to be persuasive. The natural condition of the stream is that it shall flow, and in ordinary cases the current is sufficiently strong to keep the channel clear, and therefore the question

<sup>10</sup>*Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367. 41 Atl. 385.

<sup>1</sup>See *post*, § 546.

<sup>2</sup>See *post*, § 491.

<sup>3</sup>See *post*, § 480.

<sup>4</sup>See *post*, § 503b.

<sup>5</sup>26 Vt. 72.

<sup>6</sup>60 L. T. N. S. 819.



of the right of the upper owner to remove obstructions rarely arises. But in case it does arise, the upper owner has a right to insist that the mere fact that the deposit through natural causes has interfered with the natural condition of the stream shall not prevent the restoration of the natural condition. As has already appeared, the value of the stream for the most part depends upon the free flow of its current, and the riparian owners have a right to the stream in the condition in which nature gave it to them, and to preserve that condition. The lower owner, however, as the owner of the bed of the stream, has certain rights with which the upper owner cannot interfere. He has a right to be free from trespass by the upper owner, or any unlawful interference with his soil. But his rights are held subject to the easement of the natural flow of the stream, and he cannot insist on the maintenance of conditions upon his property which will interfere with such flow. The upper owner cannot require him to remove *débris* and keep the channel open.<sup>7</sup> But in case the *débris* is valuable to him, or he is particular about the manner in which it is to be removed, he should take active measures to remove it, since the easement of the upper owner to have the water flow freely from his property includes the right to remove obstructions. It has been held in Massachusetts that the owner of a mill has an easement in land below for free passage of the water from his mill, accompanied by the right to enter upon the land for the purpose of cleaning out the stream and removing obstructions to the free flow of the water.<sup>8</sup> That decision is undoubtedly influenced to some extent by the doctrine of the Massachusetts mill acts, which are to the effect that the first appropriator of a mill site upon a stream has a right to maintain it against all adverse conditions. But the doctrine is sound, and is equally applicable

<sup>7</sup> See *post*, § 570.

<sup>8</sup> *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688.

In *Withers v. Purchase*, 60 L. T. N. S. 819, where it was held that a riparian proprietor cannot in scouring a river remove natural accretions for the purpose of restoring the river to its former flow, the court referred to the construction placed upon *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 286, which involved the right to scour a raceway, in Angell on Watercourses, § 390, where it states the rule of that case to be as follows: "The owner of a water mill has so much of the easement in the land below for the free passage of water from the mill in the natural channel of the stream as to give him a right to enter upon the

land for the purpose of removing obstructions to the free flow of water," and said this rule, however, cannot be safely deduced from the case as reported. That in that case there appears to have been a grant of what is styled a mill privilege, and the question was whether the mill owner was entitled to cleanse the stream below the mill so as to allow the water to flow freely, and it was held that he was; but it seemed also to have been proved that the mill owner had purported to have exercised the power for more than thirty years, and the court said that these considerations deprived the case of any importance it might otherwise have had in reference to the *Withers Case*.

to the owner of farm lands or any other species of property, as to the owner of a mill. The water course is the main thing, and there is a right to maintain it in its natural condition, regardless of the fact that interference with such condition may result from natural causes. And the principle was directly decided in *Chapman v. Thames Mfg. Co.*<sup>9</sup> where the owners of a lake were held to be entitled to enter upon the stream forming the outlet, and remove obstructions accumulating there through natural causes, for the purpose of maintaining the lake at its natural level.

**465. Right to use water.**—The next most important right of the owner of land bordering on a stream is that of making such use of the water as it flows past his land as he can make without materially interfering with the common right of all owners of land which touches the stream to make use of it. He is not entitled to make such use of the water as will consume or destroy it to an unreasonable extent, or fail to leave sufficient in the stream to enable others having an equal right to exercise their rights.<sup>1</sup> With these limitations the riparian owner has a right to make any use of the water as it flows which it will be to his advantage to make.<sup>2</sup> The common law does not deprive all persons of the right to use, but allows all to use, the water in any manner not incompatible with the rights of others. When it is said that a riparian proprietor has a right to have a stream continue through his land, it is not intended to be said that he has the right to all the water,

<sup>9</sup> 13 Conn. 269, 33 Am. Dec. 401.

<sup>1</sup> The appropriation of the water of a non-navigable river by a riparian owner in such quantities as unreasonably to diminish the supply of other riparian owners is a private nuisance for which an injunction will lie. *Saunders v. Bluefield Waterworks & Improv. Co.* 58 Fed. 133.

<sup>2</sup> *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633; *Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707, 27 Week. Rep. 616; *Waring v. Martin*, Wright (Ohio) 380; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73; *New York Rubber Co. v. Rothery*, 32 N. Y. S. R. 905, 10 N. Y. Supp. 872; *Lur v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Pinney v. Luce*, 44 Minn. 367, 46 N. W. 561; *Rudd v. Williams*, 43 Ill. 385; *Hossie v. Hossie*, 38 Mich. 80; *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50; *Hendricks v. John-*

*son*, 6 Port. (Ala.) 472; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; Fed. Cas. No. 14, 371; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; *Wheatley v. Chrisman*, 24 Pa. 208, 64 Am. Dec. 657; *Williamson v. Lock's Creek Canal Co.* 78 N. C. 156; *Mason v. Cotton*, 2 McCrary, 82, 4 Fed. 792; *Bates v. Weymouth Iron Co.* 8 Cush. 548; *Phœnix Cotton Mfg. Co. v. Hazen*, 118 Mass. 352; *White v. Whitney Mfg. Co.* 60 S. C. 254, 38 S. E. 456; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Mississippi C. R. Co. v. Mason*, 51 Miss. 234.

The owner of land across which flows a stream of water from a spring thereon is equally entitled to the use thereof with lower riparian proprietors, and he will be enjoined only from making unreasonable use of such water. *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503.

The water rights of a riparian proprietor will be determined by the natural flow of the stream as modified by

for that would render the stream, which belongs to all the proprietors, of no use to any.<sup>3</sup> No proprietor on the banks of a river has a right to use the water to the prejudice of other proprietors above or below, unless he has acquired a prior right to divert it. No one can set up an exclusive right to the flow of all the water in its natural state. As said by Mr. Justice Nelson in *Howard v. Ingersoll*,<sup>4</sup> "streams of water are intended for the use and comfort of men, and it would be unreasonable and contrary to the universal sense of mankind to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others." The right to use necessarily implies a right to exercise a degree of control over the water, and to some extent to diminish its volume. The proprietor may apply it to domestic purposes or purposes of irrigation, but not to such extent as to unreasonably diminish its quantity; in applying it to manufacturing purposes, he must not corrupt it or injure its quality so as to render it unfit for use by the lower proprietor. He cannot unreasonably retard its natural flow, or injuriously accelerate its motion. In case of a small stream the water may be detained long enough to accumulate a head before it is let down to the next user.<sup>5</sup> The right of the riparian owner depends upon what is reasonable under all the circumstances of the case.<sup>6</sup>

**466. What is reasonable use?**— The right of the riparian owner to use the water extending to the making of a reasonable use, the question to be settled in each case is, What is a reasonable use? That is primarily a question of fact, to be settled by the jury in view of all the circumstances of the case.<sup>1</sup> But there are certain general rules

grant or prescription, and cannot be measured by the amount of grain they might have to grind within a given time nor by the peculiar structure of their water wheels. *Clark v. Rockland Water Power Co.* 52 Me. 68.

<sup>3</sup>*Vansickle v. Haines*, 7 Nev. 286.

<sup>4</sup>13 How. 381, 14 L. ed. 189.

<sup>5</sup>*Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

<sup>6</sup>*Pollitt v. Long*, 3 Thomp. & C. 232; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592.

In *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, Hillyer, J., says the more we examine the matter the more we become impressed with the wisdom of the common-law rule that each proprietor may make a reasonable

use of the stream, and what that is depends on the circumstances of each case.

<sup>1</sup>*White v. Whitney Mfg. Co.* 60 S. C. 254, 33 S. E. 456; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526.

What constitutes a reasonable use is a question of fact having regard to the subject-matter and the use; the occasion and manner of its application; its object, extent, and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party; and the extent of the injury caused by it to the other. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194; *Tourtillot v. Phelps*, 4 Gray, 376.

The question of the reasonableness of the use of the stream is one of fact

which have been laid down by the courts to aid the jury in arriving at a conclusion. And first, to be reasonable, the use must work no unnecessary injury to others living along the stream.<sup>2</sup> The next things to be considered are the character of the particular use in its relation to the size of the stream and the custom of the country, and, finally, the necessities of the one making the consumption. As said in *Meng v. Coffey*,<sup>3</sup> in determining the reasonableness of a particular use of water the law does not regard the needs and desires of the person taking the water solely, to the exclusion of all other riparian proprietors, but looks rather to the natural effect of his use of the water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, with but little interference with the stream, such as drinking and other household uses, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the rights of other riparian owners to apply the water to the same or to other purposes. This purpose is not subserved by any arbitrary classification, and in regions where water must be carefully husbanded, and is in great demand for agricultural purposes, it is obviously better to incline toward such a rule as will further equality and a wide participation in the benefits of a stream.<sup>4</sup> The rule of equality of right

when it is not settled by custom, as in the case of irrigation, propelling machinery, and watering cattle, and when it is in its nature doubtful. *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

*Johns v. Stevens*, 3 Vt. 308; *Tyler v. Wilkinson*, 4 Mason, 400, Fed. Cas. No. 14,312; *Union Mill & Min. Co. v. Dangler*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Ellis v. Clemens*, 21 Ont. Rep. 227, Affirmed in 22 Ont. Rep. 216; *Baltimore v. Appold*, 42 Md. 442; *Townsend v. Bell*, 70 Hun, 557, 24 N. Y. Supp. 193.

*Wright v. Howard*, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Revised Rep. 169.

One riparian owner cannot appropriate a specific portion of the water of a stream to his own use to the exclusion of those below him. *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

But so long as there is no larger ap-

propriation of water running through the land than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

<sup>2</sup> (Neb.) 60 L. R. A. 910, 93 N. W. 713.

*Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727; *White v. Whitney Mfg. Co.* 60 S. C. 254, 38 S. E. 456.

That the character of the bed of a creek is such that the water would all be lost or evaporated before it reached a lower riparian owner may be considered in determining what is a reasonable use of the water by the upper owner for the purposes of irrigation. *Meng v. Coffey* (Neb.) 60 L. R. A. 910, 93 N. W. 713.

is what determines the quantity to be used by each.<sup>5</sup> In *Meng v. Coffey*,<sup>6</sup> it is again said that the apparent modifications of the common-law rules in the semi-arid or arid states, in that courts of such states are more liberal in their construction of what is a reasonable use, are no departure from the principles on which the common-law rules are founded. On the contrary, they carry them to their logical conclusion in view of the special conditions of such regions.

**467. Priority between uses.**—While the general rule is that of equality of right, the right of self-preservation has made an exception to the general rule in favor of the right to consume water for what are known as domestic purposes. This gives the riparian owner the right to supply the needs of himself, his family, and his stock for drinking, cooking, or bathing purposes, even though the supply is thereby consumed so that none is left for the owners lower down. Water being a necessity of life, the first one gaining access to it may supply his needs, although the others are left to perish, the theory being that it is better to preserve to one his life and strength than to leave all alike to perish by dividing the supply.<sup>1</sup> And the use for this purpose takes precedence over all others, so that no other use can be made of the water if enough will not be left to supply the natural wants of the owners along the stream.<sup>2</sup> And the use next in order of precedence, because the one which makes least consumption of the water, is the

<sup>5</sup>*Pinney v. Lucc*, 44 Minn. 369, 46 N. W. 561.

No person has the right to use the waters of a stream to the prejudice of other proprietors above and below him unless he has a prior right to divert it, or a title to some exclusive enjoyment; and, while he may make reasonable use thereof on his own land provided he restores it to its natural channel upon leaving his land, he has no right to divert it or change the course thereof so as to turn it away from lower proprietors. *Crook v. Heuritt*, 4 Wash. 749, 31 Pac. 28.

In *Baltimore v. Appold*, 42 Md. 442, it is said that the limits which separate the lawful from the unlawful use of a stream may be difficult to define. It is in fact, impossible to lay down a precise rule to cover all cases, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others.

<sup>6</sup>(Neb.) 60 L. R. A. 910, 93 N. W. 713.

<sup>1</sup>*Miner v. Gilmour*, 12 Moore. P. C. C. 131, 7 Week. Rep. 328, 3 L. T. N. S. 98; *Slack v. Marsh*, 23 Pittsb. L. J. 29, 32 Phila. Leg. Int. 355, 11 Phila. 543; *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Atl. 780; *Baker v. Brown*, 55 Tex. 377; *Spence v. McDonough*, 77 Iowa, 460, 42 N. W. 371; *Evans v. Merriceather*, 4 Ill. 492, 38 Am. Dec. 106; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Tampa Waterworks Co. v. Clinc*, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262, 20 So. 780; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727.

But in one case it was held that the question whether the amount of water taken from a stream for use in a house is wrongful, depends upon its quantity in relation to that which remains in the stream, and is for the jury. *Norbury v. Kitchin*, 9 Jur. N. S. 132, 7 L. T. N. S. 685.

<sup>2</sup>*Evans v. Merriceather*, 4 Ill. 492, 38 Am. Dec. 106; *Canton v. Shock*, 66 Ohio St. 19, 58 L. R. A. 637, 90 Am. St. Rep. 557, 63 N. E. 600.

turning of water wheels for the development of power. The riparian owner is entitled to make use of all the power he can develop by the flow within his boundary lines.<sup>3</sup> But he must utilize the water in such a way that he will not interfere with the like rights of other owners on the stream.<sup>4</sup> The machinery which the riparian owner undertakes to operate must bear a proper relation to the capacity of the stream, so as not to cause an unnecessary interruption in its regular flow.<sup>5</sup> Although no one can complain of the interruption to the flow caused by the ordinary working of a mill suited to the size of the stream,<sup>6</sup> no right is acquired by the first utilization of the water which will prevent other owners from making use of it.<sup>7</sup> On the other hand, the erection of a mill of a certain power will not prevent the subsequent erection of another of greater power if the common right of the owner is not thereby exceeded.<sup>8</sup> When individuals interfere with, or undertake to control, water for their own purposes by the employment of dams, canals, or machinery, the law requires them to use judgment, skill, care, and caution in the construction and maintenance of such means and appliances in order that their neighbors or other people may not be injured. But they are only required to anticipate and prepare to meet such emergencies as would reasonably be

<sup>3</sup>*McIntosh v. Rankin*, 134 Mo. 340, 35 S. W. 995; *People ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Smith*, 70 App. Div. 543, 75 N. Y. Supp. 1100; *Beissell v. Sholl*, 4 Dall. 211, 1 L. ed. 804; *Haskins v. Haskins*, 9 Gray, 390.

Where there are two mills in operation on the same stream, the lower proprietor may be compelled to take some steps and be at more expense than he would if he were the only proprietor on the stream; and it becomes the duty of the upper proprietor to use great care and caution to take such action as will avoid, so far as possible within the bounds of reason, any injury to the lower proprietor by the flow of tailings from his mill. *Otaheite Gold & S. Min. & Mill Co. v. Dean*, 102 Fed. 929; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394.

Each proprietor is entitled to the use of the stream for the purpose of working mills and machinery, so far as it is reasonably conformable to usages and wants of the community, and having regard to the improvement in hydraulic works, and not inconsistent with a like use by other proprietors on land on the same stream above and below. *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532.

A riparian owner is entitled to a reasonable use of the water of his stream

for operating his machinery, and of the pond for the storage and moving of logs, free from any undue obstruction or check by the owner of tanneries above. *Horton v. Hall*, 1 Pennyp. 159.

<sup>4</sup>*Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404.

<sup>5</sup>*Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373.

<sup>6</sup>*Gould v. Boston Duck Co.* 13 Gray, 451; *Chandler v. Hocland*, 7 Gray, 348, 66 Am. Dec. 487.

<sup>7</sup>*Bearse v. Perry*, 117 Mass. 211.

<sup>8</sup>*Skowhegan Water Power Co. v. Weston*, 94 Me. 285, 47 Atl. 515; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55.

A lower proprietor of land including dam, sawmill, and mill pond, may not complain of such use of water by an upper proprietor as does not unreasonably interfere with his rights; and the fact that such upper proprietor has established a sawmill on land at one time limited to be used for a tannery, but subsequently unrestricted by reason of the acquisition by such proprietor of all the surrounding land and water rights, cannot be complained of by the lower proprietor if he is supplied with all the water he was entitled to under his grant. *Rackliff v. Rackliff*, 96 Me. 261, 52 Atl. 839.

expected to arise in the course of nature; they are not required to prepare to meet unlooked-for and overwhelming displays of adverse power,—as, storms of such unusual violence as to surprise cautious and reasonable men.<sup>9</sup>

*Irrigation*.—When the use begins to consume the water, the rights of the riparian owner grow weaker. In *Union Mill & Min. Co. v. Dangberg*,<sup>10</sup> Judge Hawley said there can be no distinction between milling and agricultural interests, as to water supply, based on the relative importance of either, but both are entitled to the equal and due protection of the law. But while there may be no distinction in the relative importance of the two uses, there is a material distinction in the effect of the two. Irrigation necessarily consumes a large part of the water taken from the stream for that purpose, while milling permits practically all the water to remain in the stream. Therefore, the right of irrigation is less strong than that of milling. The principles of the common law with reference to the use of the water are not prohibitive of its use for irrigation, but, that use being so destructive, must be used with much more care than some other uses. The rule with reference to the use of the water for irrigation is that the water may be used for that purpose if it is done prudently, and the quantity used is not excessive in view of the size of the stream, so as to interfere with the natural rights of the lower owners. The one attempting to use the water for irrigation must not waste, needlessly diminish, or wholly consume it to the injury of others, nor so as to prevent its reasonable use by them also.<sup>11</sup>

*Steam power*.—The use of water for steam power entirely consumes it so as to deprive the lower owner of the power of enjoying it. The question of the right to make such use of it depends upon whether the quantity taken corresponds with the size of the stream, so that an undue portion of the water flowing in the stream is not consumed by one owner.<sup>12</sup> When, in addition to the desire to consume the water,

<sup>9</sup>*Lisonbee v. Monroe Irrig. Co.* 18 Utah, 343. 54 Pac. 1009.

<sup>10</sup> 81 Fed. 73.

<sup>11</sup> For a full discussion of the right to use water for irrigation purposes, see chapter XXI., *post*.

<sup>12</sup>*Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Bliss v. Kennedy*, 43 Ill. 67.

Courts of equity will not interfere to restrain the use of the water of a stream by an upper mill owner in favor of another mill owner, where both consume the water used by them by converting it into steam, and in dry seasons

the supply is insufficient for both, neither of whom has an exclusive right to its use as against the other; and it is a question to be determined from all the circumstances, what proportion each is entitled to. In such case a jury, and not the court, should decide what that due proportion is. *Bliss v. Kennedy*, 43 Ill. 67.

A salt company which uses the waters of a creek for the operation of its engines, and also forces water down its wells to the deposits of salt and pumps out the brine which it evaporates, will not be enjoined from so diverting the

there is the further fact that it is to be consumed off from the riparian property, all the right to take the water from the stream for that purpose ceases. Therefore, the water cannot be taken from the stream for use in locomotive engines so as in any way to interfere with the rights of the riparian owner in the stream.<sup>13</sup> But if the water can be taken for such purpose without interfering with other rights on the stream, it may be done.<sup>14</sup> In England, it is held that a railroad company which owns land on the banks of a river may take a reasonable quantity of water for the supply of its engines from the river, and the quantity will not be held to be unreasonable if it does no injury in wet weather, and never shortens the working hours of mills lower down the stream more than a few minutes a day at any time.<sup>15</sup> But even

waters of the stream, where it does not appear that the natural flow has been perceptibly or materially diminished thereby, but that the steam and vapor is recondensed on the premises and finds its way back to the stream. *Chace v. Kerr Salt Co.* 77 Hun, 71, 28 N. Y. Supp. 309.

<sup>13</sup>*Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Atl. 780; *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989; *Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44, 9 Am. St. Rep. 263, 5 S. W. 49; *Philadelphia & R. R. Co. v. Pottsville Water Co.* 18 Pa. Co. Ct. 501; *Garwood v. New York, C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452, Affirming 17 Hun, 356; *Anderson v. Cincinnati Southern R. Co.* 5 Ky. L. Rep. 663.

<sup>14</sup>*Contra, Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

The erection of a dam by a railroad company across a stream on its own lands, and the use of the waters thereof for railroad purposes, without having obtained leave therefor under the statute regulating the building of such dams, or acquired a prescriptive right thereto by long use, is not a use of the waters of such stream for ordinary purposes, such as every riparian proprietor is entitled to; and if the building of such dam and use of the waters thereof diminishes the quantity and lessens the water power below, the owner of a lower mill and dam, who has acquired a vested right to the use of the waters of such stream by obtaining prior leave under the statute to build such mill and dam, may recover damages for the injuries sustained by him thereby. *Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44, 9 Am. St. Rep. 263, 5 S. W. 49.

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Under Tex. Rev. Stat. art. 4172, which provides that nothing in the chapter relating to the condemnation of land "shall be so construed as to authorize the erection of any bridge, or any other obstruction, across or over any stream of water navigable by steamboats or sail vessels at the place where any bridge or other obstruction may be proposed to be placed, so as to prevent the navigation of such stream or water," land cannot be condemned for the purpose of enabling a railroad company to maintain a dam across a navigable stream so as to furnish a reservoir of fresh water for the use of the company in operating its locomotives. *G. C. & S. F. R. Co. v. Taouard*, 3 Tex. App. Civ. Cas. (Willson) § 141, p. 179.

<sup>15</sup>*Pennsylvania R. Co. v. Miller*, 17 W. N. C. 382.

Equity will not restrain the abstraction of water from a stream by a railroad for supplying its locomotives when the amount taken deprives the riparian proprietor of but eleven twelfths of one horse power. *Graham v. Northern R. Co.* 10 Grant Ch. (U. C.) 259.

For the purpose of showing injury by the taking of water from a stream by a railroad company for the use of its engines, the lower owner may prove that after such taking less water flows in the stream than formerly flowed there. *Garwood v. New York C. & H. R. R. Co.* 116 N. Y. 649, 22 N. E. 396, Affirming 17 Hun, 356.

<sup>16</sup>*Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707, 27 Week. Rep. 616.

In *Embrey v. Owen*, 6 Exch. 360, 20 L. J. Ex. Ch. N. S. 212, 15 Jur. 633, *Anderson*, B., cited the case of *Dakin v. Cornish*, tried before him in 1845, which



in that country it is held that the water cannot be taken by a railroad company for the purpose of supplying its railroad station.<sup>16</sup> The owner of a milldam cannot recover damages for its use of the waters of a stream above by a railroad company for railroad purposes, thereby reducing the quantity of the flow below, where such supply is ample for the use of both during ordinary times, and during dry seasons the supply becomes so low that the use of water as power to run the mill must cease, independent of the use of it by the railroad company; and at such times the only use he makes of the water is to supply the boilers of his engine for steam purposes, for which there is in fact always a sufficient supply, although such owner is inconvenienced at such times for want of suitable appliances to draw the water off.<sup>17</sup>

**468. What gives right to complain?**—Since the right to make use of the stream is common to all who own property upon its shores, there would prima facie seem to be no cause of complaint on the part of one for any use made by another, unless he was actually injured by such use. For instance, if a lower owner has absolutely no use at a given time for any water, it would seem to be a matter of indifference to him if an upper owner consumed most of the water flowing in the stream. And some of the courts have therefore taken the view that no one can complain of a use made by another unless he is actually injured.<sup>1</sup> Under this rule one who has not begun to make use of the water has no right of action for an excessive use by the upper propri-

was a case where water was taken from a river to work a steam engine. There was an artificial channel from the river to the reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth and was all used for the steam engine, what remained being conveyed by a tube back to the river. The question was whether that was an injury to some other mills lower down the stream. But the court left it to the jury to say whether the same quantity of water continued to run in the river as if none of it had entered the premises of the defendant, directing them in that case to find a verdict for the defendant.

<sup>16</sup>*Atty. Gen. v. Great Eastern R. Co.* 23 L. T. N. S. 344, Affirmed in L. R. 6 Ch. 572.

<sup>17</sup>*Louisville & N. R. Co. v. Beauchamp*, 19 Ky. L. Rep. 398, 40 S. W. 679.

<sup>1</sup>*Wright v. Howard*, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Revised Rep. 169; *Olney v. Fenner*, 2 R. I. 211, 57 Am.

Dec. 711; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Minnesota Loan & T. Co. v. St. Anthony Falls Water Power Co.* 82 Minn. 505, 85 N. W. 520; *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431.

A mill owner is entitled to the full flow of all the water in the stream although he does not need or use its full volume; but he cannot recover for the possible injury in case he had a better mill which could have employed more water. *Gallagher v. Kingston Water Co.* 25 App. Div. 82, 40 N. Y. Supp. 250.

That a mill owner occasionally draws more than his share of the water in a river does not justify injunctive relief in favor of another mill proprietor who has no present use for the water, nor will the court cause the water to be measured and gauged so that each may draw his just share, except to prevent immediate and irreparable mischief. *Norris v. Hall*, 1 Mich. 202.

etor.<sup>2</sup> The only objection to the application of this rule is the fact that continued exercise of the use by the upper proprietor may ripen into an adverse right. If the rule were adopted that excessive use at a time when the flow of the stream was not needed by a lower proprietor was not an adverse use which would ripen into a prescriptive title there would be no need of interfering with any use which the upper owner would wish to make, so long as the lower owner would not need the water. But for fear that, when questioned, the upper owner may succeed in showing an adverse use, and that, therefore, the lower owner may lose his right by remaining quiet, some of the courts have permitted the maintenance of actions to vindicate rights when there was no actual use to be made of them. These courts have held that for an unreasonable use by an upper proprietor an action would lie, although the lower owner had suffered no actual damage and was making no use of the water.<sup>3</sup> This rule is unnecessarily severe, as there is no reason for denying a riparian owner the right to use the stream if he does not interfere with the use by others having an equal right; and, if the rule were established that he had a right to do so, he could gain no prescriptive right so long as the lower owner was not injured, and therefore there would be no necessity of an action to establish the right. This rule would avoid litigation and best serve the rights of all concerned. The strictness with which the courts are inclined to protect the rights of riparian owners is, however, well illustrated by *Palmer v. Persse*,<sup>4</sup> in which it was held that a riparian proprietor may restrain another proprietor from erecting a structure in the *alveus* of a stream which may possibly result in damage to him, without proof of actual damage; and it is not necessary to the granting of such relief that the complainant and the party erecting the structure be opposite or conterminous owners of the banks and the bed of the stream. In this case the vice chancellor, in reply to the argument that the doctrine of *Bickett v. Morris*<sup>5</sup> could not be applied, as in that case the parties were opposite or conterminous owners, in which cases only the doctrine of that case applies, said: "There is nothing, either in the judgment of the learned lords who established that important principle, or in the reason of the thing, why it should

<sup>2</sup>*Tyler v. Wilkinson*, 4 Mason, 397, Fed. V. S. R. 905, 10 N. Y. Supp. 872; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; Cas. No. 14,312.

<sup>3</sup>*Water Comrs. v. Perry*, 60 Conn. 461, 57 Atl. 1059; *Elliot v. Fitchburg R. Co.*, 10 Cush. 191, 57 Am. Dec. 85; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841, Reversing 32 N. A. C. 691, 69 L. T. N. S. 838, 58 J. P. 100.

<sup>4</sup>1r. Rep. 11 Eq. 616.

<sup>5</sup>L. R. 1 H. L. S. C. App. Cas. 47, 14 L. T. N. S. 835, 12 Jur. N. S. 803.

be so confined. The principle on which that case proceeded was this,—that the bed of the stream was considered as a sacred thing, to be preserved from all obstruction which could by reasonable possibility produce injury to any of the riparian proprietors. No doubt, in that case the contending parties were opposite riparian proprietors, and it became necessary in the judgment to advert to that point, as it was contended on behalf of the defendant that because he was entitled to the bed of the stream, *ad medium aquæ filum*, he was entitled to build on his own side, provided that injury was not thereby occasioned to his opposite neighbor. But the judgment proceeded upon no such circumstances, which appear to me merely accidental. The language of the law lords is far more extended than it would have been if confined in the way insisted on by the defendant. . . . It is, therefore, plain that the judgment of the lords of the second division in Scotland was not confined to the case of conterminous proprietors, but applied to the erection in the bed or *alveus* of the river of any conterminous structures which might by possibility interfere with the flow of the stream, and affect the right of other proprietors.”

After reading portions of the judgment in those cases, his Honor continued: “I think nothing can be plainer than the language of the learned lords, especially Lords Cranworth and Westbury, both great authorities—and that the principle upon which their decision proceeded was not at all of conterminous ownership of the bed or *alveus* of the stream, and that the language of their judgment and the reason of the thing must necessarily carry that principle beyond any such case, and extend it to all cases where injury is likely to arise, or may by reasonable possibility be sustained by riparian proprietors.” In reply to the argument that, if the principle be not confined to cases of conterminous proprietors it will be difficult to say where the rights of adjacent proprietors stop or where the power of this court to interfere is to be confined, the vice chancellor said: “But I think that question does not arise in the present case. Where, from the relative positions of the parties on the banks of the water course, it is impossible for injury to be sustained by one through the acts of the other, this court may well withhold its interference and stay its hand.”

**469. Right is continuous.**— The only method of use known to the common law is the continuous use of the stream as it flows. Therefore, the respective owners cannot each be given a definite period of time during which he may make exclusive use of the entire flow of the stream.<sup>1</sup> The question how far the flow of the stream may be

<sup>1</sup>*Tolle v. Correth*, 31 Tex. 302, 98 Am. D. c. 540.

This rule may be changed by contract, and when, in times of low water, two

made periodic by the character of the machinery used will be noticed in a subsequent section.<sup>2</sup> The right of each proprietor is to the whole flow of the stream, and he cannot, therefore, be awarded the right to take a definite part as his own and consume it.<sup>3</sup> An injunction restraining an upper mill proprietor from allowing more water to run over his dam than is required to operate his mill, or from preventing its flow to at least the natural volume of the stream during the working hours of the day, is therefore objectionable, since it undertakes to definitely fix the rights of the lower mill owner and secure them to him unlimited and unaffected by the corresponding rights of the upper owner.<sup>4</sup>

**470. Contract rights.**—The relative rights of the riparian owners may be changed by contract.<sup>1</sup> The grant by a riparian owner to a nonriparian owner of a square rod of land, through the center of which a stream flows, with a right of way for a water pipe of a specified size therefrom to the grantee's nonriparian land for the conveyance across the grantor's land of running water from the stream, deprives him, to the extent of the use of the water granted, of his riparian right to divert or use it for domestic purposes and for watering stock to the detriment of his grantee.<sup>2</sup> And when the right to use the water in a par-

mills on adjoining privileges are to have an equal use of the water alternately, it is immaterial what was the kind or capacity of either mill when the right was acquired, as their water rights are fixed. *Oress v. Varney*, 17 Pa. 497.

<sup>1</sup> See Post, § 476.

<sup>2</sup> *Crippen v. White*, 28 Colo. 298, 64 Pac. 184; *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598; *Vandenburgh v. Vandergen*, 13 Johns. 212; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

<sup>3</sup> *Howe v. Howe*, 38 Mich. 77.

<sup>4</sup> One who acquires the title to a mill site together with half of the upper dams and the stream above, and also a lower mill privilege, may annex an interest in the use of the upper dams to the lower privilege or convey such privilege to the grantee of the lower mill, so that the rights thereafter attached to each mill will be different from those theretofore existing before the junction of the estates. *Perry v. Parker*, 1 Woodb. & M. 280, Fed. Cas. No. 11,010.

An easement and servitude appurtenant to a dominant estate, for a specific use of water against a lower riparian owner, may be relinquished or restricted in favor of such riparian owner by contract, for a consideration. *Miner v.*

*Thomas Furnace Co.* 12 Ohio C. D. 490.

A parol agreement reserving to the grantor of land, granted for the easement of a roadway, the right not to have his use of a stream flowing across the same disturbed or the flow interrupted, is not void under the statute of frauds, as the right to the water remains in him as the owner of the fee, and the agreement but confirms his existing legal right. *Smith v. Holloway*, 124 Ind. 329, 24 N. E. 886.

A railroad company constructing its road under a license conditioned on saving the licensor's water power may be restrained by equity from constructing its road on the licensor's premises until it shall give sufficient bond to pay damages suffered, if the conditions of the license is not observed. *Unangst's Appeal*, 55 Pa. 128.

<sup>1</sup> *Yocco v. Conroy*, 104 Cal. 468, 38 Pac. 107.

But one who has granted to another the right and privilege of taking water from his farm is entitled to have a stream of water thereon continue in its natural course until such time, at least, as the grantee exercises his right and privilege. *Hill v. Water & Sewer Comrs.* 77 Hun, 491, 28 N. Y. Supp. 1089.

ticular manner is granted a reservation of certain rights to the grantor will not be construed to impair the rights granted any further than is necessary.<sup>3</sup> Specific performance may be granted of an agreement for the mutual use of the waters of a stream when it can be done in specie, and when an action for damages would not put the injured party in as beneficial a situation, because of the nature of the property and the fact that the continued use of the water as stipulated in the contract is necessary to the use to which the property is alone adapted, and to which it is, and from a period anterior to the time of making the agreement has been, devoted.<sup>4</sup> If a mill owner having the right to take sufficient water from plaintiff's flume to operate his mill takes more than is necessary, it amounts to a technical diversion, although plaintiff's mill is not situated on the stream, but on the farther end of the pond which is fed by the stream, and the defendant takes the water to supply his mill from the same flume which supplies plaintiff's mill and after it passes plaintiff's mill in its course to the flume.<sup>5</sup> If one having the privilege of taking the water from a reservoir raises the dam to the injury of the grantor, the latter has the right to reduce it to a proper height, but not to demolish it entirely.<sup>6</sup> A legislative grant to a riparian owner of the right to make use of his riparian rights confers upon him no franchise or additional powers.<sup>7</sup> Conversely, the acceptance of a grant of land further up the stream, with certain conditions attached, does not deprive the riparian owner of any of the rights which have attached to his property.<sup>8</sup>

The owners of all the power on a stream may unite in an agreement for the construction of a storage reservoir farther up the stream, and provide for the regulation of the flow of the water therefrom.<sup>9</sup> A

<sup>3</sup>The grantee in a partition deed of that portion of an entire tract on which is located a distillery erected by the original owner of the tract, together with "the necessary and useful water privileges for the benefit" of the distillery, reserving to one of the grantors the use of the water in the race for his stock as heretofore, is entitled to have the water so used by such grantor as not to pollute it or divert it from its natural flow so as to make it unfit and interfere with its use for distillery purposes, since the incidental use thus reserved cannot be construed to defeat or interfere with the dominant right of the grantee to the beneficial use of the water for his distillery. *Price v. Lawson*, 74 Md. 499, 22 Atl. 206.

<sup>4</sup>*Shimer v. Morris Canal & Bkg. Co.* 27 N. J. Eq. 364.

<sup>5</sup>*Wier v. Covell*, 29 Conn. 197.

<sup>6</sup>*Dyer v. Depui*, 5 Whart. 584.

<sup>7</sup>*People ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Smith*, 70 App. Div. 543, 75 N. Y. Supp. 1100.

<sup>8</sup>A riparian owner entitled to the use of the flowing water of a creek, by the acquisition of a grant of lands higher up the stream, in which the Crown reserves the right to take the water, does not thereby lose his right to compensation for loss of water to his property lower down the stream upon the Crown availing itself of the reservation in the upper grant. *Lord v. Sydney*, 12 Moore P. C. C. 473, 33 L. T. 1, 7 Week. Rep. 267.

<sup>9</sup>An agreement by several mill owners to convey their rights to a company which should build a new dam adequate to furnish power to all, and that they

servitude to contribute toward the expense of maintaining a storage reservoir may be imposed upon the estate of a mill owner by prescription.<sup>10</sup> The owner of a mill benefited by a reservoir owned in common by the owners of other mills on the stream will be bound by his agreement to contribute to the cost of repairing the reservoir dam after the repairs have been made.<sup>11</sup> The mere imposing upon the grantee of a lower mill privilege of the duty of sharing in the expense of maintaining the dam, flume, and gate at the outlet of the reservoir pond will not of itself give him a right to have the water held back for his benefit.<sup>12</sup> Where several mill owners unite for the erection of a storage reservoir under an agreement that the times when, and the

should take the water at an annual rental of 5 percent on the cost of the new dam, each to pay his proportional part of the same in January annually, measured by the proportion of the water he should have drawn during the year, is an agreement running from year to year, so that a mill owner may terminate his liability at the end of any year by ceasing his use of the water. *New Sharon Water Power Co. v. Fletcher*, 88 Me. 571, 34 Atl. 522.

Where the proprietors of mills and mill sites upon a stream erected a dam for the purpose of furnishing their mills with an increased and more constant supply of water, under an agreement by which each contributed a certain sum for its erection, which it was agreed should remain a permanent dam for their use and benefit, it became the duty of the parties to the contract during dry season to consult each others interests and to use the water only during the usual working hours of each day, when all could use it to advantage; and respondent whose mill and pond was above those of most of the petitioners, who used the water rights, thereby lowering his pond and necessitating the petitioner's mills to wait in the morning until his pond had filled, was restrained from such wrongful use of the water. *Rock Mfg. Co. v. Hough*, 39 Conn. 190.

The owners of milling property on an upper race, which, by mutual covenants and agreements, constitutes, in connection with a flume and lower race, a reservoir from which the owners of such property and the former owners of lower milling property had the right to draw water for their respective mills as therein provided for, are entitled to an injunction to restrain a city purchasing the lower milling property from filling

up such lower race, thereby reducing the size and capacity of the reservoir so as to reduce the water supply at their mill at certain stages of the water; although the city has the fee of the land, where most of the proposed filling is to be done as it holds it subject to the plaintiff's easement. *Koenig v. Watertown*, 104 Wis. 409, 80 N. W. 728.

A burden imposed upon the grantee of a mill privilege to contribute towards the amount to be paid for flowage by a storage reservoir may be enforced in equity against his grantee. *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 29 L. R. A. 500, 41 N. E. 441.

An agreement between mill owners to share equally the expense of constructing reservoirs to improve the flow of the stream and making such proportionate share of the expense a lien on their respective estates creates an equitable lien, enforceable by one of them alone who has paid more than his share, against purchasers of some of the mills who bought them with notice of the lien. *Clarke v. Southwick*, 1 Curt. C. C. 297, Fed Cas. No. 2,863.

<sup>10</sup>*Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 29 L. R. A. 500, 41 N. E. 441.

<sup>11</sup>*Mullett v. Bemis*, 100 Mass. 92.

<sup>12</sup>*Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613, 24 N. E. 774.

The system of discharging water from a reservoir, a portion of which another is entitled to convey therefrom to his land through a ditch, may be changed so long as it is discharged in such volume that, the ditch being in good condition, it will give the latter a reasonable use of the water to which he is entitled. *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

quantity and manner in which, the water shall be drawn off shall be subject to the will, order, and direction of the majority in interest, the majority will not have the right to let the water run to waste, nor the right to compel the minority to pay rent for water used when its flow is not required by the interest of the majority.<sup>13</sup> Owners of parts of water lots with easement to the water in the remainder of them, whose deeds make them stockholders in the grantor corporation, are chargeable with notice that the unconveyed fee thus subject to their easement is a trust fund for the payment of the debts of the corporation, and, knowing of the trust, they cannot hold so as to defeat a judgment creditor thereof.<sup>14</sup>

**471. Utilization of power.**—In *Dickson v. Burnham*,<sup>1</sup> it is said that “the water to which every riparian proprietor is entitled consists of the difference of level between the surface where the stream in its natural state first touches his land, and the surface where the stream leaves his land. He has no right to dam the water back so as to throw it upon the land above his own. If he does so by a single foot or less, he is liable to an action, even though the proprietor above him suffers no material injury, and though the mill of the trespasser is a public benefit. This rule follows from the sacred character which the law attaches to private property, property being one of the chief mainstays of society, and one of the most active agents in promoting civilization and material prosperity.” The maxim, *De minimis non curat lex*, cannot be applied in such cases. And this expresses the true rule upon the subject. Therefore, a riparian owner cannot be said to be entitled to a natural mill seat for the propulsion of machinery by falling water, although such a mill seat may exist, if it appears that the title to the land between the point where the mill is to be located and a point a sufficient distance up the stream to give a head race with a sufficient fall of water to render it valuable for milling purposes is not in such owner, but such land is divided into several parcels owned in severalty by various persons.<sup>2</sup> In the other direction the mill owner on a stream has a right to sink his water wheel as low as the fall on his land will permit, and, where he has acquired a right, whether permanent or temporary, to flow the water back to the channel of the stream by means of a race through the lands of a lower proprietor, he can sink his wheel so as to take advantage of the fall in

<sup>13</sup>*Ballou v. Wood*, 8 Cush. 48.

<sup>14</sup>*Moses v. Eagle & P. Mfg. Co.* 62 Ga. 455.

<sup>1</sup>14 Grant Ch. (U. C.) 594.

<sup>2</sup>*Binney's Case*, 2 Bland. Ch. 99; Dec. 102.

*Brown v. Bush*, 45 Pa. 61; *Plumleigh v. Dawson*, 6 Ill. 550. 41 Am. Dec. 190; *Good v. Dodge*, 3 Pittsb. 557; *McCalmont v. Whitaker*, 3 Rawle, 84, 23 Am.

the stream upon his own and the lower lands taken together, and can maintain an action against a proprietor still lower on the stream for obstructing the flow from such race by the construction of a fish dam, causing backwater upon the wheel.<sup>3</sup> No one can be said to have a mill privilege which cannot be used without injury to others.<sup>4</sup> But the power which can be derived from the flow of the stream within the limits of a man's boundaries is as much property as is the land to which it is incident.<sup>5</sup> The damages to be paid for injury to it is the actual value, exclusive of any imaginary or speculative value.<sup>6</sup> In determining the power which any given fall will furnish, the courts will take judicial notice of the natural laws of gravitation and hydraulics which govern the natural flow of water from a higher to a lower level.<sup>7</sup> And Leffel's tables are competent evidence upon the number of horse power which can be furnished by a stream, in view of the fact of the united acquiescence in their accuracy and in the results of computations founded upon them.<sup>8</sup> Instrumental measurements of the height of a dam or flow of the water must yield to actual, visible facts.<sup>9</sup> When a lower riparian owner has established at law his right to an uninterrupted flow of water for certain purposes, it is *res adjudicata*, and cannot then be impaired by the institution by the upper owner of an alleged original standard for its measurement.<sup>10</sup> One tenant in common of a water right may sue alone to protect or recover the water from a trespasser or one using it without right.<sup>11</sup> Several owners on the same stream may unite in a bill to enjoin the drawing of water from a reservoir used by them jointly for the benefit of their mills.<sup>12</sup> Equity will take no action in a case involving the determination of conflicting water rights appurtenant to the mills of plaintiff and defendant, when the situation of the defendant's mill is such that by running at unusual hours he exhausts the plaintiff's water supply for his mill situated lower down on the stream, where it

<sup>3</sup>*Case v. Weber*, 2 Ind. 108.

<sup>4</sup>*Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

Therefore, the fact that the owner of land between the outlet of a pond and the adjoining land of mill owners below, in conjunction with such mill owners erected a dam, flume, and gate at said outlet for the purpose of controlling the water for the use of their mill, did not confer upon such owner the right to construct or use the works at the outlet of the pond to the exclusion of those who might subsequently become, under him, owners on the stream between the outlet and the lower part

of his property. *Hickox v. Parmelee*, 21 Conn. 80.

<sup>5</sup>*Good v. Dodge*, 3 Pittsb. 557.

<sup>6</sup>*Dorlan v. East Brandywine & W. R. Co.* 48 Pa. 520.

<sup>7</sup>*Hicks v. Silliman*, 93 Ill. 255.

<sup>8</sup>*Garwood v. New York C. & H. R. R. Co.* 45 Hun, 128.

<sup>9</sup>*Finch v. Green*, 16 Minn. 355, Gil. 315.

<sup>10</sup>*Marshall v. Hershey*, 185 Pa. 238, 39 Atl. 887.

<sup>11</sup>*Spanish Fork City v. Hopper*, 7 Utah, 235, 26 Pac. 293.

<sup>12</sup>*Ballou v. Hopkinton*, 4 Gray, 324.



is not apparent that defendant operates his mill differently in point of time from what it has always been operated since its erection in 1836, prior to plaintiff's mill, nor whether defendant has or has not a prescriptive right to operate his mill as he does, nor that such operation thereof is an unreasonable use of his rights as a mill owner and riparian proprietor.<sup>13</sup>

**471a. Interference with stored water.**—After the arrangements for utilizing the power have been perfected the potential energy latent in stored water is a species of property which will be protected by the courts. Equity will enjoin the letting off of the water without right.<sup>1</sup> And the right to the possession and enjoyment of a water privilege of that kind cannot be questioned by a stranger who shows no claim to the property.<sup>2</sup> The owner of a mill privilege is entitled to all the power generated by his works, and, where power over and above what he uses is illegally used by another, he may recover damages therefor.<sup>3</sup> Persons who keep, maintain, and continue an outlet cut by a third person, which drains the water from a pond, may be liable for the injuries thereby caused if such conduct necessitates direct and positive efforts to keep the outlet open.<sup>4</sup> Although a grant to one, not a tenant, of the right to take water from a mill flume owned by another, not his landlord, is presumed from its uninterrupted exercise for more than fifteen years, whether under a claim derived from a third party, or from the flume owner accompanied by his continued acquiescence,—such presumption is rebutted when it is shown that the claimant, within that time, acknowledged the superior right of the owner, even though he did so under a mistake as to his own rights.<sup>5</sup> That an obstruction wrongfully placed in a mill pond is lower than the bottom of the owner's flume will not defeat an action, since the owner is entitled to have his pond clear, so that he can lower his flume should he wish to do so.<sup>6</sup> The upper owner cannot tap the pond which has been thrown back upon his land by the lower owner to secure water

<sup>13</sup>*Cheshire Mills v. Goings*, 62 N. H. 618.

<sup>1</sup>*Bollou v. Hopkinton*, 4 Gray, 324; *Emerson v. Bergin*, 71 Cal. 335, 12 Pac. 242.

Equity has jurisdiction of a suit by the owner of a mill pond to restrain the drawing of water therefrom by a third person who claims a right to do so under a deed requiring construction, where the anticipated injury will be continuing, and its extent is doubtful. *Lyon v. McLaughlin*, 32 Vt. 423.

<sup>2</sup>*Howard v. Ingersoll*, 17 Ala. 780.

<sup>3</sup>*Butman v. Hussey*, 12 Me. 407.

Case will lie for consequential damages from an alleged diversion of water caused by one who wrongfully enters upon the mill premises and removes a flashboard. *Meyer v. Horst*, 106 Pa. 552.

<sup>4</sup>*Smith v. Moodus Water Power Co.* 33 Conn. 463.

<sup>5</sup>*Mitchell v. Walker*, 2 Aik. (Vt.) 266, 16 Am. Dec. 710.

<sup>6</sup>*O'Riley v. McChesney*, 49 N. Y. 672. Affirming 3 Lans. 278, where it was held that the fact that a deposit in a mill pond has not been removed will not prevent the owner from recovering from the

to run his machinery.<sup>7</sup> If the water is removed and utilized by a stranger, the owner may maintain an action of tort for the wrong done, and recover as damages the market value of the power actually taken, with annual interest; and the fact that the owner had no present facilities for utilizing the power does not prevent a recovery. Rents received by the wrongdoer for the use of the water cannot, however, be recovered in an action for the wrongful taking of the water.<sup>8</sup> No recovery can be had for the use of water escaping from a waste way of the owner of the power, and which he could not reclaim.<sup>9</sup> A purchaser from the state of surplus water power created by a dam in aid of navigation, and which is reserved to the state by the statute authorizing the improvement, is entitled to an injunction restraining riparian proprietors, who have cut through an embankment built in front of their land for the purpose of utilizing the water power of the pond by means of a canal constructed by them, from drawing water therefrom for such purpose.<sup>10</sup> An injunction will not be granted to restrain interference with the plaintiff's alleged right to draw water for the use of his mill from the defendant's reservoir, where the right is controverted, has not been established at law, and it does not appear that there is danger of irreparable mischief or that the plaintiff has not an adequate remedy at law.<sup>11</sup>

**471b. Common interests in single privilege.**—If the descent of the stream at one point extends through the property of several different owners, they may, for the purpose of utilizing the power to its fullest extent, unite in the construction of works which will enable them to use the full power of the stream at that point and divide the power created among themselves according to their respective interests. So, also, one owning power which is sufficient to operate several mills may grant to different mill owners the right to draw from the reservoir enough power to operate their respective mills. And again, a single mill and privilege may descend to heirs in such a way as to create joint interests in the power. In these ways there may arise common interests in one privilege which will require regulation and protection by the courts. The questions presented by the rights arising out

one responsible therefor the expense of making the removal.

<sup>7</sup>*Merritt v. Parker*, 1 N. J. L. 460.

<sup>8</sup>*Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 112 Wis. 323, 87 N. W. 864.

<sup>9</sup>*Washabaugh v. Oyster*, 18 Pa. 497.

<sup>10</sup>*Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

But he may, in the discretion of the court, be refused a mandatory injunction to compel one who, without right, has cut through the embankment for the purpose of utilizing the power, to restore such embankment, where the gates erected at such point stop the water as effectually as the bank would, if restored. *Ibid.*

<sup>11</sup>*Perkins v. Foye*, 60 N. H. 496.

of the adjustment of the common interests which attach to the land, mill and privilege, are somewhat different from those which arise in the adjustment of mere power rights. If the joint ownership extends to the mill as well as to the privilege, occupation by one of the joint owners necessarily excludes the other from any use, and he will be required to make compensation for the use which he makes of the property, notwithstanding he occupies with the consent of his cotenant, unless he is expressly relieved by the latter from the necessity of making such compensation.<sup>1</sup> If the joint interest is merely in the privilege, each owner is entitled to make use of the common property and is entitled to any advantage which the location of his property gives him over his cotenant; and, therefore, he is not answerable for the reasonable use of his property, although the other is thereby prevented from obtaining full enjoyment of his own property as he might otherwise have done.<sup>2</sup> The respective rights of those entitled to receive power from one dam may be adjusted by contract, and, when this is done, the courts will follow the contract in enforcing the respective rights of the parties.<sup>3</sup> The contract may provide for the periodical use by the respective parties in interest of the entire

<sup>1</sup>*Shiels v. Stark*, 14 Ga. 429.

<sup>2</sup>Each of two joint owners of a mill privilege is entitled to the use of his share, notwithstanding that, where the mills of both are on the same side of the stream, the use of his privilege by the lower owner will impair the value of the interest of the other. *Bailey v. Rust*, 15 Me. 440.

<sup>3</sup>*Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219.

Tenants in common of a mill lot and privilege may by mutual deeds divide the former, but continue to possess the privilege in common. *Bailey v. Rust*, 15 Me. 440.

Where by an indenture the water power created by certain works is apportioned between those having interests in it, by stating that each shall have the amount of water which will flow through a certain number of gates of certain dimensions, neither can claim an advantage over the other by prescription, usage, prior occupancy, location, or otherwise. *Bardwell v. Ames*, 22 Pick. 333.

A release by one tenant in common of land containing a mill privilege, to the other of the privilege, together with the rights and appurtenances thereunto belonging, will include the right to flow the land detained by him as it exists at

the time of the release, so that such right will pass to subsequent grantees of the releasee. *Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645.

Under partition deeds executed between tenants in common of a gristmill and sawmill, whereby one mill is conveyed to each, but which leave the mill-dam and the land on which it stood as a common property, one cannot exclude the other from taking water through a flume passing along his water front and over the bed of the river, where there is nothing in the deeds which implies an intent by either party to abandon the use of the water for mill purposes. *Norris v. Hill*, 1 Mich. 202.

Where tenants in common, upon dividing the property, conduct a stream out of its natural channel for the purpose of creating a number of mill sites upon the artificial course, and divided them among the proprietors, each is entitled to the proportion of the flow which is capable of being enjoyed upon his own lot according to the rules which prevail among riparian proprietors, in the absence of any stipulation making another apportionment. *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 381. The construction of contracts relating to a division of water power more fully appears in chap. xxiv., post.

power of the stream.<sup>4</sup> In defense of an attempt to enforce contract rights, the contract may be shown to be invalid.<sup>5</sup> Where the common interest attaches only to the use of power, either may use all the power generated by the stream when the other does not need it, and when he can do so without inflicting injury upon his co-owner.<sup>6</sup> But, in case all are seeking to make use of their rights, each must act in a reasonable manner, and what that is, is a question of fact to be settled by the jury.<sup>7</sup> The acts and declarations of one of several owners of a water power in the presence and hearing of the others as to their respective rights is competent evidence as against one claiming under either.<sup>8</sup> Any misuser on the part of one of the cotenants which directly impairs the rights of the other gives the latter a right of action for damages.<sup>9</sup> And equity may enjoin such wrongful use.<sup>10</sup> One

<sup>4</sup>Where tenants in common of a mill privilege have agreed to apportion the use by each using the number of days a month which represents his share, one of them, who owns the opposite side of the stream, cannot interfere with the privilege by drawing water from the pond on that side during the time that his cotenant is entitled to the privilege. *Bliss v. Rice*, 17 Pick. 23.

<sup>5</sup>A mortgagor of a water privilege may, in defense of an action for attempting to use the privilege in contravention of the terms of the mortgage, avail himself of the fact that he had no title, so that nothing passed by the instrument, when such fact appears by admissions upon the record. *Wheelock v. Henshaw*, 19 Pick. 341.

<sup>6</sup>When a miller, on taking title to one of two mills on opposite sides of a dam supplying both with power, finds the other mill suspended, with its wheel and sluice rotted away, he may, in a prudent, careful way, lawfully run his own mill continuously, as heretofore it had been run, with the water that otherwise would go to waste, although useable by the other mill when in operation: and will not incur liability for so doing to the neighboring proprietor, at least until after notice from the latter. *Hovey Scale Co. v. Terry*, 47 Vt. 109.

<sup>7</sup>*Bataria Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230.

<sup>8</sup>*Crippen v. Morse*, 49 N. Y. 63.

<sup>9</sup>*Ruane v. Bullen*, 2 N. H. 532; *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772.

<sup>10</sup>But when an improved wheel replaces one used when the water right accrued, which, while requiring more water to drive all the machinery, does a given

amount of work in less time, more efficiently and with less water, if, in propelling additional machinery, it uses, for a few hours at a time, more water than the old wheel needed, but in such case the miller closes the gates and allows the dam to refill, so that in fact there is supplied to another mill thereto entitled as much and as beneficial water power as was reserved to it when the old wheel was in use,—the proprietor of the latter has no good reason to complain. *Hovey Scale Co. v. Terry*, 47 Vt. 109. But see *Miller v. Lapham*, 44 Vt. 416.

<sup>11</sup>A temporary injunction should be granted plaintiff to restrain, pending the action, the obstruction of a race by a frame and gates constructed by one of the parties to, and in violation of, a partition judgment prescribing the method of regulating and using the water thereof, and by inference requiring the race to be kept clear and unobstructed, where such obstruction is under the absolute control of the defendant, and so constructed as to be readily used so as to destroy the plaintiff's rights, although claimed to have been constructed solely to prevent the use by plaintiff of more than his share of the water power. *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745.

Injunction may be granted for the purpose of preserving water rights which are held in common. *Bliss v. Rice*, 17 Pick. 39; *Ballou v. Wood*, 8 Cush. 48; *Kennedy v. Scovil*, 12 Conn. 327.

But one tenant in common of water power will not be restrained from occasionally using more than his share of the water, where his cotenant has no

of several owners of power on the same dam may maintain an action against any other who is injuring his rights.<sup>11</sup> The interest which a joint owner has in a dam gives him no right to erect other structures on the stream which will injure the common property, and, thereby his co-owner.<sup>12</sup> What the rights of the respective owners are and what will constitute an interference with them are questions of fact for the jury.<sup>13</sup> A person having a right to a certain portion of the water of the stream at a particular dam has no right to draw off the same portion at a considerable distance above the dam without the consent of the owners of the other mills on the same dam.<sup>14</sup> A change of place in the use of water power presents no cause of complaint to the owner of a water privilege at one end of the dam, so long as a mill owner on the other bank of the river, who opens the gates of his end of the dam and allows the water to flow down to be used in mills owned by him situated lower down, does not use a greater quantity of water than he is entitled to.<sup>15</sup> One under obligation to bear a portion of the expense of keeping a dam in repair, and whose right to use water is qualified by the obligation, is not entitled to a mandatory injunction awarding him an absolute and unqualified right to a specified quantity of water.<sup>16</sup> To entitle one to control the use of the power of a dam he must have a legal interest in it. Therefore one who merely places a flume in a dam erected by another cannot maintain an action against the latter for permitting water to run to waste, although he is the owner of the land on which the dam is located.<sup>17</sup> Persons having contract interests in a dam cannot recover damages for injuries caused by changes in the dam which were made with their consent. So that if the general owner of a mill privilege in which others have a contract interest has with their knowledge, acquiescence and consent, built on his own land a new dam and works by which the water is supplied to the common flume, they cannot recover compensation for any injuries they may have thereby sustained.<sup>18</sup> The relative rights of the owners of mill privileges on a stream, under a deed from a common owner granting each a certain proportion of the flow of the stream, are not affected by the appropriation by a municipal corporation of a portion of the water formerly flowing in the stream

means of utilizing his share and has never sued for damages for the excessive use made by the other. *Norris v. Hill*, 1 Mich. 202.

<sup>11</sup>*McLellan v. Jenness*, 43 Vt. 183, 5 Am. Rep. 270.

<sup>12</sup>*Farrar v. Cooper*, 34 Me. 394.

<sup>13</sup>*Douglass v. Whittemore*, 32 Vt. 685.

<sup>14</sup>*Webb v. Portland Mfg. Co.* 3 Suran. 189, Fed. Cas. No. 17,322.

<sup>15</sup>*Whittier v. Cochecho Mfg. Co.* 9 N. H. 454, 32 Am. Dec. 382.

<sup>16</sup>*Bradfield v. Dorell*, 48 Mich. 9, 11 N. W. 760.

<sup>17</sup>*Bradford v. Cressey*, 45 Me. 9.

<sup>18</sup>*Pratt v. Lamson*, 2 Allen, 275.

at a point on one of its tributary branches for the injury caused by which compensation has been made and received by them.<sup>19</sup>

Priorities may be established between the several rights to take power from a dam, and, if they are so, those owning junior rights cannot utilize their privilege in such a manner as to interfere with the superior rights.<sup>20</sup> But a superior right to take water from one side of a dam, when and to the extent required by the dominant proprietor, an opposite mill having the privilege of taking water from the other side by means of a flume a foot higher when it is not wanted for the first mill or for other works not drawing more water, to be afterwards built, does not, as against the servient mill owner, confer a right upon the grantee of the dominant owner to carry over the dam to a mill pond below it, for the use of a lower mill, the quantity of water required for works on the original site.<sup>21</sup> The dominant and servient characters impressed on mills and water privileges by their common owner survive a partition among his heirs.<sup>22</sup> A decree is proper that there shall not be any use of water by grantees of second-class power until the water is flowing freely over the crest of the dam, in an action to restrain an excessive use of the water of an artificial canal, when it appears that the water power was divided into two classes, and that there was no second-class power until the water was flowing over the dam.<sup>23</sup> The right to take water from a reservoir may be acquired by prescription, as may be a right to use the power superior to that of other joint owners of the dam.<sup>24</sup> Adverse pos-

<sup>19</sup>*Wamesit Power Co. v. Sterling Mills*, 158 Mass. 435, 33 N. E. 503.

<sup>20</sup>The dominant mill owner, whose needed water supply is partly impaired by a sand bar formed by natural causes in the mill pond serving both his and the servient mill with power, who fails to remove it, but makes no objection to its removal by the other proprietor, is none the less entitled to recover from the servient owner for an undue diversion of the water. *Rood v. Johnson*, 26 Vt. 64.

Grantees of separate mills on one head race, the conveyance in each instance entitling the grantee to a certain number of inches of water without any specification as to the head, and conditioned so as to make each of the grantees liable for a proportionate share of the expense in maintaining the power, in the absence of a limitation in their deeds, are entitled to as nearly the same head as is possible in view of their relative positions on the race and the topography of the ground: and each may ex-

cavate his tail race so as to obtain his proper proportion of power, but may not deprive others of theirs. *Forrest Mill Co. v. Cedar Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

<sup>21</sup>*Rogers v. Bancroft*, 20 Vt. 250.

The owner of a servient mill, restricted in times of low water to the use of the appurtenant water power when it is not wanted for works across the stream, is not entitled to notice from the dominant proprietor before becoming liable for unduly depleting the pond, at least in the absence of all proof that he did not know, and could not ascertain, that the water was insufficient. *Rood v. Johnson*, 26 Vt. 64.

<sup>22</sup>*Mason v. Horton*, 67 Vt. 266, 48 Am. St. Rep. 817, 31 Atl. 291.

<sup>23</sup>*Powers v. Perkins* (Mich.) 92 N. W. 790.

<sup>24</sup>When, as between two mills served from the same dam, a paramount right to use the water for one has been claimed and enjoyed for more than fifteen years, when and to whatever extent

session by different mill owners cannot be tacked together to make out a prescriptive right, if there was no privity between them.<sup>25</sup> A mere verbal claim of the right to use water from another's raceway, unaccompanied with acts of ownership, may not amount to adverse user or enjoyment.<sup>26</sup> Where adjoining mill owners have ancient prescriptive rights to certain proportions of the water power developed by means of a particular dam, when amicable division of said power seems impossible equity may make a division if the evidence presented reveals a practical mode for doing so.<sup>27</sup>

A joint owner of a water privilege may be compelled to contribute to the cost of keeping it in repair,<sup>28</sup> and may be held liable for injury caused by the negligent use of the power.<sup>29</sup> The fact that the per-

it was required, leaving only the surplus for the other, any equal or superior water privilege which theretofore may have appertained to the mill thus made servient is extinguished. *Rogers v. Bancroft*, 20 Vt. 250.

Where there has been an adverse use of water for twenty years from a dam owned during the beginning and the end of the period by parties who were of full age, but there was an intervening period of three or four years when the title was held by a minor, such intervening disability will not defeat the presumption of title resulting from the twenty years' possession. *Wallace v. Fletcher*, 30 N. H. 434.

A lower mill owner who claims, and for the prescriptive term actually enjoys, a continuous use of water from a dam and flume upon another's lands, is not prevented from acquiring a vested right thereto by prescription, by mere verbal objections and denials by the upper proprietor, who, having the power and opportunity, does nothing to interrupt the user. *Kimball v. Ladd*, 42 Vt. 747.

<sup>25</sup>*Perrin v. Garfield*, 37 Vt. 304.

<sup>26</sup>*Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 542.

<sup>27</sup>*Warren v. Westbrook Mfg. Co.* 88 Me. 58, 35 L. R. A. 388, 51 Am. St. Rep. 372, 33 Atl. 665.

<sup>28</sup>One who is a joint occupant of dams, piers, and booms, essential to the beneficial use and enjoyment of his mill property, and which for years have been kept up and maintained at the joint expense of the owners, is liable to contribute to the expense of repairs, even if he did not, by the purchase of the mill from one of the grantees of the charter giving the right to maintain such works to the

grantees, their associates, heirs, or assigns, become a tenant in common thereof. *Clark v. Plummer*, 31 Wis. 442.

But part owners of a water power cannot be compelled to contribute to the building of weirs at a large expense in order to apportion the water, nor to improvements made to raise the level of the water to facilitate apportionment. *Brown v. Cooper*, 98 Iowa, 444, 33 L. R. A. 61, 60 Am. St. Rep. 190, 67 N. W. 378.

As between mill owners under obligation to keep a dam in repair and share the expense in just proportions, one whose mill operates four runs of stone should bear four sevenths of the expense, where the other mill operates but three runs of stone. That the stream furnishes additional power which is not utilized does not entitle one to pay in the proportions which the quantity consumed by him bears to the whole power furnished. *Bradfield v. Dewell*, 48 Mich. 9, 11 N. W. 760.

And a court of equity will not decree contribution from the owner of one fourth of the water power in favor of the owner of three fourths of the water power who has purchased land in order to secure the right to flow the same. *Norris v. Hill*, 1 Mich. 202.

<sup>29</sup>One using water power from a race is not relieved from liability for the damages sustained by the owner of the race from breaking banks, due in part to the former's negligence in failing to keep his flume in proper repair, because the negligence of another user of the water power from the race, not made a party defendant, had concurred in producing the injury. *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908.

son injured has an interest in the property which causes the injury does not prevent his maintaining an action against his cotenant.<sup>30</sup>

Before a court of equity will interfere to settle and adjust the rights of the parties to the use of water, the rights to which they are severally entitled must be definitely established.<sup>31</sup> But after they have been determined, equity may regulate, define, and apportion the use of the rights.<sup>32</sup> When a multiplicity of suits may thereby be avoided, equity may ascertain, define, and settle the rights of all parties claiming water rights on one privilege.<sup>33</sup> When the rights are held in common, with nothing to show what the respective rights of the parties are, the rights may be partitioned so as to enable each right to be held in severalty. The legislature may provide that this shall be done by commissioners. And to enable them to perform their duties properly, they may be given authority to take possession of the property and operate it for a reasonable time.<sup>34</sup> But the appointment of a super-

<sup>30</sup>*Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772.

<sup>31</sup>*W. H. Howell Co. v. Charles Pope Glucose Co.* 171 Ill. 350, 49 N. E. 497; *Jordan v. Woodward*, 38 Me. 423.

Equity will not assume jurisdiction under the pretense of adjusting rights in common in water power, in a case involving the conflicting rights of several mill owners to take water from the same dam, when neither party admits rights in the other which may be adjusted, and it appears that all that is sought or needed by the parties or either of them is the determination of the existence of a disputed right, for the establishment of which the parties have a plain and perfect remedy at law. *Burnham v. Kempton*, 44 N. H. 78.

A court of equity will not enjoin one of the tenants in common of water power from running his plant nights and Sundays, upon the ground that such use prevented such accumulation of water as was necessary to enable the respective owners in times of low water to obtain a sufficient supply to run their plants in the daytime during week days, where it is not claimed that such party was making use of a greater quantity of water than he was entitled to take, and it does not sufficiently appear how much water each one was entitled to use during low water,—the rights of the parties not having been established by an action at law. *W. H. Howell Co. v. Charles Pope Glucose Co.* 171 Ill. 350, 49 N. E. 497, Affirming 61 Ill. App. 593.

<sup>32</sup>*Patten Paper Co. v. Kaukauna Water-Power Co.* 70 Wis. 659, 35 N. W. 737; *Belknap v. Trimble*, 3 Paige, 577.

A bill in equity may be maintained by one of two tenants in common against his cotenant, who, in addition to his interest in the joint mill, has a several mill, at which he is using more than his share of the water which appertains to both mills. *May v. Parker*, 12 Pick. 34, 22 Am. Dec. 393.

Equity will interfere for the purpose of regulating the exercise of the conflicting rights of two lessees of one lessor one being entitled to draw water for two wheels of a certain description and the other for one, when at times there is not sufficient for both, where there is no dispute as to the existence but merely as to the priority of the rights of each. *Ranlett v. Cook*, 44 N. H. 512, 84 Am. Dec. 92.

<sup>33</sup>*Hanna v. Clarke*, 31 Gratt. 36.

<sup>34</sup>A statute providing for the determination of the respective rights of the owners of water power, where they cannot agree, and the appointment of commissioners therefor, is not invalid as infringing the constitutional right of trial by jury, where it provides that an issue of fact in such action, properly triable by a jury, may be tried by a jury with like effect as any other cases. Nor is it invalid as creating a tribunal upon which judicial powers are conferred, since such commissioners are merely referees to assist the court in ascertaining the facts, even though a provision thereof, making their report binding upon the parties before the court acts



visor to divide water, keep up weirs, and otherwise oversee the property for the joint benefit of the owners is beyond the power of the court in a suit for partition of a water power.<sup>35</sup> If the water power is part of the mill property, a petition for the partition of the power alone cannot be sustained.<sup>36</sup> But if the rights of the respective parties are determinable, they may be partitioned if it is practicable to do so.<sup>37</sup> The mere fact that the partition will be inconvenient does not prevent its being ordered.<sup>38</sup> But the privilege cannot be partitioned by a division of the use into periods of time.<sup>39</sup> A partition leaves flowage rights untouched.<sup>40</sup> The entire power of the dam should be partitioned, and not merely that necessary to operate existing mills.<sup>41</sup> Where two modes of partitioning water rights are presented, the court will not reject one because entailing more expense than the other, where the expense is inconsiderable in comparison with the disadvantages attending the other.<sup>42</sup> Rights in a particular section or bulkhead of the dam may be partitioned among persons in-

upon it, may be invalid. *Janesville Cotton Mfg. Co. v. Ford*, 55 Wis. 197, 12 N. W. 377.

<sup>35</sup>*Brown v. Cooper*, 98 Iowa, 444, 33 L. R. A. 61, 60 Am. St. Rep. 190, 67 N. W. 378; *Cooper v. Cedar Rapids Water Power Co.* 42 Iowa, 398.

<sup>36</sup>*Miller v. Miller*, 13 Pick. 237.

<sup>37</sup>*Doan v. Metcalf*, 46 Iowa, 120.

The difficulty of making a partition of water rights held in common, and the inconvenience of the other tenants, furnish no sufficient reason for refusing a tenant such relief. *Scovil v. Kennedy*, 14 Conn. 349.

The partition of a sawmill privilege made by a committee appointed by the court to make partition, by assigning to each of the owners as much water as would run through a gate of certain dimensions, unless shown to be very injurious to the property will not be disturbed. *Morrill v. Morrill*, 5 N. H. 134.

Rights in water used as power, to which one party is entitled to one-sixteenth and the other to the residue, may be apportioned. The land under the water and dam may be divided by metes and bounds, one part assigned to each party subject to the servitude and charge of keeping up and repairing the dam on that part by the one to whom it is assigned for the use of the other, and the right to use such portion of the waters of the pond as may be assigned to each owner. If necessary, the referees should in their report state what changes are

necessary in the construction of the race-way, bulkhead, or gates, so that neither party may use more than his share of the water; or, if it can be done, mark the water to be used by each party by some visible monument, or by controlling the fluids through the gates, or designating the number of inches each party is to use, or by the bulk quantity of water. *Cooper v. Cedar Rapids Water Power Co.* 42 Iowa, 398.

<sup>38</sup>*Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162.

<sup>39</sup>*Crowell v. Woodbury*, 52 N. H. 613.

<sup>40</sup>*Hills v. Dey*, 14 Wend. 204.

In *Kane v. Parker*, 4 Wis. 123, the point is raised in a contest over a partition of lands of tenants in common by commissioners appointed therefor, that such commissioners had no power to grant an easement to overflow part of such lands set off to the contestant, by a water power on a portion of the premises sold by order of the court; but the court, while affirming the correctness of such a proposition, decided that they had not created such an easement.

<sup>41</sup>*Morrill v. Morrill*, 5 N. H. 329.

In partitioning a water power it is not sufficient to give one of the parties the right to water enough to run two sets of burs and the necessary machinery for bolting, but the dimensions of the burs and the quantity of work to be done by them must also be specified. *Doan v. Metcalf*, 46 Iowa, 120.

<sup>42</sup>*Scovil v. Kennedy*, 14 Conn. 349.

terested therein, without making those interested in other portions of the dam parties to the action.<sup>43</sup> The division should be made according to the power rights of the parties, and not according to the amount which each had contributed to the construction of the dam.<sup>44</sup> The expense of erecting and setting in operation, by an engineer appointed by the court, of an apparatus for measuring and dividing the water, should be borne by all the parties to a suit for partition of a water power in proportion to the extent of their respective interests.<sup>45</sup> To make a partition between parties binding on grantees, there must be evidence of record or such possession as will put intending purchasers on notice.<sup>46</sup> In case the property cannot be partitioned, it may be sold to effect a partition of the property rights in it.<sup>47</sup> But in *Smith v. Smith*<sup>48</sup> it is said that a milldam and land overflowed by a mill pond, which constitute a water power necessary for the use of various mills which belong in severalty to the respective tenants in common of the dam and pond, should be partitioned and not sold, if the whole water power in connection with the mill pond held in severalty by either party will not be worth more than the same water power equally divided by a proper partition thereof, the half to be used with the mills of each in the hands of different proprietors.

**472. Destruction of rights.**—The rights of the riparian owner may be taken from him for public use under the power of eminent domain.<sup>1</sup> And they may be destroyed by adverse possession for the prescriptive period; but they are not lost by abandonment or mere failure to make use of them.<sup>2</sup> In certain of the more arid parts of the western portion of the United States, the doctrine of riparian rights has been held to be inapplicable by the courts and to have never existed there.<sup>3</sup> The rights resulting from this ruling are developed in a subsequent chapter.<sup>4</sup>

**473. Rights in products of water.**—In addition to the rights to have

<sup>1</sup>*Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234.

<sup>2</sup>*Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234.

<sup>3</sup>*Wamesit Power Co. v. Sterling Mills*, 158 Mass. 445, 33 N. E. 503.

<sup>4</sup>Occupancy of mill sites and use of water as appurtenant thereto by remote grantees of tenants in common of the water power is not notice to intending purchasers of a parol partition of the water rights by the tenants in common before parting with the interest which the intending purchasers seek to acquire,—especially where there is of record a partition by deed subsequent to that period. *Forrest Mill Co. v. Cedar*

*Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

<sup>5</sup>*Allard v. Carleton*, 64 N. H. 24, 3 Atl. 313; *Baldwin v. Aldrich*, 34 Vt. 526, 80 Am. Dec. 695, *Limiting Brown v. Turner*, 1 Aik. (Vt.) 350, 15 Am. Dec. 696; *Smith v. Smith*, Hoffm. Ch. 506.

<sup>6</sup>10 Paige, 470.

<sup>7</sup>*Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

<sup>8</sup>*Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613, 24 N. E. 774.

<sup>9</sup>*Walsh v. Wallace* (Nev.) 67 Pac. 914.

<sup>10</sup>See post, chapter XXII.

the water flow past the land and to make such use of it as can be made during its passage, the riparian owner is entitled to the benefit of whatever the water produces. He is entitled to take the fish from the water.<sup>1</sup> And he may make such use of the stone and sand<sup>2</sup> in the bed of the stream as he can make without injury to other individuals or the public. He also has a right to the seaweed and other products which he can find in the water.<sup>3</sup> Where the owners of several farms have a right in common in a lot to take the seaweed therefrom which is washed on the land by the sea, the owner of one of such farms may, without joining the other farm owners, maintain an action against one who wrongfully takes seaweed from such common lot.<sup>4</sup> The right to take seaweed on another's land cannot be acquired by long-continued use as one of the public.<sup>5</sup> While the words "rights, liberties, privileges, and appurtenances" are not effectual to create *de novo* a right of common to take seaweed and sea manure from a beach, yet, when the plat and the verbal description accompanying it show the metes and bounds of the land conveyed, and that certain incorporeal rights of common and the like are annexed to and to be enjoyed with the land conveyed, and the deed refers to the plat for a more full description of what was intended to be conveyed, the incorporeal rights thus shown to be intended to be annexed to the land, and which it is capable of supporting, will pass by the deed.<sup>6</sup>

**473a. Ice.**— Among the rights of a riparian owner which may be regarded as valuable is that of taking ice from the stream. The owner of the soil over which a stream of water flows has a right to take ice therefrom in any quantities and for any purpose so long as he does not unreasonably interfere with the quantity of water flowing in the stream to the injury of lower proprietors.<sup>1</sup> And to facilitate this use

<sup>1</sup> See *ante*, chapter XIV.

<sup>2</sup> The rights of a riparian proprietor are infringed by another who digs sand above low-water line, knowing that he is upon the other's land, although it is then under the surface of the water. *Com. v. Hipple*, 7 Pa. Dist. R. 309.

<sup>3</sup> A mere right of getting seaweed on the beach in front of land is an incorporeal hereditament, and cannot be severed from the estate to which it is annexed; but the owner having taken it from the beach is not bound to use it on the land to which the right is attached. He may even use it on the land of others, or lease his privilege while he remains the owner of the land to which it is attached. *Phillips v. Rhodes*, 7 Met. 322.

The right of taking seaweed from the beach in front of a particular field is not affected by the gradual changes taking place in the shore. Wherever the beach exists in front of the described field the right may be exercised. *Ibid.*

<sup>4</sup> *Kenyon v. Nichols*, 1 R. I. 106.

<sup>5</sup> *Hill v. Lord*, 48 Me. 83.

One who has entered upon an open beach and removed seaweed from it for a number of years, and during the same time has allowed others to enter upon it and remove seaweed, acquires no such possession as will enable him to maintain an action for trespass upon it. *Tappan v. Burnham*, 8 Allen. 65.

<sup>6</sup> *Knorrles v. Nichols*, 2 Curt. C. C. 571, Fed. Cas. No. 7,807.

<sup>7</sup> *Gehlen Bros. v. Knorr*, 101 Iowa, 700,

of the stream, he may pond the water.<sup>2</sup> Ice which is formed upon a pond is property, which cannot be interfered with without liability to the owner.<sup>3</sup> One taking ice from another's property without right is subject to indictment.<sup>4</sup> To be entitled to the exclusive right of taking the ice, the claimant must have all the rights of a riparian owner. Therefore if his boundary is fixed at low-water mark, he does not own the ice, although he obtained his title for the avowed purpose of constructing an icehouse.<sup>5</sup> As between the owner of the soil and one having a right to flow the land for creating a water power, the title to the ice is in the former.<sup>6</sup> Therefore, a riparian owner along a non-navigable stream has the right to use all the water necessary for any

32 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Searle v. Gardner*, 12 Cent. Rep. 420, 22 W. N. C. 73, 13 Atl. 835; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Edgerton v. Huff*, 26 Ind. 35; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

The riparian owner on an non-navigable stream is the owner of the ice formed upon the water, though the ice field is made by flowage caused by a milldam of a riparian owner below; and the latter, maliciously and unnecessarily drawing the water from the pond, and thus destroying the ice privilege, is liable in damages to the former. *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

*Myer v. Whitaker*, 55 How. Pr. 376. Criticising and Dissenting from *Marshall v. Peters*, 12 How. Pr. 218.

A riparian owner has a right to pond the water for the purpose of gathering ice, provided he acts in a reasonable manner in view of the size and capacity of the stream and the reasonable rights of the riparian owners below; and this right cannot be affected by the appropriation to public use of a parallel stream which unites with his stream to form a larger one so that lower owners on the larger stream must in the future look to his stream for their whole supply. *Water Comrs. v. Perry*, 69 Conn. 461, 37 Atl. 1059.

The owner of an ice pond may, in order to clean it, drain the water off and then hold the water back until it is refilled, although the effect is to stop mills lower down the stream. *DeBaun v. Bean*, 29 Hun, 236.

The erection of a dam on a non-navigable stream by a riparian owner to

form a pond from which to harvest ice is not an unreasonable use of the water which will entitle the lower mill owner to an injunction, it appearing that easily about 25 per cent of the power used by the mill was furnished by the water and that it took only two days and a night to fill the upper pond. *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 607, 63 Am. St. Rep. 416, 70 N. W. 757.

But in an action to recover for the value of ice taken from a pond, it is no defense that one who had granted the proprietor of the pond the right to overflow lands, which form but a small part of the tract overflowed, permitted the removal of the ice over his land, since he had no right to deprive the owner of the pond of the use of the water, and the defendant is especially liable where, in removing the ice, he cut a channel across the entire pond, removing and destroying the ice formed over land of the pond owner. *Myer v. Whitaker*, 55 How. Pr. 376.

<sup>2</sup> Ice formed on a natural water course constitutes a part of the land to which it is attached and is the property of the riparian owner to the extent of his ownership of the bed of the stream, and he may prevent its severance and removal. *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224.

One who, with the consent of the owner of a pond, has anchored a large piece of ice to the shore to prevent it from going out during a freshet, may recover its value from a person who, before the ice is actually removed or stacked, appropriates it. *Myer v. Whitaker*, 55 How. Pr. 376.

<sup>3</sup> *State v. Pottmeyer*, 30 Ind. 287.

<sup>4</sup> *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 27 Am. St. Rep. 51, 50 N. W. 514.

<sup>5</sup> See post, § 503.

purpose, and to cut and remove the ice which may form on the stream adjoining his land in any quantity or to any extent for his own use, or to store for sale, as against a lower mill owner in the backwater of whose dam the ice forms and who has the right to cover the land with backwater in such manner as the running of the mill requires, provided he does not decrease the flow of water to the mill below what is required to successfully operate it.<sup>7</sup> But the owner of ice cannot control the use of the pond by the mill owner and the latter can draw the water off if necessary to the successful operation of the mill.<sup>8</sup> The fact that a railroad company has an easement for railroad purposes over land crossing a creek acquired by condemnation is no defense, as against the owner of the fee, to the taking by a third party for his own use and without a license from the railroad company of ice formed on the waters of the creek within the railroad right of way, even though the owner might not himself have the right to enter and cut the ice. The ice is nevertheless his property, and at most the railroad easement would only control his disposition of it.<sup>9</sup> A grant of the property carries title to the ice.<sup>10</sup> And the right to take the ice may be granted separate from the land.<sup>11</sup> And the grantee may maintain an action to vindicate his rights as against persons taking the ice without right.<sup>12</sup> The privilege of cutting ice from waters included in a conveyance of land is an easement in the nature of an encumbrance, which the vendee is not obliged to assume under a covenant by the vendor to convey the property in fee simple, free and clear from all encumbrance, even though the vendee knew at the time of contracting for the purchase that such ice-cutting privilege had been previously conveyed.<sup>13</sup> But he is not entitled to injunctive relief where no irremediable injury is shown, as, that the ice is necessary to enable him to comply with his sales or carry on his business, or that it is the only body of ice accessible to dealers.<sup>14</sup> The right to take the

<sup>7</sup>*Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717. *Ice Co. v. Shultz*, 116 N. Y. 382, 22 N. E. 564.

<sup>8</sup>*Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

<sup>9</sup>*Julien v. Woodsmall*, 82 Ind. 568.

<sup>10</sup>*McDonald v. Lake Simcoe Ice & Cold Storage Co.* 26 Ont. App. Rep. 411, Reversing 29 Ont. Rep. 247.

The grantee of lands under navigable water in front of his uplands cannot restrain the grantee of similar adjoining lands under water from erecting thereon dikes which will prevent him from towing ice cakes across them to his own premises; nor can he question the legal-

ity of such structures. *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 22 N. E. 564.

<sup>11</sup>*Hinckel v. Stevens*, 35 App. Div. 5, 54 N. Y. Supp. 457.

A right to gather ice for sale as merchandise is obtained under a grant of the right to get ice in winter time, and to make ice cream in summer time. *Pennsylvania S. Valley R. Co. v. Keller*, 20 W. N. C. 125, 11 Atl. 381.

<sup>12</sup>*Richards v. Gauffret*, 145 Mass. 486, 14 N. E. 535.

<sup>13</sup>*Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969, Affirming 78 Ill. App. 292.

<sup>14</sup>*Marshall v. Peters*, 12 How. Pr. 218.

ice may also be acquired by lease. A lease of the property on the shore includes the right to take the ice.<sup>15</sup> And the lessee is entitled to the aid of the courts in protecting his rights. But trespass cannot be maintained by the owner of a license to take ice from a pond against one taking away and converting such ice, when no title to it has become vested in the licensee by his executing or enjoying the privilege conferred upon him by the license.<sup>16</sup> The lessee has a right superior to that of a grantee of the fee pending the lease.<sup>17</sup> One granted the right to take ice from the waters of a creek is not entitled to drive a row of spiles across the creek to the damage of the grantor's lands, for the purpose of preventing sand from washing on the ice field, where such condition existed at the time of the grant, since it is not an incident to the easement granted and would enlarge its extent.<sup>18</sup> Acceptance by a riparian owner of land on an inland non-navigable lake, of an agreement executed by a mill owner at the outlet, granting the right to go and remove ice in consideration of a stipulated compensation, does not estop such riparian owner from thereafter disputing a claim of title to the ice made by a subsequent purchaser of the mill.<sup>19</sup> The fact that no ice of any value to the maker of a promissory note formed on a reservoir during the winter succeeding the giving of the note cannot be pleaded as a defense to its payment, where such note was given to the owner of the reservoir in consideration of the ice to be formed thereon during the coming winter, and no guaranty or warranty was made that any ice would form or that it would be of any particular value, and no fraudulent practices were resorted to in getting the note.<sup>20</sup> A right to the ice may be acquired by prescription.<sup>21</sup> Injunction will not be issued to prevent interference with an ice field

<sup>15</sup>*Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435.

<sup>16</sup>*Balcom v. McQuesten*, 65 N. H. 81, 17 Atl. 638.

<sup>17</sup>*Marsh v. McNider*, 88 Iowa, 390, 20 L. R. A. 333, 45 Am. St. Rep. 240, 55 N. W. 469.

<sup>18</sup>*Myers v. Baker*, 45 App. Div. 26, 60 N. Y. Supp. 797.

<sup>19</sup>*Hazleton v. Webster*, 20 App. Div. 177, 46 N. Y. Supp. 922.

<sup>20</sup>*Townsend v. Water Comrs.* 63 Ill. 26, 14 Am. Rep. 109.

<sup>21</sup>A prescriptive right to the ice on the whole surface of a pond, and not merely to those portions of it upon which ice has been cut, is acquired by those who have exercised the right, without objection from anyone, to cut and gather ice at any point they chose during a time long enough to create pres-

criptive rights under the statute of limitations, claiming the right under a deed which gave the right to the flowage by which the pond was created. *Hoag v. Place*, 93 Mich. 450, *sub nom. Mansfield v. Place*, 18 L. R. A. 39, 53 N. W. 617.

An owner of real property, whose grantors for more than thirty years annually took from a stream opposite the premises sufficient ice to fill their ice-houses, has an easement by prescription to such ice as is necessary for ordinary use, where the taking of ice by her grantors commenced because their deeds assumed to convey to the middle of the stream, but did not in fact convey the title beyond the bank, and was continued under a claim of right. *Hinckel v. Sterens*, 35 App. Div. 5, 54 N. Y. Supp. 457.

unless irremediable injury is shown.<sup>22</sup> And a mill owner cannot enjoin an upper proprietor from cutting ice on the stream until the rights of the parties are settled at law.<sup>23</sup> The measure of damages for wilful destruction of an ice field is the value of the right to harvest the ice at the time it was destroyed.<sup>24</sup> The measure of damages for wrongfully taking the ice is its value when it is severed, ready for removal, so as to become a chattel.<sup>25</sup> The measure of damages for breach of a contract to keep ice ponds full of water during the ice-making season is the value in the icehouse of the ice that might have been put up with reasonable diligence had there been no breach, less the cost of harvesting and storing it.<sup>26</sup> The act of a trespasser in cleaning and examining the ice on a pond preparatory to cutting it is not such a legal appropriation as will entitle him to recover from another trespasser for its conversion.<sup>27</sup>

**474. Protection of riparian rights.**—Riparian rights are property which will be protected by the courts. But, before a person is entitled to maintain an action for injury to the right, he must show a title. One merely in possession, without right, of land through which a stream runs, can assert no rights as against an upper owner who is making use of the water.<sup>1</sup> But if he is in possession by right, he is entitled to protection.<sup>2</sup> So, one who has entered government land with a view to acquiring title will be protected in his riparian rights until he has lost his right of possession by failure to comply with his contract.<sup>3</sup> Owners in severalty of premises occupied by them upon a mill stream and of the right to the water used by them may unite in an action against another several owner to restrain him from using more water than he is entitled to, under the New York Code.<sup>4</sup> An action to quiet title to the water of a stream may be maintained where

<sup>22</sup>*Glassbrenner v. Groulik*, 110 Wis. 402, 85 N. W. 962.

<sup>23</sup>*Cummings v. Barrett*, 10 Cush. 186.

<sup>24</sup>*Handforth v. Maynard*, 154 Mass. 414, 23 N. E. 348.

Damages are recoverable for the wanton destruction of ice while in process of formation. *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

When an ice crop is destroyed without circumstances of aggravation, the measure of damages will be mere compensation or the value of the crop in the nearest market, having regard to time and place, less the cost of getting it there, including loss in handling and shrinkage; so that the damage cannot be computed according to spring or summer

prices for every ton shown by arithmetical calculation to be upon the pond in February. *Stauffer v. Miller Soap Co.* 151 Pa. 330, 25 Atl. 95.

<sup>25</sup>*Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Piper v. Connelly*, 108 Ill. 646.

<sup>26</sup>*Farr v. Griffith*, 9 Utah, 416, 35 Pac. 506.

<sup>27</sup>*Abbott v. Cremer* (Wis.) 95 N. W. 387.

<sup>1</sup>*Silver Creek & P. Land & Water Co. v. Hayes*, 113 Cal. 142, 45 Pac. 191.

<sup>2</sup>*Dille v. Sherman*, 2 Nev. 67; *Moore v. Clear Lake Water Works*, 68 Cal. 146, 8 Pac. 816.

<sup>3</sup>*Lus v. Haggin*, 69 Cal. 255, 10 Pac. 674.

<sup>4</sup>*Emery v. Erskine*, 66 Barb. 9.

there is an assertion of an adverse claim thereto, although there is no actual interference with the plaintiff's rights.<sup>5</sup> But where there is a mere dispute as to the respective rights of riparian owners, the right cannot be determined in a real action, but the appropriate remedy is an action on the case.<sup>6</sup> Assumpsit is not the proper form of action to settle the rights of one who used water under a claim, known to plaintiff, that the right to use it was appurtenant to his estate.<sup>7</sup> Equity will not interfere to prevent a mere threatened interference with the rights of a riparian owner. The proper remedy is at law.<sup>8</sup> And equity will not entertain a bill to settle rights in a water course and adjust damages, although the prayer is incidentally for an injunction.<sup>9</sup> Equity will not interfere with the exercise of a legal right by a riparian owner on a stream in opening the gates of a dam of an upper proprietor to restore the flow of water in the stream, although it is done from a bad motive and for no purpose useful to him.<sup>10</sup> But where a large number of persons are claiming conflicting rights, equity, for the purpose of preventing a multiplicity of suits, may interfere and adjust the conflicting rights.<sup>11</sup> The ground of the jurisdiction of equity in adjusting and protecting the rights of parties interested in hydraulic powers is that the intervention of equity prevents litigation and affords a more complete and perfect remedy than could be obtained at law.<sup>12</sup> The principle upon which a court of equity has jurisdiction of cases involving water privileges rests in the preventive remedy which it can afford, to shield a person from some great, irreparable injury which may threaten him.<sup>13</sup> And where the injury is of such a nature that recovery of damages will be wholly inadequate, equity may interfere and grant an injunction.<sup>14</sup> But the rights of riparian owners will not be regulated by injunction except

<sup>5</sup>*Perego v. Sellick*, 79 Cal. 568, 21 Pac. 966.

On a bill to quiet the enjoyment of a water course and of weirs for working stampmills, where plaintiff's right is uncertain the court will first direct issues to be tried at law. *Falmouth v. Innys*, Moely, 87.

<sup>6</sup>*Hobbs v. Gould* (Me.) 10 Atl. 457.

<sup>7</sup>*North Haverhill Water Co. v. Metcalf*, 63 N. H. 427.

<sup>8</sup>*Peters v. Hansen*, 55 Mich. 276, 21 N. W. 342.

<sup>9</sup>*Prentiss v. Larnard*, 11 Vt. 135.

Equity will not interfere for the purpose of settling rights in water where the right is not disputed, but only the quantity to which the complainant is entitled. *Olmsted v. Loomis*, 6 Barb. 152.

Before a suit in equity can be commenced in the Federal courts to restrain interference with an alleged water right the right must be established at law, where, during the erection of the interfering structure, complainant has slept upon his rights and does not allege danger of irreparable injury or of protracted litigation or of multiplicity of suits. *Parker v. Winnipiseogee Lake Cotton & Woolen Co.* 2 Black, 545, 17 L. ed. 333.

<sup>10</sup>*Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373.

<sup>11</sup>*Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

<sup>12</sup>*Dyer v. Cranston Print Works Co.* 17 R. I. 774, 24 Atl. 827.

<sup>13</sup>*Fisk v. Wilber*, 7 Barb. 395.

<sup>14</sup>*Crittenden v. Field*, 8 Gray, 621.



in very clear cases.<sup>15</sup> Whenever it appears that any use of a stream by one riparian owner interferes with its reasonable use by another to his injury, either by the interruption, diversion, or pollution of the water, the burden of proof is upon the former to show that his use is reasonable.<sup>16</sup> When the right to restrain an interference with the flow of water of a stream depends upon the fact of riparian proprietorship alone, and does not exist by virtue of any contract or prior appropriation, the court can only compel the restoration of the banks of the stream to their natural condition and permit them so to remain.<sup>17</sup> The complainant may lose his right to equitable relief by laches or acquiescence.<sup>18</sup>

### III. INTERFERENCE WITH FLOW OF STREAM.

**475. Right to pond water.**—The rights in a water course are controlled by the maxim, *Aqua currit et debet currere ut currere solebat*.<sup>1</sup> And therefore there is no right to obstruct the flow of a stream so as to destroy the rights of lower owners.<sup>2</sup> But a rule which would ab-

Equity will restrain interference with the enjoyment of a right to the uninterrupted flow of a stream across another's land as an action for damages would be wholly inadequate to the vindication of such a right. *Schetz's Appeal*, 35 Pa. 88.

An injunction to restrain interference with the landowner's enjoyment for family, domestic, and farming purposes of the water of a stream flowing on the land should be granted without qualification, and not on condition of the failure of defendant to give a bond, where the damages, if any, would be irreparable because incapable of ready computation and ascertainment, as in such a case a bond would not afford adequate protection. *Woodall v. Cartersville Min. & Manganese Co.* 104 Ga. 156, 30 S. E. 665.

<sup>15</sup>*Howse v. Howse*, 38 Mich. 77.

A bill for an injunction against disturbance of a water privilege will not be retained when it is shown that defendants have not encroached upon the right nor threatened to do so, to enable plaintiffs to thereafter apply for an injunction, or to aid them in securing the identity of their right, or of ascertaining the limits and extent of it, unless special and sufficient reasons therefor are shown. *Pratt v. Lamson*, 6 Allen, 457.

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power is not entitled to an injunction to restrain the construction by another owner of a new dam in place of the old one, which it is the latter's duty to maintain, although such new dam is much higher, where there is no restriction in its deed on the height or manner of constructing the same, since the mere construction thereof is not a violation of the latter's covenant not to take more than half the water, as the dam itself does not divide the water, but merely creates a head to enable it to turn into its race its share of such water. *City of Salem Co. v. Salem Flouring Mills Co.* 12 Or. 374, 7 Pac. 497.

<sup>16</sup>*Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167.

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<sup>2</sup>*Hall v. Swift*, 4 Bing. N. C. 381, 1 Arnold, 157. 6 Scott, 167, 7 L. J. C. P. N. S. 209; *Ohio & M. R. Co. v. Thillman*,

solutely prevent interference with the flow of the stream would needlessly deprive the various riparian owners of much of the value of the stream. There could be no utilization of the water power, or any artificial pondage of the water for fish culture or the gathering of ice. Since every owner has a right to make such reasonable use of the water as he can make without interfering with the like rights of others, he has a right to check the flow of the stream long enough to accumulate a head of water sufficient to run his machinery, if it is adapted to the size and capacity of the stream.<sup>3</sup> But the machinery which is to be propelled by the water must correspond to the capacity of the stream. The owner will not be permitted to hold back the water to furnish power to a wheel which requires much more than the natural power of the stream.<sup>4</sup> In order to use the power of the stream advantageously, it must be accumulated in a pond; and the owner may, therefore, pond it in a reasonable manner for any legitimate purpose for which he is entitled to use it.<sup>5</sup> This right includes, not only the accumulation of water to operate machinery, but the formation of a pond for the cultivation of fish,<sup>6</sup> and for the formation of ice.<sup>7</sup> And,

143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Thompson v. Moore*, 2 Allen, 350; *Ingraham v. Hutchinson*, 2 Conn. 584; *Ennor v. Baricell*, 2 Giff. 410, 6 Jur. N. S. 1233.

Pits for watering cattle cannot be enlarged to the injury of a lower proprietor. *Brown v. Best*, 1 Wils. 174.

Assize of nuisance lies against the heir of one who builds a house across a trench to the injury of fish in a pool which were accustomed to be refreshed by the water from the trench, if he refuses to reform it. 16 Vin. Abr. 33, (L).

<sup>3</sup>*Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Pitts v. Lancaster Mills*, 13 Met. 156; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 30 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Whaler v. Ahl*, 29 Pa. 98.

It is a reasonable use of the water of a stream for the upper proprietor to close the gates of his dam during dry seasons for the purpose of raising the head of water sufficient to work his mill, though he thereby, for a time, while the water was raising sufficiently to flow over the dam, prevented sufficient water from flowing down the stream to enable the lower owner to operate his mill, and during such period was unable to operate his own mill. *Keith v. Corey*, 17 N. B. 400.

<sup>4</sup>A mill owner whose wheel requires

50 per cent more water than the stream will supply will not be permitted to retain the water to raise a head for the wheel, to the detriment of lower proprietors. *Timm v. Bear*, 29 Wis. 265.

<sup>5</sup>*West Arlington Improv. Co. v. Mt. Hope Retreat (Md.)* 54 Atl. 982; *Fisher v. Feige*, 137 Cal. 39, 59 L. R. A. 333, 92 Am. St. Rep. 77, 69 Pac. 618; *Coleman v. LeFranc*, 137 Cal. 214, 60 Pac. 1011; *Parker v. Hotchkiss*, 25 Conn. 321; *Hartzall v. Sill*, 12 Pa. 248; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Whaler v. Ahl*, 29 Pa. 98; *Mabie v. Matteson*, 17 Wis. 1; *Mumpower v. Bristol*, 90 Va. 153, 17 S. E. 853; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

<sup>6</sup>*Wood v. Edes*, 2 Allen, 578.

<sup>7</sup>See ante, § 473a.

*DeBaun v. Bean*, 29 Hun, 236, Affirmed without opinion in 101 N. Y. 620.

The detention for two days and a night, for the purpose of forming an ice pond, is not an unreasonable interference with the rights of a mill owner below, if he obtains only 25 per cent of the power for his mill from the stream. *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757.

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<sup>1</sup>*Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525.

<sup>2</sup>*Hall v. Swift*, 4 Bing. N. C. 381, 1 Arnold, 157, 6 Scott, 167, 7 L. J. C. P. N. S. 209; *Ohio & M. R. Co. v. Thillman*,

solutely prevent interference with the flow of the stream would needlessly deprive the various riparian owners of much of the value of the stream. There could be no utilization of the water power, or any artificial pondage of the water for fish culture or the gathering of ice. Since every owner has a right to make such reasonable use of the water as he can make without interfering with the like rights of others, he has a right to check the flow of the stream long enough to accumulate a head of water sufficient to run his machinery, if it is adapted to the size and capacity of the stream.<sup>3</sup> But the machinery which is to be propelled by the water must correspond to the capacity of the stream. The owner will not be permitted to hold back the water to furnish power to a wheel which requires much more than the natural power of the stream.<sup>4</sup> In order to use the power of the stream advantageously, it must be accumulated in a pond; and the owner may, therefore, pond it in a reasonable manner for any legitimate purpose for which he is entitled to use it.<sup>5</sup> This right includes, not only the accumulation of water to operate machinery, but the formation of a pond for the cultivation of fish,<sup>6</sup> and for the formation of ice.<sup>7</sup> And,

143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Thompson v. Moore*, 2 Allen, 350; *Ingraham v. Hutchinson*, 2 Conn. 584; *Ennor v. Baricell*, 2 Giff. 410, 6 Jur. N. S. 1233.

Pits for watering cattle cannot be enlarged to the injury of a lower proprietor. *Brown v. Best*, 1 Wils. 174.

Assize of nuisance lies against the heir of one who builds a house across a trench to the injury of fish in a pool which were accustomed to be refreshed by the water from the trench, if he refuses to reform it. 16 Vin. Abr. 33, (L).

<sup>3</sup>*Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Pitts v. Lancaster Mills*, 13 Met. 156; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Whaler v. Ahl*, 29 Pa. 98.

It is a reasonable use of the water of a stream for the upper proprietor to close the gates of his dam during dry seasons for the purpose of raising the head of water sufficient to work his mill, though he thereby, for a time, while the water was raising sufficiently to flow over the dam, prevented sufficient water from flowing down the stream to enable the lower owner to operate his mill, and during such period was unable to operate his own mill. *Keith v. Corey*, 17 N. B. 400.

<sup>4</sup>A mill owner whose wheel requires

50 per cent more water than the stream will supply will not be permitted to retain the water to raise a head for the wheel, to the detriment of lower proprietors. *Timm v. Bear*, 29 Wis. 265.

<sup>5</sup>*West Arlington Improv. Co. v. Mt. Hope Retreat* (Md.) 54 Atl. 982; *Fisher v. Feige*, 137 Cal. 39, 59 L. R. A. 333, 92 Am. St. Rep. 77, 69 Pac. 618; *Coleman v. LeFranc*, 137 Cal. 214, 69 Pac. 1011; *Parker v. Hotchkiss*, 25 Conn. 321; *Hartzall v. Sill*, 12 Pa. 248; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Whaler v. Ahl*, 29 Pa. 98; *Mabie v. Matteson*, 17 Wis. 1; *Mumpower v. Bristol*, 90 Va. 153, 17 S. E. 853; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

<sup>6</sup>*Wood v. Edes*, 2 Allen. 578.

<sup>7</sup>See ante, § 473a.

*DeBaun v. Bean*, 29 Hun, 236, Affirmed without opinion in 101 N. Y. 620.

The detention for two days and a night, for the purpose of forming an ice pond, is not an unreasonable interference with the rights of a mill owner below, if he obtains only 25 per cent of the power for his mill from the stream. *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757.

visor to divide water, keep up weirs, and otherwise oversee the property for the joint benefit of the owners is beyond the power of the court in a suit for partition of a water power.<sup>35</sup> If the water power is part of the mill property, a petition for the partition of the power alone cannot be sustained.<sup>36</sup> But if the rights of the respective parties are determinable, they may be partitioned if it is practicable to do so.<sup>37</sup> The mere fact that the partition will be inconvenient does not prevent its being ordered.<sup>38</sup> But the privilege cannot be partitioned by a division of the use into periods of time.<sup>39</sup> A partition leaves flowage rights untouched.<sup>40</sup> The entire power of the dam should be partitioned, and not merely that necessary to operate existing mills.<sup>41</sup> Where two modes of partitioning water rights are presented, the court will not reject one because entailing more expense than the other, where the expense is inconsiderable in comparison with the disadvantages attending the other.<sup>42</sup> Rights in a particular section or bulkhead of the dam may be partitioned among persons in-

upon it, may be invalid. *Janesville Cotton Mfg. Co. v. Ford*, 55 Wis. 197, 12 N. W. 377.

<sup>35</sup>*Brown v. Cooper*, 98 Iowa, 444, 33 L. R. A. 61, 60 Am. St. Rep. 190, 67 N. W. 378; *Cooper v. Cedar Rapids Water Power Co.* 42 Iowa, 398.

<sup>36</sup>*Miller v. Miller*, 13 Pick. 237.

<sup>37</sup>*Doan v. Metcalf*, 46 Iowa, 120.

The difficulty of making a partition of water rights held in common, and the inconvenience of the other tenants, furnish no sufficient reason for refusing a tenant such relief. *Scovil v. Kennedy*, 14 Conn. 349.

The partition of a sawmill privilege made by a committee appointed by the court to make partition, by assigning to each of the owners as much water as would run through a gate of certain dimensions, unless shown to be very injurious to the property will not be disturbed. *Morrill v. Morrill*, 5 N. H. 134.

Rights in water used as power, to which one party is entitled to one-sixteenth and the other to the residue, may be apportioned. The land under the water and dam may be divided by metes and bounds, one part assigned to each party subject to the servitude and charge of keeping up and repairing the dam on that part by the one to whom it is assigned for the use of the other, and the right to use such portion of the waters of the pond as may be assigned to each owner. If necessary, the referees should in their report state what changes are

necessary in the construction of the race-way, bulkhead, or gates, so that neither party may use more than his share of the water; or, if it can be done, mark the water to be used by each party by some visible monument, or by controlling the fluids through the gates, or designating the number of inches each party is to use, or by the bulk quantity of water. *Cooper v. Cedar Rapids Water Power Co.* 42 Iowa, 398.

<sup>38</sup>*Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162.

<sup>39</sup>*Crorell v. Woodbury*, 52 N. H. 613.

<sup>40</sup>*Hills v. Dey*, 14 Wend. 204.

In *Kane v. Parker*, 4 Wis. 123, the point is raised in a contest over a partition of lands of tenants in common by commissioners appointed therefor, that such commissioners had no power to grant an easement to overflow part of such lands set off to the contestant, by a water power on a portion of the premises sold by order of the court; but the court, while affirming the correctness of such a proposition, decided that they had not created such an easement.

<sup>41</sup>*Morrill v. Morrill*, 5 N. H. 329.

In partitioning a water power it is not sufficient to give one of the parties the right to water enough to run two sets of burs and the necessary machinery for bolting, but the dimensions of the burs and the quantity of work to be done by them must also be specified. *Doan v. Metcalf*, 46 Iowa, 120.

<sup>42</sup>*Scovil v. Kennedy*, 14 Conn. 349.

terested therein, without making those interested in other portions of the dam parties to the action.<sup>43</sup> The division should be made according to the power rights of the parties, and not according to the amount which each had contributed to the construction of the dam.<sup>44</sup> The expense of erecting and setting in operation, by an engineer appointed by the court, of an apparatus for measuring and dividing the water, should be borne by all the parties to a suit for partition of a water power in proportion to the extent of their respective interests.<sup>45</sup> To make a partition between parties binding on grantees, there must be evidence of record or such possession as will put intending purchasers on notice.<sup>46</sup> In case the property cannot be partitioned, it may be sold to effect a partition of the property rights in it.<sup>47</sup> But in *Smith v. Smith*<sup>48</sup> it is said that a milldam and land overflowed by a mill pond, which constitute a water power necessary for the use of various mills which belong in severalty to the respective tenants in common of the dam and pond, should be partitioned and not sold, if the whole water power in connection with the mill pond held in severalty by either party will not be worth more than the same water power equally divided by a proper partition thereof, the half to be used with the mills of each in the hands of different proprietors.

**472. Destruction of rights.**—The rights of the riparian owner may be taken from him for public use under the power of eminent domain.<sup>1</sup> And they may be destroyed by adverse possession for the prescriptive period; but they are not lost by abandonment or mere failure to make use of them.<sup>2</sup> In certain of the more arid parts of the western portion of the United States, the doctrine of riparian rights has been held to be inapplicable by the courts and to have never existed there.<sup>3</sup> The rights resulting from this ruling are developed in a subsequent chapter.<sup>4</sup>

**473. Rights in products of water.**—In addition to the rights to have

<sup>43</sup>*Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234.

<sup>44</sup>*Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234.

<sup>45</sup>*Wamesit Power Co. v. Sterling Mills*, 158 Mass. 445, 33 N. E. 503.

<sup>46</sup>Occupancy of mill sites and use of water as appurtenant thereto by remote grantees of tenants in common of the water power is not notice to intending purchasers of a parol partition of the water rights by the tenants in common before parting with the interest which the intending purchasers seek to acquire,—especially where there is of record a partition by deed subsequent to that period. *Forrest Mill Co. v. Cedar*

*Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

<sup>47</sup>*Allard v. Carleton*, 64 N. H. 24, 3 Atl. 313; *Baldwin v. Aldrich*, 34 Vt. 526, 80 Am. Dec. 695, *Limiting Brown v. Turner*, 1 Aik. (Vt.) 350, 15 Am. Dec. 696; *Smith v. Smith*, Hoffm. Ch. 506.

<sup>48</sup>10 Paige, 470.

<sup>1</sup>*Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

<sup>2</sup>*Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613, 24 N. E. 774.

<sup>3</sup>*Walsh v. Wallace* (Nev.) 67 Pac. 914.

<sup>4</sup>See *post*, chapter XXII.

the water flow past the land and to make such use of it as can be made during its passage, the riparian owner is entitled to the benefit of whatever the water produces. He is entitled to take the fish from the water.<sup>1</sup> And he may make such use of the stone and sand<sup>2</sup> in the bed of the stream as he can make without injury to other individuals or the public. He also has a right to the seaweed and other products which he can find in the water.<sup>3</sup> Where the owners of several farms have a right in common in a lot to take the seaweed therefrom which is washed on the land by the sea, the owner of one of such farms may, without joining the other farm owners, maintain an action against one who wrongfully takes seaweed from such common lot.<sup>4</sup> The right to take seaweed on another's land cannot be acquired by long-continued use as one of the public.<sup>5</sup> While the words "rights, liberties, privileges, and appurtenances" are not effectual to create *de novo* a right of common to take seaweed and sea manure from a beach, yet, when the plat and the verbal description accompanying it show the metes and bounds of the land conveyed, and that certain incorporeal rights of common and the like are annexed to and to be enjoyed with the land conveyed, and the deed refers to the plat for a more full description of what was intended to be conveyed, the incorporeal rights thus shown to be intended to be annexed to the land, and which it is capable of supporting, will pass by the deed.<sup>6</sup>

**473a. Ice.**— Among the rights of a riparian owner which may be regarded as valuable is that of taking ice from the stream. The owner of the soil over which a stream of water flows has a right to take ice therefrom in any quantities and for any purpose so long as he does not unreasonably interfere with the quantity of water flowing in the stream to the injury of lower proprietors.<sup>1</sup> And to facilitate this use

<sup>1</sup> See *ante*, chapter xiv.

<sup>2</sup> The rights of a riparian proprietor are infringed by another who digs sand above low-water line, knowing that he is upon the other's land, although it is then under the surface of the water. *Com. v. Hipple*, 7 Pa. Dist. R. 399.

<sup>3</sup> A mere right of getting seaweed on the beach in front of land is an incorporeal hereditament, and cannot be severed from the estate to which it is annexed; but the owner having taken it from the beach is not bound to use it on the land to which the right is attached. He may even use it on the land of others, or lease his privilege while he remains the owner of the land to which it is attached. *Phillips v. Rhodes*, 7 Met. 322.

The right of taking seaweed from the beach in front of a particular field is not affected by the gradual changes taking place in the shore. Wherever the beach exists in front of the described field the right may be exercised. *Ibid.*

<sup>4</sup> *Kenyon v. Nichols*, 1 R. I. 106.

<sup>5</sup> *Hill v. Lord*, 48 Me. 83.

One who has entered upon an open beach and removed seaweed from it for a number of years, and during the same time has allowed others to enter upon it and remove seaweed, acquires no such possession as will enable him to maintain an action for trespass upon it. *Tappan v. Burnham*, 8 Allen. 65.

<sup>6</sup> *Knowles v. Nichols*, 2 Curt. C. C. 571, Fed. Cas. No. 7,897.

<sup>7</sup> *Gehlen Bros. v. Knorr*, 101 Iowa, 700,

of the stream, he may pond the water.<sup>2</sup> Ice which is formed upon a pond is property, which cannot be interfered with without liability to the owner.<sup>3</sup> One taking ice from another's property without right is subject to indictment.<sup>4</sup> To be entitled to the exclusive right of taking the ice, the claimant must have all the rights of a riparian owner. Therefore if his boundary is fixed at low-water mark, he does not own the ice, although he obtained his title for the avowed purpose of constructing an icehouse.<sup>5</sup> As between the owner of the soil and one having a right to flow the land for creating a water power, the title to the ice is in the former.<sup>6</sup> Therefore, a riparian owner along a non-navigable stream has the right to use all the water necessary for any

32 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Searle v. Gardner*, 12 Cent. Rep. 420, 22 W. N. C. 73, 13 Atl. 835; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 402; *Edgerton v. Huff*, 26 Ind. 35; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

The riparian owner on a non-navigable stream is the owner of the ice formed upon the water, though the ice field is made by flowage caused by a milldam of a riparian owner below; and the latter, maliciously and unnecessarily drawing the water from the pond, and thus destroying the ice privilege, is liable in damages to the former. *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

<sup>2</sup>*Myer v. Whitaker*, 55 How. Pr. 376. Criticising and Dissenting from *Marshall v. Peters*, 12 How. Pr. 218.

A riparian owner has a right to pond the water for the purpose of gathering ice, provided he acts in a reasonable manner in view of the size and capacity of the stream and the reasonable rights of the riparian owners below; and this right cannot be affected by the appropriation to public use of a parallel stream which unites with his stream to form a larger one so that lower owners on the larger stream must in the future look to his stream for their whole supply. *Water Comrs. v. Perry*, 69 Conn. 461, 37 Atl. 1059.

The owner of an ice pond may, in order to clean it, drain the water off and then hold the water back until it is refilled, although the effect is to stop mills lower down the stream. *DeBaun v. Bean*, 29 Hun, 236.

The erection of a dam on a non-navigable stream by a riparian owner to

form a pond from which to harvest ice is not an unreasonable use of the water which will entitle the lower mill owner to an injunction, it appearing that easily about 25 per cent of the power used by the mill was furnished by the water and that it took only two days and a night to fill the upper pond. *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 38 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757.

But in an action to recover for the value of ice taken from a pond, it is no defense that one who had granted the proprietor of the pond the right to overflow lands, which form but a small part of the tract overflowed, permitted the removal of the ice over his land, since he had no right to deprive the owner of the pond of the use of the water, and the defendant is especially liable where, in removing the ice, he cut a channel across the entire pond, removing and destroying the ice formed over land of the pond owner. *Myer v. Whitaker*, 55 How. Pr. 376.

<sup>3</sup>Ice formed on a natural water course constitutes a part of the land to which it is attached and is the property of the riparian owner to the extent of his ownership of the bed of the stream, and he may prevent its severance and removal. *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224.

One who, with the consent of the owner of a pond, has anchored a large piece of ice to the shore to prevent it from going out during a freshet, may recover its value from a person who, before the ice is actually removed or stacked, appropriates it. *Myer v. Whitaker*, 55 How. Pr. 376.

<sup>4</sup>*State v. Pottmeyer*, 30 Ind. 287.

<sup>5</sup>*Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 27 Am. St. Rep. 51, 50 N. W. 514.

<sup>6</sup>See *post*, § 503.



drowned, and his grass depreciated, an action will lie for the damage.<sup>21</sup> A mill owner who withholds more water than he has a right to at one time cannot compel the lower owner to receive and credit on the injury excessive quantities let down at other times.<sup>22</sup> Nor can damages caused by flowage from an upper milldam be set off against benefits caused to the property by a ditch dug by the mill owner through his own property at the time the mill was erected.<sup>23</sup> It is the duty of the lower owner to diminish his injury as much as possible.<sup>24</sup> But the owner of land on a stream is not bound to remove an obstruction lower down the stream to protect his land from the effects of unusual quantities of water turned into the stream by an upper proprietor.<sup>25</sup> The upper proprietor upon a stream cannot acquire a right to hold back the water by the fact that the lower proprietor has constructed a reservoir on his own land to regulate the flow of the water, so that less is required than would be required by the natural flow. But, in case the lower owner desires to abandon the reservoir, he may insist on the natural flow of the stream, uninterrupted by the acts of the upper proprietor, unless the right to hold back the water has been acquired by adverse use for the statutory period.<sup>26</sup> That there are other causes contributing to the injury is no defense to an action for injuries by the wrongful manipulation of the water.<sup>27</sup> If the water is accumulated wrongfully, the one responsible for the accumulation will act at his peril in turning it into the stream.<sup>28</sup> For each successive inundation of property by freshets to which it is subjected by the removal of water gates from the head race on which it is located, such removal not being *per se* a nuisance,

<sup>21</sup>*Gerrish v. Newmarket Mfg. Co.* 30 N. H. 484.

<sup>22</sup>*East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631.

<sup>23</sup>*Gile v. Stevens*, 13 Gray. 146.

<sup>24</sup> If the owner of a lower pond refuses to open his gate upon being notified that the owner of the upper dam is about to remove it to clear the mud from the pond, so that the lower pond is filled up and throws the water back on the upper proprietor, the latter may recover for his injury, but the owner of the lower pond cannot recover for the filling up of his pond. *Hardin v. Ledbetter*, 103 N. C. 90, 9 S. E. 641.

<sup>25</sup>*Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540.

<sup>26</sup>*Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

<sup>27</sup> If an unnatural accumulation of water has been wrongfully let down onto a mill owner's property, to the injury of

his flume, it is no defense to show that the flume was weak and improperly constructed, if it was sufficient for all ordinary or natural contingencies. *Frye v. Moor*, 53 Me. 583.

It is no defense to an action for damages by the overflowing of land resulting from letting water out of a dam in unusual quantities, that a bridge in the stream below set back the water when so let out, where the defendant had knowledge of such obstruction and the effect thereof. *Folsom v. Apple River Log-Driving Co.* 41 Wis. 602.

<sup>28</sup> One who wrongfully lets down an unnatural accumulation of water onto another's mill property cannot justify by showing that such flow did not exceed in magnitude some which have arisen from natural causes. "He cannot assume the right to create a freshet whenever he pleases." *Frye v. Moor*, 53 Me. 583.

but becoming such only at times of high water when large and unusual quantities of water are thrown on such property, a new cause of action accrues against which the statute of limitations begins to run, not from the time of the removal of the water gates, but from the time of the accrual of each right of action.<sup>29</sup>

**477. Other interference with flow.**—The upper owner is not permitted to obstruct the flow of the stream by casting *debris* into it, or felling trees, or lopping their branches in such a way that they fall into the stream and obstruct the flow.<sup>1</sup> So, if a log owner places such quantities in the stream as to obstruct the flow of water to a mill, he will be liable.<sup>2</sup> As appeared from the discussion of the right to float logs in a stream,<sup>3</sup> the navigator has no right to manipulate the water in such a way that injury is done to the riparian owner. Therefore, the upper owner has no right to construct a splash dam for the purpose of floating his logs down to market if he thereby exceeds the capacity of the stream to the injury of the lower owner.<sup>4</sup> The stream may be ponded for the purpose of creating a watering place for stock if the water not consumed is permitted to flow down to the lower land.<sup>5</sup> But a dam cannot be constructed to protect the upper land if the effect is to deprive the lower land of needed water.<sup>6</sup> The rule

<sup>29</sup>*Augusta v. Lombard*, 101 Ga. 724, 31 Mich. 336, 18 Am. Rep. 184; 22 S. E. 994.

<sup>1</sup>*Lawson v. Price*, 45 Md. 123.

In *Lambert v. Bessey*, T. Raym. 421, which was an action for false imprisonment, it was said that in all civil acts the law does not so much regard the intent of the actor as the loss and damage of the party suffering; and illustrated by saying that the owner of a mill has an action against one felling a tree on land adjoining a water course, which falls into the water and obstructs the flow of the stream.

<sup>2</sup>In an action against a log owner for the unlawful obstruction of a stream, whereby the flow of water to a mill is prevented, it is no defense that the dam was constructed without proper authority from the board of supervisors, where the defendant is not injured by its maintenance. *Wooden v. Mt. Pleasant Lumber & Mfg. Co.* 106 Mich. 412, 64 N. W. 329.

<sup>3</sup>See *ante*, § 34.

<sup>4</sup>A booming company cannot retain the water for the purpose of obtaining a sufficient quantity to float logs down the stream, and then let it all down at once, if the effect is to deprive the lower riparian owner of the power to run his mill. *Thunder Bay River Boom Co. v. Speech-*

*ly*, 31 Mich. 336, 18 Am. Rep. 184; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813.

Log owners who maintain dams for floatage purposes will be restrained from retaining the waters of the river to such an extent as to prevent a lower mill owner from getting constantly the natural volume of the stream, and from letting out floods which will endanger his mill. *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649.

<sup>5</sup>*Redman v. Foman*, 7 Ky. L. Rep. 199.

Under the rule that use depended on appropriation it was held that pits for watering cattle could not be enlarged to the injury of lower owners. *Brown v. Best*, 1 Wils. 174.

<sup>6</sup>*Bliss v. Johnson*, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785.

Where the owner of land on which a stream has its source in a pond fed by springs, builds a dam across the head of the stream and thereby interferes with the water supply of a lower riparian owner, it is no defense in an action by such lower proprietor against the one creating the obstruction, that the defendant ponded the water for the purpose of killing vegetation growing on the land to purify the water, which a city with which defendant has a contract

with respect to the obstruction of water courses applies to the shutting off of the flow of the tide to land or mills which are dependent upon such flow for their value.<sup>7</sup> But to give a right of action the injury must be substantial, and not merely an interference with the flow.<sup>8</sup>

**477a. Drawing down natural reservoir.**—Not only is the lower proprietor protected from acts of the upper one which deprive him of his rightful use of the water, but the upper one is also protected against acts of the lower one which interfere with the comfortable enjoyment of his property. The owner of land on the margin of a natural lake or pond has a right to have the natural level of the water maintained, so as to permit him to enjoy the advantages attendant upon riparian ownership, and to protect him from the disadvantage of having a strip of uncovered lake bottom left in front of his property. Therefore the owners of mills on the outlet of a natural pond cannot lower the outlet, and draw down the water below its natural low-water line.<sup>1</sup> Such act cannot even be authorized by the legislature without making compensation to the injured property owner.<sup>2</sup> In a suit to maintain the natural level of a lake all persons contributing to the lowering of the level may be made parties defendant, although they act independently.<sup>3</sup>

**478. Facilitating evaporation from stream.**—The ponding of water, whereby the current is rendered sluggish and the surface increased, facilitates the evaporation of the water; and at some seasons of the year a perceptible quantity may be lost to the lower proprietor by

to supply water may need in the future. He has no right ultimately to intercept and appropriate the water permanently for the use of the city, and he has no right to intercept and accumulate it, even temporarily, with a view to such ultimate permanent appropriation. *Hove v. Norman*, 13 R. I. 488.

<sup>1</sup> An action by the owner of salt meadow situated above a mill dam, for obstructing the natural ebb of the tide and thereby injuring the grass of his meadow, is an action respecting an easement on real estate within the meaning of a statute giving jurisdiction of such action. *Cary v. Daniels*, 5 Met. 236; *Turner v. Blodgett*, 5 Met. 240, note.

<sup>2</sup> *Carvalho v. Brooklyn & J. B. Turnp. Co.* 56 App. Div. 522, 67 N. Y. Supp. 539.

Where a person claims the right to have tide water flow in a raceway in a river for the purpose of operating a tide mill, but does not show that such an easement is appurtenant to his mill, he cannot maintain an action for the inter-

ference with that right on the ground of actual possession and enjoyment. where it appears that at the time the right was interfered with the mill wheel had been taken out for repairs and the tides were not being used to run the mill; and especially is this the case where it appears that those obstructing the raceway were not mere wrongdoers but were acting under authority from the state. *Folsom v. Freeborn*, 13 R. I. 200.

<sup>3</sup> *Fernald v. Knox Woolen Co.* 82 Me. 48, 7 L. R. A. 459, 10 Atl. 93.

<sup>4</sup> See *ante*, p. 405.

And an act authorizing the raising of a lake above low-water mark as a reservoir to hold water for hydraulic purposes does not give or imply the power to lower the lake below low-water mark. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.* 79 Wis. 297, 48 N. W. 371.

<sup>5</sup> *Draper v. Brown*, 115 Wis. 361, 91 N. W. 1001.

such evaporation. The question then arises, To what extent has he the right to complain of such use? So far as the courts have answered this question the rule seems to be that so long as the upper owner makes merely such reasonable use of the stream as his needs require the lower owner cannot complain if the evaporation is thereby somewhat increased.<sup>1</sup> So, the cutting of trees along the stream cannot be enjoined merely because it would cause the water to evaporate in greater quantities, and the motive with which it is done is immaterial.<sup>2</sup> On the other hand the maintenance of a dam by an upper proprietor, which backs up the water over a large surface causing a large amount of it to be lost by evaporation and absorption, and preventing any water from flowing down in its natural course to a lower proprietor, is not a reasonable use of such water by said upper proprietor.<sup>3</sup> So, it is not a reasonable use of water for a riparian proprietor, who desires to use the water for cattle, to build dams and spread the water out in such manner that it is lost by evaporation and absorption, so as to injure the proprietor below him on the stream.<sup>4</sup> And the water cannot be spread out for irrigation in such a way that a large quantity is lost by evaporation and absorption.<sup>5</sup> Such acts constitute a wrongful diversion of the water.<sup>6</sup>

**479. Interference with flow by improvements.**—Interference with the flow of a stream by the construction of a railroad or other public improvement is a taking of property for which compensation must be made. But the compensation is to be settled in a statutory proceeding, and therefore, where interference with a stream is in pursuance of legislative authority granted for the purpose of constructing a work of public utility upon making compensation, the party obstructing the stream is liable to an action for only such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods.<sup>1</sup> A railroad company will not be enjoined from building an embankment in the construction of its road across a pond the water of which is used by the plaintiff for milling purposes, where his land is not taken and the damage is indirect

<sup>1</sup>*Dorman v. Amcs*, 12 Minn. 451, Gil. 347; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 757.

<sup>2</sup>*Fisher v. Feige*, 137 Cal. 39, 59 L. R. A. 333, 92 Am. St. Rep. 77, 69 Pac. 618.

<sup>3</sup>*Barneich v. Mercy*, 136 Cal. 205, 68 Pac. 539.

<sup>4</sup>*Ferra v. Knipe*, 28 Cal. 341, 87 Am. Dec. 128.

<sup>5</sup>*Anthony v. Lapham*, 5 Pick. 175.

<sup>6</sup>*White v. East Lake Land Co.* 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393; *Anthony v. Lapham*, 5 Pick. 175; *Pettibone v. Maclem*, 45 Mich. 381, 8 N. W. 84.

<sup>1</sup>*Bellinger v. New York C. R. Co.* 23 N. Y. 42. But see *post*, § 904.

or consequential.<sup>2</sup> A railroad company which, in the construction of its road, has built a wall whereby the water power is diminished, will not be compelled to remove the wall, where the owner granted the right of way after the wall was constructed and the railroad company has agreed to restore the water power.<sup>3</sup> Only a public corporation can be clothed with the privilege of unreasonably diminishing the power of a lower mill owner, or of flooding it by casting an unusual quantity of water upon it.<sup>4</sup>

**479a. Causing channel to fill up.**—The action of the water as it falls in rain and melts from snow and finds its way into the streams has a constant tendency to carry with it sand and soil, and to cause the channels of the streams to fill up. This tendency is generally enhanced in places where the slope toward the stream is abrupt, by loosening the soil on the surface as is done in the ordinary process of cultivation. This is one of the ordinary uses which a landowner has a right to make of his property, and there is no liability upon his part for injury caused to the lower owner by a filling of the stream caused by his reasonable use of his property in the ordinary manner.<sup>1</sup> Even the construction of a roadbed for a railroad near the stream, in such a way as to cause the sand to be washed into the stream, is not a tak-

<sup>1</sup>*Barnes v. South Side R. Co.* 2 Abb. Pr. N. S. 415.

But a railroad company constructing its railroad across a mill race will be restrained from constructing a culvert of such dimensions as to interfere with the operation of the mill, although a statute authorizes it to construct its railway and make compensation for injuries inflicted, as the person injured is not restricted to such remedy where the injury is one that may be avoided. *Coats v. Clarence R. Co.* 1 Russ. & M. 181, 8 L. J. Ch. 72.

<sup>2</sup>*Woodford v. Brinker*, 47 App. Div. 632, 63 N. Y. Supp. 884.

Where the mill owner is entitled to a restoration of the water power after the construction of the road, he may recover rental value of the premises from the time the power should have been restored. *Ibid.*

But he cannot recover for the diminution in value of the premises, where the cost of restoring the efficiency of the water power would be less, and the burden is on him to show such cause that the court may know what rule of damages to apply. *Ibid.*

He may recover permanent damages for the diminution in value of his property, or damages for the temporary loss

of its use, but cannot have both, since the measure of the permanent damages would be the value of the property at and after the breach of the contract up to the time when compensation was made, which would cover the entire loss sustained. *Ibid.*

<sup>3</sup>*Finney v. Somerville*, 80 Pa. 59.

<sup>4</sup>*Texas & S. R. Co. v. Meadows*, 73 Tex. 32, sub nom. *Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145.

The owner of land sloping to a pond may cultivate and fertilize it in the ordinary way for garden purposes, without becoming liable to the owner of the pond for diminishing the water supply by the large amount of solid matter carried into the pond by surface drainage. *Middlesex Co. v. McCue*, 149 Mass. 103, 14 Am. St. Rep. 402, 21 N. E. 230.

It seems that where a recovery is had by a mill owner for causing sand to be washed into his pond and thereby destroying his motive power, the measure of damage is not the depreciation in the value of the mill, but the cost of restoring the pond to its original capacity, where such cost would be less than the depreciation in the value of the mill. *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, sub nom. *Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145.

ing of property which requires compensation to be made to the riparian owner.<sup>2</sup> So, a municipal corporation is not liable for suffering stones and materials to remain in a raceway where they were carried by a violent storm during the repair of a road at a point where it crossed the raceway.<sup>3</sup> But if the deposit in the stream is not caused by natural cultivation of the soil, but by an erection of structures in or across the stream, such use is not a natural one; and the one responsible for it may be held liable for injuries thereby inflicted. Therefore the owner of a boom so located and constructed as to cause a deposit of sand and *débris* in a stream, which injures a natural or artificial dam of another, is liable for the damages occasioned thereby.<sup>4</sup>

**480. Right of lower owner to remove obstruction.**— If the upper owner places an unlawful obstruction in the stream the lower owner may remove it so far as he can do so peaceably, doing no unnecessary injury to the upper proprietor.<sup>1</sup> But the obstruction cannot be abated

<sup>2</sup> By Tex. Const. art. 1, § 17, which provides that "no person's property can be taken, damaged, or destroyed for or applied to a public use without adequate compensation being made," it was not intended to give an action against those constructing public works for acts which, if done by persons in pursuit of a private enterprise would not have been actionable. Hence, where a railroad company in constructing its railway over land the surface of which consists of sand displaces sand which, as the effect of heavy rains, is washed into a stream flowing into a mill pond, the company is not liable to a mill owner for the destruction of his motive power by the filling of the pond with the sand, where it appears that the roadbed is skilfully constructed, and that the natural flow of water is not changed or impeded thereby. *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, *sub nom. Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 565, 11 S. W. 145.

<sup>3</sup> *Snook v. Brantford*, 14 U. C. Q. B. 255.

<sup>4</sup> *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 Am. St. Rep. 319, 41 S. E. 400.

<sup>1</sup> *Miner v. Gilmour*, 12 Moore, P. C. C. 131, 7 Week. Rep. 328; *Strong v. Benedict*, 5 Conn. 210.

In *Darlington v. Painter*, 7 Pa. 473, it is said that the owner of a water course through the land of another, whether to lead the stream to his ground or to discharge it therefrom, may enter to remove obstructions from natural or artificial courses.

This is the rule with respect to water courses generally, whether natural or artificial. See note to *Carson v. Gentner*, 43 L. R. A. 130.

In *Raikes v. Townsend*, 2 Smith, 9, 7 Revised Rep. 776, an action in trespass for entering the plaintiff's close and destroying a dam constructed across a rivulet, wherein a verdict was entered for the defendant, he having justified on the ground that the dam obstructed the flow of the stream so as to deprive him of the use of the water, the plaintiff moved to set aside the verdict and for judgment upon the ground that this right of abatement is confined merely to a nuisance to a house, a mill, or to land; citing 2 Rolle's Abr. 144, Pl. 2 & 3, where it is said that if a man in his own soil erects a thing which is a nuisance to my mill or my house or land, I may stand on my own land and abate it, from which he argued the right of abatement should be confined only to the cases there put. To this, Lord Ellenborough, in overruling the motion, said: "Those cases are only an instance. You should come with a very strong case to apply to enter judgment for the one party instead of the other, after a verdict, and the court left the plaintiff to bring his writ of error."

In cases which have been decided under the doctrine of prior appropriation it has been held that an appropriator can go upon the land of an upper proprietor and remove obstructions, such as sediment, from the bed of the stream, so as to permit the water to flow in its natural course to the head of the ditch.

until it becomes an actual nuisance.<sup>2</sup> An injunction to restrain lower mill owners from cutting down the dam and gates of the complainant will be refused until the question is settled in an action at law, where the complainant's title is denied in good faith.<sup>3</sup> But the one attempting to remove the obstruction must be careful not to exceed his rights, for, if he does so, he will be liable as a trespasser. Therefore, where one having a right to place in the stream an obstruction composed of stones and a board to aid in irrigating his land, fastened the board by stakes, thereby giving it a permanent character, upon which a lower owner undertook to remove the obstruction, it was held that, while he might remove the stakes, he would be liable if he removed the board also.<sup>4</sup>

**481. Right to object to obstruction.**—In order to entitle a lower owner to object to the obstruction of a water course, he must have all the rights of a riparian owner. Therefore, if he has purchased property according to a plat which does not observe the riparian rights, but divides the water according to metes and bounds, he has no right to object to interference by upper owners with the flow of the stream.<sup>1</sup> The riparian owner must show injury before he has a cause of complaint.<sup>2</sup> So, if by the improvements made by the upper owner the supply of water is actually improved, the lower owner has no cause of action.<sup>3</sup> And although the upper owner changes his works the lower owner cannot complain if he is not injured thereby.<sup>4</sup> But the

*Crisman v. Heiderer*, 5 Colo. 589; *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475.

<sup>1</sup>*King v. Wharton*, 12 Mod. 510.

<sup>2</sup>*Perry v. Parker*, 1 Woodb. & M. 280, Fed. Cas. No. 11,010.

<sup>3</sup>*Greenslade v. Halliday*, 6 Bing. 379, 4 Moore & P. 71, 8 L. J. C. P. 124.

<sup>4</sup>*Hoehl v. Muscatine*, 57 Iowa, 444; *Fulleam v. Muscatine*, 57 Iowa, 457, 10 N. W. 837.

<sup>1</sup>*Williams v. Morland*, 2 Barn & C. 910, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579; *Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781; *Norway Plains Co. v. Bradley*, 52 N. H. 109; *Shreve v. Voorhees*, 3 N. J. Eq. 25.

The lower proprietor cannot complain of the upper dam, if enough water comes down the stream to run the lower mills; and the mere fact that the difficulty of getting logs is increased, so that it requires an extra hand for each twenty-five logs, is not sufficient to give a right of action. *Palmer v. Mulligan*, 3 Caines, 320, 2 Am. Dec. 270.

*Edleston v. Crossley*, 18 L. T. N. S. 15, was an action to restrain the defend-

ant from interfering with a channel and flow of the water of a water course. The water course ran along the side of a road and at the place in question had been covered over with a culvert, and the defendant, in excavating and constructing a building, had caused the culvert to cave in and obstruct the flow of the water. and for the purpose of remedying the defect had constructed a pipe to carry the water to the lower proprietor. The court refused to grant an injunction on the ground that the remedy proposed by the defendant of carrying the water by means of a drain, while possibly reducing the quantity of water which had formerly flowed, would be sufficient if it sent to the plaintiff's works a proper quantity for his use.

Damages cannot be recovered for the mere exposure of the lower milldam to the sunshine by the holding back of the water. *Louisville & N. R. Co. v. Beauchamp*, 19 Ky. L. Rep. 398, 40 S. W. 679.

<sup>2</sup>*Re Thompson*, 85 Hun, 438, 32 N. Y. Supp. 897.

<sup>3</sup>In an action against an upper ripar-

cause of action arises as soon as the lower owner, upon attempting to make use of his rights, finds that the upper owner has interfered with them.<sup>5</sup> But, since the obstruction of the water by the upper owner under a claim of right may ripen into an adverse right, by lapse of time, the lower owner has a right to make his objection to prevent such result; and the fact that the lower owner is not injured will be immaterial under such circumstances.<sup>6</sup> The lower owner may estop himself from contesting the right of the upper owner by permitting him to construct his works without objection, and with knowledge that his own rights will be injured.<sup>7</sup> And he may be prevented by laches from raising any objection.<sup>8</sup> But the fact that he himself obstructs the flow of the water will not prevent his complaining of such act on the part of the upper owner.<sup>9</sup> So, the right to complain may be barred by the statute of limitations.<sup>10</sup> The rights of the respective parties may be altered by contract.<sup>11</sup> The question of the reasonableness of the act of the upper owner is one of fact for the jury.<sup>12</sup>

ian proprietor for the diversion of water by the erection of a dam of much greater height than he was legally entitled to, plaintiff may not recover where it appears that by virtue of a twenty years' user defendant was entitled to retain the water for certain hours and times during the day, and that the dam erected, although higher, did not retain the water for a longer period each day than he was entitled to under his twenty years' user. *Tucker v. Paren*, 8 U. C. C. P. 63.

<sup>5</sup>*McLaren v. Cook*, 3 U. C. Q. B. 299; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405.

<sup>6</sup>*Roberts v. Gwyrfai* [1899] 1 Ch. 583, 68 L. J. Ch. N. S. 233, 80 L. T. N. S. 107, 47 Week. Rep. 376, 63 J. P. 181; *Norbury v. Kitchen*, 15 L. T. N. S. 501; *Ware v. Allen*, 140 Mass. 513, 5 N. E. 629.

<sup>7</sup> But a riparian owner is not unconscionably silent while the owner next above him is erecting valuable works, when the dam and other works could be made available for the purposes of their erection without unduly or essentially interfering with the rights he is entitled to exercise; and the one making the erection must be presumed to be informed of limitations on his water rights. *Aquackanonk Water Co. v. Watson*, 20 N. J. Eq. 366.

And where an upper proprietor had constructed a dam on his own land across a stream the waste water of which was sufficient for the use of the

lower proprietor, such lower proprietor by paying an annual sum for the privilege of going on to the upper proprietor's land and opening the dam at his pleasure did not thereby admit such upper proprietor's right to maintain the dam at his own pleasure and regardless of the rights of the lower proprietor who is entitled to have the waste water continue to flow as before. *Buell v. Read*, 5 U. C. Q. B. 546.

<sup>8</sup> A mill owner is guilty of laches depriving him of the right to equitable relief where he waits three years after an upper proprietor has constructed water works which he claims interferes with his rights, before bringing his bill to compel the defendant to pull down his works. *Weller v. Smeaton*, 1 Cox, 102, 1 Bro. Ch. 572.

<sup>9</sup>*Clarke v. French*, 122 Mass. 419.

It is no defense to an action by the owner of a mill for injury thereto caused by the act of another in obstructing the stream upon which it is situated, that such owner's mill dam obstructed the navigation of the stream, declared navigable at that point by law, so that it constituted a public nuisance. *Haller v. Pine*, 8 Blackf. 175, 44 Am. Dec. 762.

<sup>10</sup>*Lone Tree Ditch Co. v. Rapid City Electric & Gaslight Co.* (S. D.) 93 N. W. 650.

<sup>11</sup> The lessee of a mill and water course may pen up the water whenever necessary for the operation of the mill, although he covenanted in his lease not to pen up said stream to the prejudice of the lower



**482. Who may bring suit?**—A prima facie right to the use and flow of a stream is sufficient to entitle a plaintiff to recover for the wrongful obstruction thereof by one who shows no right or title to such use in himself.<sup>1</sup> This permits the action to be brought by one in possession as tenant, for injuries done to his interests.<sup>2</sup> And the landlord may also recover for the injury to his interest.<sup>3</sup> A reversioner occupying land by parol permission of the life tenant may maintain an action for injury occasioned to the land by the stoppage of a water course flowing through it.<sup>4</sup> The right of recovery arises upon the natural right to the flow of the stream, and not on a prescriptive use of the water.<sup>5</sup> Lower owners whose common right is injured by the obstruction may join in the action for its abatement.<sup>6</sup>

**483. Remedy.**—If the water is withheld, and then precipitated in a body onto the property of the lower owner to its injury, the form of action is trespass.<sup>1</sup> But if the injury is caused by the withholding of the water the action is upon the case.<sup>2</sup> Equity will not take jurisdiction of a bill to remove an obstruction from the stream if plaintiff's rights are not clear, or if the recovery of damages will be an adequate remedy, or if there is no pressing necessity for the inter-

mills, for the covenant will not operate to deprive him of the right to use the water. *Martin v. Stiles*, Mosely, 145.

The owner of a paramount water right the extent of which is limited to the amount of water necessary to run a factory as constituted at the time of the creation of the power will be allowed, as against the subordinate water-power owners, to accumulate water to the top of the dams, where former owners of the power were accustomed to do so, and the right thus asserted had been acquiesced in by other parties in interest. *Dexter Sulphite Pulp & Paper Co. v. Frontenac Paper Co.* 20 Misc. 442, 46 N. Y. Supp. 363.

<sup>1</sup>*White v. East Lake Land Co.* 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393; *Hettrich v. Deachler*, 6 Pa. 32; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66.

<sup>2</sup>*Austin v. Dickson*, 11 U. C. C. P. 594; *Austin v. Snyder*, 21 U. C. Q. B. 299.

Seisin in fact is not necessary to entitle the owner of a mill to maintain an action against another for constructing a mill and interfering with plaintiff's use of the water, seisin in law being sufficient. So held in an action by the heir of the deceased mill owner, who during

his life time had been seised in fact. *Russell v. Handford's Case*, 1 Leon. 273.

<sup>3</sup>*Austin v. Dickson*, 11 U. C. C. P. 594.

But the lessee of a water right cannot have a *quod permittat* against an upper mill owner for detaining the water, as that lies only for the owner of the inheritance. *Martin v. Stiles*, Mosely, 145.

<sup>4</sup>*Cress v. Varney*, 17 Pa. 497.

<sup>5</sup>*Ashley v. Ashley*, 4 Gray, 197.

<sup>6</sup>*Sands v. Trefuscs*, Cro. Car. 575.

<sup>7</sup>*Barnes v. Racine*, 4 Wis. 454.

Counts for injury to two mills upon a stream by the manner of using an upper dam may be joined in one action, although the right to the use of the water for one of them depends upon the riparian right of the owner, while the use of the water for the other depends upon a contract with the owner of the dam. *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229, 40 N. W. 809.

<sup>8</sup>*Kelly v. Lett*, 35 N. C. (13 Ired. L.) 50.

<sup>9</sup>A person may maintain an action on the case for obstructing the flow of water, although he has removed the obstruction, as he is entitled to recover the damages which have accrued. *Kendrick v. Bartland*, 2 Mod. 253.

ference of such court.<sup>3</sup> Injunction will not be issued for trivial injuries, nor unless it is necessary to prevent irremediable injury.<sup>4</sup> As said in *Parker v. Winnipiseogee Lake Cotton & Woollen Mfg. Co.*<sup>5</sup> a court of equity will not enjoin a manufacturing company from obstructing the natural flow of water from a lake, whereby it is alleged the supply of a lower riparian owner is rendered unequal in quantity, unless the right of the complainant is clear and well-defined and there is danger of irreparable injury, or unless an injunction is necessary to prevent a multiplicity of suits or to suppress oppressive and interminable litigation. But the rights in a water course being common, their adjustment is of a nature which is peculiarly within the machinery of a court of equity; and if there is no dispute as to the rights of the parties, but merely as to whether or not one is making excessive use of his rights, equity may take jurisdiction of the suit to adjust the rights.<sup>6</sup> If necessary, an injunction *pendente lite* may be issued.<sup>7</sup> The court having taken jurisdiction to adjust the rights of the parties will not enjoin all obstruction on the part of the upper proprietor, but only such as exceeds his rights.<sup>8</sup> The court will not,

<sup>3</sup>*Weller v. Smeaton*, 1 Cox C. C. 102, 1 Bro. Ch. 572; *Dentson Paper Mfg. Co. v. Robinson Mfg. Co.* 74 Me. 116; *Varney v. Pope*, 60 Me. 192.

<sup>4</sup>*Shreve v. Voorhees*, 3 N. J. Eq. 25.

In *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis. 667, in deciding that no injunction should be granted to restrain interference with the flow of the waters of a stream by the placing of piles, timbers, and posts therein at a railroad bridge crossing the same, until by an action at law the acts of the company are shown to be illegal and not authorized by its charter, the court intimates that, although a highway was washed away and bridges owned by the town were injured thereby, the legal obligation of a town to restore and repair them might not make the same specially injurious to the town so as to give it a right to an injunction.

<sup>5</sup>Cliff. 247, Fed. Cas. No. 10,752.

<sup>6</sup>*Middleton v. Flat River Boom Co.* 27 Mich. 533.

In *Norbury v. Kitchin*, 15 L. T. N. S. 501, the court granted an injunction restraining the defendant from damming the stream a short distance above where it entered the plaintiff's land, although no actual damage was inflicted on the plaintiff, and said that, although the jury had awarded merely nominal damages, he could do nothing inconsistent with *Bickett v. Morris*, which decided

that a riparian owner had a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream.

That decision was explained in *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 566, 52 L. J. Ch. N. S. 608, 48 L. T. N. S. 784, 31 Week. Rep. 603, as being consistent with its determination that the *Bickett Case* must be considered as holding, not that all interference with the bed of the river though not causing any injury to lower owners is actionable, but only that such interference was actionable unless the court was satisfied that there would not be a future injury resulting from it; as, in the *Norbury Case*, although no actual loss was shown to have been sustained by the plaintiff, yet his right was shown to have been interfered with, and that such interference would possibly lead to future loss.

<sup>7</sup>*Corning v. Troy Iron & Nail Factory*, 6 How. Pr. 89.

<sup>8</sup>A perpetual injunction against the maintenance of a dam will not be granted where the waters stored thereby served to operate a municipal electric lighting plant, and the only injury caused can be remedied by an injunction prohibiting the storing of the waters by day and their discharge by night. *Lone Tree Ditch Co. v. Rapid City Electric & Gaslight Co.* (S. D.) 93 N. W. 650.

for the purpose of acquiring jurisdiction, treat as fraud the creation of obstructions to the injury of lower proprietors.<sup>9</sup> Nor will it assume jurisdiction to prevent a multiplicity of suits as irreparable damage because of a withholding of water in time of drouth from a lower riparian owner, when seven years have elapsed since the preliminary injunction expired, during which the relations of the parties have been regulated by no order or decree of the court, and, so far as appears, no new dispute has arisen.<sup>10</sup> And in order to effect the removal of the obstruction the injunction may be made mandatory.<sup>11</sup> A judgment for defendant will not prevent equity from taking jurisdiction if it does not show whether it went upon the ground that there was a right to obstruct the stream, or because there was in fact no obstruction.<sup>12</sup> One who violates an injunction forbidding the further obstruction of a stream, which will only be accomplished by removing the obstruction, may be held liable for the damages caused by violating the injunction.<sup>13</sup>

**484. Recovery for injuries.**— A mill owner who is prevented from operating his mill by the illegal holding back of the water by the upper owner is entitled to recover for the injury thereby caused.<sup>1</sup> As said in *Davis v. Fuller*,<sup>2</sup> the owner of land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not com-

Where a riparian owner has erected a dam across the stream which interferes with the riparian rights of another, the latter's remedy would not be to enjoin such use altogether, but rather to have the respective rights of the parties determined as riparian owners, after which an injunction might be had to restrain an excessive use. *Coleman v. Le Franc*, 137 Cal. 214, 69 Pac. 1011.

Equity will enjoin the use and maintenance of a dam by an upper owner so far as it obstructs the flow to a lower owner of waters to which he has legal right; and, when the dam is not a nuisance in itself, it will not be ordered abated, but its improper use will be enjoined. *Byers v. Colonial Irrig. Co.* 134 Cal. 553, 66 Pac. 732.

<sup>9</sup>*Galvin v. Shaw*, 12 Me. 454.

<sup>10</sup>*Denison Paper Mfg. Co. v. Robinson Mfg. Co.* 74 Me. 116.

<sup>11</sup>In *Robinson v. Byron*, 1 Bro. Ch. 588, the court granted an injunction, mandatory in effect. The defendant in that case constructed a dam across a stream supplied with a flood gate, by which he would at one time stop the wa-

ter, and then at another let it out in such quantities as to injure a lower mill; and the injunction granted restrained him from operating the dam and flood gates in such a manner as to prevent the water flowing to the mill in such regular quantities as it had done before the erection of the works.

But the upper proprietor will not be required to tear down a manufactory built over the water course if he has provided a drain to carry the water, but the lower proprietor will be left to his action at law for the temporary stoppage of the flow. *Edleston v. Crossley*, 18 L. T. N. S. 15.

<sup>12</sup>*McDowell v. Langdon*, 3 Gray. 513.

<sup>13</sup>*Benson v. Connors*, 63 Iowa, 670, 19 N. W. 812.

<sup>1</sup>*Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

An action will lie for stopping the natural flow of a stream, and compensation need not be sought under the mill acts. *Thompson v. Moore*, 2 Allen, 350.

<sup>2</sup>12 Vt. 178, 36 Am. Dec. 335.

mon to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation of another, but only by grant or by the use or occupancy of another for such a length of time as that a grant may be presumed therefrom. Whenever this right is encroached upon by obstructions or perversions above or below, and actual injury ensues to any material amount, an action accrues, however valuable or convenient the use of such obstructions may be to him who erected them. The notion that a man who has a mill privilege may use it if he does no wanton or unnecessary injury to another is entirely without foundation. The fact that the plaintiff has abated the nuisance does not deprive him of the right to recover for the injury previously inflicted.<sup>3</sup> Notice or demand are not a prerequisite to an action by a riparian owner injured by the permanent diversion or obstruction of the stream above him.<sup>4</sup> If the one in possession of the obstruction did not create it, but merely continues it, he must be requested to remove it before an action will lie against him.<sup>5</sup> Proof of injury by the manner of detention and letting out of water from an upper milldam creates a prima facie case for the recovery of damages therefor; and the burden of proof is on the defendant to show that the detention and use thereof were necessary, reasonable, and proper.<sup>6</sup>

**485. Damages.**—The measure of damages for the wrongful obstruction of the flow of a stream of water is not the permanent injury to the property, but the injury which has been inflicted by the temporary wrong. In case, however, the obstruction is a permanent one by act of a public service corporation which would have power to acquire the right to withhold the water, the damages may be assessed as for injury to the freehold.<sup>1</sup> So, in one case it was held that where, for the purpose of compelling the sale to him of a meadow, a landowner obstructed the flow of a stream to it which its owner had a right to have continue to flow to the meadow, the court, on the offer of the plaintiff to release any damages which might be awarded in case a deed was made to him of the right to the water, recommended that the jury fix the damages at the full value of the land.<sup>2</sup> But, in the ordinary course, the measure of damages should be the injury caused

<sup>3</sup>*Gleason v. Gary*, 4 Conn. 418; *Kendrick v. Bartland*, 2 Mod. 253.

<sup>4</sup>*Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220.

<sup>5</sup>*Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405.

A notice to one continuing a dam which is a nuisance to complainant is sufficient to found an action if it clearly

apprises him that the obstruction is against the right of complainant and that complainant insists on its removal.

*Snow v. Cowles*, 26 N. H. 275.

<sup>6</sup>*Timm v. Bear*, 29 Wis. 254.

<sup>1</sup>*Hot Springs R. Co. v. Tyler*, 36 Ark. 205.

<sup>2</sup>*Anonymous*, 4 Dall. 147, 1 L. ed. 778.

by deprivation of the use of the water. This may include the loss caused by the idleness of the mill, in determining which loss of profits may be considered.<sup>3</sup> In determining the damages the natural condition of the stream must be considered, and no recovery can be had for loss of any advantages which would result from the existence of an unusual condition.<sup>4</sup> The value of leases which had been made of the property may be taken into consideration on the question of measure of damages.<sup>5</sup> In a proceeding to recover damages for the diminution of water flowing in a river, by reason of the construction of a dam, the report of the commissioners will not be interfered with unless the amounts awarded are so small or so great as to be palpably unjust, where there are no legal errors in the proceedings and the commissioners have adopted no erroneous rules of damage.<sup>6</sup>

**486. Deflection of current in stream.**—The action of flowing water is such that, in course of time, it will wear away and destroy any embankment against which it comes, no matter how firm the embankment may be. This tendency of the water is one of the necessary incidents attached to the flow of a stream through private property. So long, therefore, as the current retains its natural course the riparian owner has the burden of protecting his property against the current by repairing his banks when they are washed away, or strengthening them to prevent their being overcome by the water. The operations of owners further up the stream may not only change the periodic flow of the stream, but they may also change the course which the current takes when it leaves the upper property; and the question then arises as to how far the lower owner is entitled to protection from such change of current. As between the owners of land on opposite sides of the stream the current cannot be changed by one in such a

<sup>3</sup>*Taylor v. Dustin*, 43 N. H. 493.

A mill owner from whom the water necessary to operate his mill is wrongfully withheld by the state may recover for the loss of profits as well as sums paid workmen whom he was compelled to keep about his mills, but for whom there was nothing to do. But if the loss of profits is made the basis of recovery, the rental value of the mill is not to be considered. *Weeks v. State*, 48 App. Div. 357, 63 N. Y. Supp. 203.

In one case, however, it was held that the damages for the unlawful detention of water in a stream cannot be established by showing the profit which would have been made upon the product of the mill had the water flowed in its usual course; but the value of the use of the

water during the time it is wrongfully detained is the proper measure of damages. *Pollett v. Long*, 58 Barb. 20.

<sup>4</sup>*Weare v. Chase*, 93 Me. 264, 44 Atl. 900.

In determining the amount of damage to be awarded for unreasonably withholding water from the mill of a lower proprietor on the stream, the fact of the existence of a drought and unusually low stage of water which may account for part of the injury may be considered. *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404.

<sup>5</sup>*Little Schuylkill Nav. R. & Coal Co. v. French*, 81 Pa. 366.

<sup>6</sup>*Re Thompson*, 85 Hun, 438, 32 N. Y. Supp. 897.

way as to carry the water to his side of the stream and give him the use of it, and at the same time deprive his neighbor of the use to which he is entitled.<sup>1</sup> And upper proprietors will not be permitted to construct improvements in the stream on their land if the result is to cast the current directly against the banks of the lower owner to his injury.<sup>2</sup> This rule applies, not only to piers and projections from the shores, but also to bridge piers and other structures in the bed of the stream.<sup>3</sup> The rule is stated in *Spencer v. Hartford, P. & F. R. Co.*<sup>4</sup> as follows: A railroad corporation is liable in damages for building a bridge across a river with a pier turned obliquely to the course of the river, in such a manner as to turn the water of the stream, in time of freshets, upon the plaintiff's grass land, thereby throwing sand and earth upon it, and gullying and washing away the same, it appearing that the bridge could, at an additional expense, have been erected, with safety to the railroad, in such a manner as not to injure such land.<sup>5</sup> But the one erecting the improvement is not responsible for consequences which it was not possible to foresee and prevent, such as the casting of water, through an opening left for the passage

<sup>1</sup> Enlarging and deepening the channel leading to water wheels to the injury of riparian owners on neighboring channels shows such a change in the natural flow of a stream as to be a cause of equitable relief. *Skowhegan Water Power Co. v. Weston*, 94 Me. 285, 45 Atl. 515.

<sup>2</sup> *Dayton v. Robert*, 8 Ohio C. C. 649.

A riparian owner cannot justify the maintenance of a pier in a stream in such a way as to cast the overflow of the water upon land further down, upon the ground that it extends no farther into the stream than the abutments of a bridge recently removed, which stood more than twelve years. *Gillespie v. Forrest*, 18 Hun, 110.

<sup>3</sup> A railroad company which, under an agreement with the city as the proprietor of land, places an obstruction in a stream for the protection of such land, by which the current is directed into a new channel across another's land, is liable for damages to the latter if resulting from the faulty plan and location of the work, although there was no negligence in the manner of its execution; but if the damages result solely from a plan and location which the city has exercised such care and skill in creating and fixing as to exempt it from liability, the railroad company is not responsible therefor. *De Baker v. Southern California R. Co.* 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

<sup>4</sup> 10 R. I. 14.

Where a railroad company constructs a bridge across a river, with a pier turned obliquely to the course of the river in such a manner as to turn the course of the stream in times of freshets so that injury is done to adjoining land by overflow, the plaintiff, as owner of such land, is not estopped from maintaining his action for the damage so caused to his land, by reason of having previously, by deed, conveyed to the said company a portion thereof for the purposes of a railroad, and, in consideration of the purchase money, released all claims for damages which might be awarded by commissioners, inasmuch as the commissioners could have appraised and awarded only such damages as would have resulted from the construction and use of the road in a legal and proper manner. *Ibid.*

<sup>5</sup> One who properly constructs a wharf on his land adjoining a railroad right of way may recover damages from the railroad company, where the wharf was washed out, undermined, and injured by the diversion of water due to the improper construction of the railroad bridge over the river, although such bridge was constructed before the wharf. *Perley v. Boston, O. & M. R. Co.* 57 N. H. 212.

of logs, by a flood against a bridge pier lower down the stream.<sup>6</sup> Where a railroad company constructs jetties in a river some distance from its bridge, and not upon its property, and they are constructed with the consent of the owner of the land adjacent to the river where the jetties are constructed, a company which subsequently purchases the railroad without assuming any duty to keep the jetties in repair, and which does not adopt them in any way, will not be held liable for injuries to adjacent lands by overflow caused by failure to repair or remove the jetties.<sup>7</sup> And some courts have denied all liability for injuries caused by a change of the current.<sup>8</sup> In *Covington Harbor Co. v. Phoenix Bridge Co.*<sup>9</sup> the court says that "the Supreme Court of the United States rejects the Ohio doctrine and follows the common law in holding that an exercise of the sovereign power, which is not a physical encroachment upon private property and only causes consequential and indirect damages to it, is not a taking of private property for public use, and gives no right of action, either against the sovereign power or any agent acting under its authority in making the improvement; and that, as the question in this case involves the right to recover damages for the exercise of an authority granted by the United States government, it is bound to follow the authority of the United States Supreme Court." The ground of the liability for such action is, however, not that private property is taken for public use, but that one property owner has made a negligent use of his property to the injury of his neighbor, which always gives a right of action which cannot be taken away by the legislature without depriving the injured person of his property without due process of law. If the water is taken out of the stream, it cannot be returned at such an angle that the current will cause injury to the property of another owner.<sup>10</sup> If the deflection of current is in a navigable stream so that it results in a public nuisance a private individual cannot complain unless he has suffered an injury peculiar to himself.<sup>11</sup>

<sup>6</sup>*Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 Rawle, 9, 26 Am. Dec. 111.

<sup>7</sup>*Fordyce v. Russell*, 59 Ark. 312, 27 S. W. 82.

<sup>8</sup>*Henry v. Vermont C. R. Co.* 30 Vt. 638, 73 Am. Dec. 329; *Covington Harbor Co. v. Phoenix Bridge Co.* 10 Ohio Dec. Reprint, 657.

<sup>9</sup>10 Ohio Dec. Reprint, 657.

<sup>10</sup>*Briscoe v. Young*, 131 N. C. 386, 42 S. E. 893; *Valley R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88.

The upper proprietor cannot cut a tail race so as to turn the water into the foot instead of the head of the lower

proprietor's pond, if the result will be to hasten the flow of the water and fill the pond with sand. *Hulme v. Shreve*. 4 N. J. Eq. 116.

If the cutting of an artificial channel for a stream causes an obstruction of the old channel, and the water is turned back into the old channel without removing such obstructions, thereby causing injury to the land of another, such damages may be recovered of the person who cut the artificial channel.

*Briscoe v. Young*, 131 N. C. 386, 42 S. E. 893.

<sup>11</sup>A bill in equity to enjoin or abate

**487. Hastening flow of water.**— The upper owner may inflict great injury on the lower one by sending the water down the stream in greater quantities than the natural flow. The channel of the stream has been formed by the water which is accustomed to flow in it, and if a much greater quantity is turned into the stream the channel is not sufficient to carry it and it may overflow its banks to the injury of the adjoining land. The upper owner is not bound to interfere with the natural flow of the water or control it so as to prevent injury to the lower owner.<sup>1</sup> But if the upper owner has stored the water in a pond, he cannot remove the barriers and let the water run down the channel at his pleasure, if the result will be injury to the lower owner.<sup>2</sup> And water taken from another stream cannot be turned into the channel to the injury of the lower owner.<sup>3</sup> But a change in the watershed of the stream, which only slightly and occasionally enlarges the flow within the capacity of the stream, is not actionable.<sup>4</sup> And if the increased flow of the water occasioned no more injury to the lower proprietor than would have occurred in the absence of the act of the upper owner, there is no ground of complaint.<sup>5</sup> If, however, the increased flow infringes the rights of the lower owner and is against

as a public nuisance a runway for logs on the ground that it will divert the course of a navigable river must be filed by one who has sustained, or is in danger of sustaining, special damages. *St. Louis v. Knapp S. & Co. Co.* 2 McCrary, 516, 6 Fed. 221.

<sup>1</sup>*Schwartz v. Nie*, 29 Ind. App. 329, 64 N. E. 619; *Wegenust v. Ernst*, 8 U. C. C. P. 456.

<sup>2</sup>*Dubois v. Glaub*, 52 Pa. 238.

Where, for two hundred and fifty years, a corporation had been in the habit of opening the sluices of a stream to let go the water in time of flood, and on various occasions had asserted its right to do so against persons who shut down the sluice gates which had been opened by its order, a good easement in law exists, unaffected by the fact that the exercise of it also benefits lands belonging to other persons. *Simpson v. Godmanchester* [1897] A. C. 696, 77 L. T. N. S. 409, 66 L. J. Ch. N. S. 770.

<sup>3</sup>*Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631; *Merritt v. Parker*, 1 N. J. L. 460; *Plattsmouth Water Co. v. Smith*, 57 Neb. 579, 78 N. W. 275.

Where the natural flow of a stream has been increased to the injury of other riparian owners, equity may determine

the amount of such increase and the method of preventing in the future the use of such increased flow. *Skowhegan Water Power Co. v. Weston*, 94 Me. 285, 47 Atl. 515.

<sup>4</sup>*Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995.

<sup>5</sup>Where, during an extraordinary rainfall, a canal company, to prevent the breaking of the canal banks and the flooding of the adjoining country, opened a sluice and thereby cast into a brook more water than it could carry off, resulting in the flooding of the plaintiff's mines, which, had the sluice not been opened, would have been flooded with the rest of the country through the inevitable breaking of the banks of the canal, it was *injuria absque damno* and the mine owner could not recover. This decision was based upon the ground that the mine owner would have suffered the same damage had not the sluice been opened, and the court did not decide whether, under such circumstances of imminent peril to life and property, the act of opening the sluice was in point of law wrongful so as to have entitled the plaintiff to recover if the extent of the injury was increased thereby. *Thomas v. Birmingham Canal Co.* 49 L. J. Q. B. N. S. 851, 43 L. T. N. S. 435, 45 J. P. 21.



his will, the fact that it benefits his land will not deprive him of his right of action.<sup>6</sup> Water having a time relation as well as a space relation, both being fixed by nature, there is no more right in an adjacent proprietor to alter the one than the other.<sup>7</sup> And therefore the upper owner cannot remove natural ledges of rock in such a way as to flood the lower land.<sup>8</sup> So, if the channel of the stream has been gradually filled so that the natural flow has been altered, a riparian owner cannot, by removing the accretion, restore the same to its ancient course and velocity to the injury of an upper proprietor who has made improvements on the faith of the changed condition.<sup>9</sup> But the owner of a spring is not liable for the increased flow of water from it, caused by his cleaning it out and walling it up so as to keep the water in one channel, rather than to let it spread over the ground and make a wet and spongy place of the land.<sup>10</sup> And where a culvert through which the water of a stream passed under a railroad caved in and obstructed its flow until great quantities had accumulated, the railroad company was held not liable, in the absence of negligence on its part, for injuries resulting from its removing the obstruction and setting the water free.<sup>11</sup> Equity will not restrain one from causing an increased flowage in a stream onto the lands of another, unless it was, or threatened to be, injurious to such lands.<sup>12</sup>

If authority is given by statute to hasten the flow of the stream in case the channel is kept unobstructed the grantee will be liable in case he sends the water down without complying with the conditions. So, in *Geddis v. Bann Reservoir*,<sup>13</sup> it was held that the defendants, who were authorized by statute to impound waters in time of flood for the purpose of increasing the supply of water in the river at certain

<sup>6</sup>*Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355.

<sup>7</sup>*Grant v. Kuglar*, 81 Ga. 637, 3 L. R. A. 606, 12 Am. St. Rep. 348, 8 S. E. 878.

In an action for causing the washing away of land by removal of stones from the river, evidence is not admissible of a similar effect from the removal of stones in another place unless it is shown that all the conditions of the two events are the same. *Hawks v. Charlemont*, 110 Mass. 110.

<sup>8</sup>So an upper riparian proprietor will be enjoined from deepening the channel of a river so as to lower lakes, constituting an enlargement of it for the purpose of reclaiming the land overflowed by them, where it will deprive a lower mill owner of power during a portion of the year, and the deepening of the chan-

nel will carry down the water in times of freshet in such volume as to endanger his dam. *Hyatt v. Albro*, 121 Mich. 638, 80 N. W. 641.

<sup>9</sup>*Withers v. Purchase*, 60 L. T. N. S. 819.

But in an earlier case it had been held that a riparian owner may remove shoals from the stream without liability to a lower owner for overflow of the stream by the hastening of the flow. *Rhodes v. Airedale Drainage Comrs.* L. R. 1 C. P. Div. 402, 45 L. J. C. P. N. S. 861, 35 L. T. N. S. 46, 24 Week. Rep. 1053.

<sup>10</sup>*Waffle v. Porter*, 61 Barb. 130.

<sup>11</sup>*Mills v. Greenville & O. R. Co.* 13 S. C. 97.

<sup>12</sup>*Sloan v. James*, 13 Pa. Super. Ct. 399.

<sup>13</sup>S. R. 3 App. Cas. 430.

seasons of the year and to send it into that river through the channel of another river and to cleanse and scour the river through which the water was to be conducted, they are liable for flooding land along such river by their failure to cleanse and keep the channel of the same in proper condition for the flow of the water that had to pass through it.

**488. Hastening by drainage.**—Drainage being necessary to fit the land for successful occupation, and the streams being the natural channels of drainage, the flow of the surface water may be hastened into the streams so far as it can be done without flooding lower property. It has even been held that the right to the use of natural drains in their natural condition for drainage is as much *publici juris* as the right to navigate rivers for navigation; and at common law no one may obstruct them to the injury of another.<sup>1</sup> The lower owner cannot complain that the water is made to flow at one time, rather than left to find its way more gradually past his property, provided the capacity of the stream is not exceeded.<sup>2</sup> But the upper owner cannot be permitted to relieve his land of surface water by casting it in a body onto the land of the lower owner; nor can he accomplish that result by casting it into a stream in such quantities that the capacity of the stream is exceeded and the water overflows its banks and inundates the property of the lower owner.<sup>3</sup> Nor can the area of drainage

<sup>1</sup>*Brown v. Keener*, 74 N. C. 714.

<sup>2</sup>*McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Waffle v. New York O. R. Co.* 53 N. Y. 11, 13 Am. Rep. 467, Affirming 58 Barb. 421; *Sowers v. Schiff*, 15 La. Ann. 301; *Spink v. Corning*, 61 App. Div. 84, 70 N. Y. Supp. 143; *Hicks v. Owensboro*, 6 Ky. L. Rep. 225; *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783; *Mizell v. McGowan*, 129 N. C. 93, 85 Am. St. Rep. 705, 39 S. E. 729; *Treat v. Bates*, 27 Mich. 390; *Martin v. Riddle*, 26 Pa. 415 note; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 309, 23 N. E. 621, Affirming 30 Ill. App. 558; *Bailey v. Schnitzius*, 53 N. J. Eq. 235, 22 Atl. 732, 32 Atl. 219, Affirming 48 N. J. Eq. 409, 22 Atl. 732.

A railroad which drains its roadway into the natural drainage channel for such waters, which channel has been occupied by the landowners for an artificial drainage ditch intended to drain the land above the embankment before its construction, is not liable if an increased volume of water is thereby thrown upon lower lands. *New York, P. & N. R. Co. v. Jones*, 94 Md. 24, 50 Atl. 423.

But under the civil law the upper proprietor cannot send down more water than is accustomed to flow in the stream. *Frechette v. La Compagnie Manufacturiere*, L. R. 9 App. Cas. 170, 53 L. J. C. P. N. S. 20, 50 L. T. N. S. 62.

A landowner may collect the surface water of his land and water drained from wells thereon and discharge them into an artificial stream running through his land, provided it is done in the reasonable use of his land, and the volume of water in the stream is not increased beyond the natural capacity of the stream to discharge it, and adjoining land is not thereby overflowed and injured. *Jackman v. Arlington Mills*, 137 Mass. 277.

<sup>3</sup>*McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193.

But if the cutting of ditches by the upper proprietor on a natural stream causes such an increase of the flow of water in the stream that it overflows its banks to the damage of a lower proprietor, the latter has no right to dam back the stream. *Williams v. Gale*, 3 Harr. & J. 231. That is not the proper remedy for the injury.

be increased by taking the water out of its natural course and casting it into the stream, if injury is thereby caused to the lower owner.<sup>4</sup> It has been held that the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability for damages to a lower owner, as the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him.<sup>5</sup> But that doctrine must be limited to cases where the capacity of the stream is not exceeded. That an upper proprietor increases the flow of water beyond the natural flow does not give the lower proprietor the right to fill up the channel entirely and prevent the waters flowing therein.<sup>6</sup>

#### IV. CHANGE IN CHANNEL OF STREAM.

**489. No right to change channel.**—The channel in which a stream flows is a component part of the stream itself, and one owner cannot change the flow of the water to another channel to the injury of a lower proprietor without being liable for the injury.<sup>1</sup> If a pond is fed by a natural stream, the owner cannot cut an outlet for it which will throw the water on the land of another person at a point different from its natural course.<sup>2</sup> A riparian owner has a right to have

<sup>1</sup>*Miscell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *Hocutt v. Wilmington & W. R. Co.* 124 N. C. 214, 32 S. E. 681; *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437; *Staton v. Norfolk & C. R. Co.* 109 N. C. 337, 13 S. E. 933; *Williams v. Union Improv. Co.* 1 Pa. Dist. R. 288; *Gettling v. Union Improv. Co.* 7 Kulp. 493.

An upper proprietor cannot cut a ditch and divert the water for the purpose of protecting his meadow from overflow if the effect will be to increase the flow of the water in the stream to such an extent as to injure the dam of a lower proprietor. *Kay v. Kirk*, 76 Md. 41, 35 Am. St. Rep. 408, 24 Atl. 328.

If upper riparian owners turn so much water into a stream as to overflow its banks and thus flood lands below, the lower owner may justly complain; but if, in derogation of the right of the upper owner to drain into the stream in such quantity as not to exceed its capacity, the lower owner erects a building below the level of the banks, he cannot complain. *Hicks v. Owensboro*, 6 Ky. L. Rep. 225.

An admission by plaintiff in open court that a draw constitutes a natural

water course and has constituted such water way ever since his ownership of the premises through which it passes precludes recovery for injury to his hay in the draw by an additional flow of water therein because defendant drained a pond therein, when plaintiff also admits that the water generally from that portion of the country drained into the draw. *Rath v. Zembleman*, 49 Neb. 351, 68 N. W. 488.

<sup>2</sup>*Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521.

So it has been said that there can be no recovery by the lower owner for injuries caused by merely enhancing the flow of the surface water into the stream. *Newport News & M. Valley Co. v. Wilson*, 16 Ky. L. Rep. 262.

<sup>3</sup>*Bloomer v. Morss*, 68 N. Y. 623.

<sup>4</sup>*McLean v. Crosson*, 33 U. C. Q. B. 448; *Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820, 41 Pac. 31.

If one has ancient ponds which are replenished by channels from a river he cannot change the channels if any prejudice accrue to another by such action. *Duncombe v. Randall*, Hetley, 32.

<sup>5</sup>*Vernum v. Wheeler*, 35 Hun, 53.

the water of a stream continue to flow in its natural course, undiminished in quantity except by reasonable and lawful use by upper riparian owners, and has therefore the right, as against those not riparian owners, to protect and maintain the banks above his land in their original and accustomed condition so as to prevent the diversion of the water into other channels.<sup>3</sup> Heirs who partition their ancestor's land between them without reserving any right as to the flow of a brook through the property must permit the brook to flow in its ancient course, although the ancestor, for the benefit of his business while he was owner of the entire tract, shifted the flow of the brook from place to place on the land.<sup>4</sup> The one who attempts to change the course of a stream is liable for the creation of a nuisance if he causes it to enter the property of the lower owner at a new point.<sup>5</sup> One who undertakes to change the channel of a stream must see that the capacity of the new channel is in all respects equal to the old one, and he will be liable for injuries caused by the overflow of the stream in case it is not so. And the fact that the size is greater than that of the old channel will not relieve him from liability if it is constructed in such a manner as to be more likely to overflow.<sup>6</sup> The lower owner cannot

<sup>3</sup>*Cox v. Bernard*, 39 Or. 53, 64 Pac. 860.

<sup>4</sup>*Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349.

<sup>5</sup>*Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Porter v. Durham*, 74 N. C. 767; *Manwell v. Shirts*, 27 Ind. App. 529, 87 Am. St. Rep. 268, 61 N. E. 754; *Woodworth v. Genesee Paper Co.* 18 App. Div. 510, 46 N. Y. Supp. 99.

In 32 Assize, 2, an assize of nuisance was maintained for the drawing away of a river by means of a ditch, whereby the grounds of the plaintiff were surrounded.

The fact that surface water accumulates in a water course or greatly increases the flow of water at times will not defeat a recovery for diverting the water course so as to cast the water upon another's land. *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370.

An instruction is erroneous which denies the right of recovery for the overflow of land, caused by the filling up of a culvert and construction of a drainage ditch in its place, if the land was at all subject to overflow before the commission of those acts. *Gulf, C. & S. P. R. Co. v. Wishart*, 28 Tex. Civ. App. 162, 66 S. W. 860.

Each proprietor on a river has the

right to modify and limit its current upon his own property to suit his convenience, and may construct and maintain embankments thereon for such purpose, if he exercises this right with a just regard to the rights of others; but he cannot thereby divert the waters of the river from his own lands and cause them to flow over and upon those of his neighbor, to the latter's injury, however beneficial it may be to his own lands. *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429.

A person has no right to change a natural water course through his lands so as to throw the water on the lands of a lower proprietor in a new place. And if he does this by confining said water course into a sewer, and the lower proprietor thereafter constructs a connecting sewer through his lands for the passageway of said waters, the latter will not be liable for damages resulting from the bursting of the sewer above, caused by the obstructions said lower sewer offered to the flow of the water, unless it is affirmatively shown that said lower proprietor failed to use ordinary care and skill in the construction of his sewer. *Niles' Works v. Cincinnati*, 2 Disney, 400.

<sup>6</sup>The question involved in this case was whether a person diverting a stream

recover if the capacity of the new channel was the same as the old and the injury would have been the same had the change not been made.<sup>7</sup> But one diverting the waters of a stream from their natural channel and turning the same into a public ditch by erecting a dam across the stream is not relieved from liability for the damages resulting to an owner's land by being flooded to a greater extent than before, caused by the increased volume of water in the ditch, because such land would have been flooded at the time complained of without such diversion, owing to an unusually heavy rain.<sup>8</sup> The same rule with respect to liability applies against one who removes the banks of a water course so as to permit the stream to take a new channel of its own force.<sup>9</sup> The riparian owner cannot justify the change of channel even when necessary to protect his own interests.<sup>10</sup> The owner of land through which a stream runs may repair the banks and prevent the water from making a new channel, but in so doing he will not be permitted to narrow the channel so as to inflict an injury on lower owners.<sup>11</sup> Or to place obstructions in the stream so as to cause it to change its channel.<sup>12</sup> The accustomed course of a stream which riparian owners are entitled to say must not be disturbed is not to be found in historical research, but is that which is its natural and apparently permanent course at the time when the right is called in question.<sup>13</sup> A plantation owner whose property would be damaged by the proposed

into a new channel was relieved from liability for resulting injuries by constructing a new channel of as great or greater cubical capacity than the old one. The court in holding that they were not relieved declared that it was of the opinion that persons making a new channel for their own convenience were bound to construct it in such a manner that it would be capable of conveying all the water that might flow into it from all ordinary floods and rain-falls. *Fletcher v. Smith*, L. R. 2 App. Cas. 781, 47 L. J. Exch. N. S. 4, 37 L. T. N. S. 367, 26 Week. Rep. 83.

*Rock Island & P. R. Co. v. Knapp*, 173 Ill. 219, 50 N. E. 603; *Gulf, C. & S. F. R. Co. v. Wishart*, 28 Tex. Civ. App. 102, 66 S. W. 860; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

*Todd v. Bodger*, 134 Ind. 204, 33 N. E. 963.

*Byrd v. Blessing*, 11 Ohio St. 365.

<sup>10</sup> The accidental washing of earth from the outlet of a lake so as to cause an obstruction to the flow of the water and raise the level of the lake is not a nuisance within the rule that one in-

jured by a nuisance may proceed to abate it so as to justify him in turning the water of the lake in another direction from that of its ancient flow. *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687.

A landowner cannot justify an obstruction or alteration of an open water course by showing that his action was necessary after a public highway had been located across it, as he has his redress against the public authorities. *Johnston v. Hyde*, 33 N. J. Eq. 632.

<sup>11</sup> *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

Where a landowner narrows the natural course of a run on his land so as to cause water to flow upon the property of another, and it appears that the obstruction placed in the river for the purpose of narrowing the channel may be removed, damages will not be awarded as for a permanent injury, but only for the damages sustained up to the time of the suit. *Ibid*.

<sup>12</sup> *Armendais v. Stillman*, 67 Tex. 453, 3 S. W. 678.

<sup>13</sup> *Withers v. Purchase*, 60 L. T. N. S. 819.

cutting of a canal across the bank of a river, whereby the stream would be made to flow through the cultivable portion of his land on which was situated the most valuable buildings and improvements, is entitled to enjoin the work, although undertaken in pursuance of a contract entered into with the state board of engineers, where the enterprise is only an experiment inaugurated in the interest of a few private persons for their own advantage, and it cannot be upheld as an exercise of the police power or under the levee laws.<sup>14</sup>

**490. Change effected by negligence.**—The liability for negligently effecting a change in the channel of a stream is as great as though the change was effected intentionally. Thus, if a landowner digs a trench through his land so near to a stream that the water breaks through and follows the line of the trench, he will be liable for injuries inflicted on his neighbor.<sup>1</sup> And the damage in such cases may be shown by a comparison of the condition of the land before and after the change. But the improvement caused to defendant's land by the change cannot be considered.<sup>2</sup> The upper proprietor will be liable for throwing rocks and *débris* into the stream so as to cause it to change its course and cut a new channel on the land of the lower proprietor.<sup>3</sup> So, a railroad company is liable if, in constructing its road-bed it throws rocks by blasting into the stream in such a way as to change its course.<sup>4</sup>

<sup>14</sup>*Chaffee v. Trezevant*, 38 La. Ann. 746.

<sup>1</sup>*McLean v. Crosson*, 33 U. C. Q. B. 148; *Roberts v. Vest*, 126 Ala. 355, 28 So. 412.

One may not excavate in a public street or on his own land with such want of caution that adjoining owners will be injured by flood water of a river whose course is changed as a result of the excavation. *Rau v. Minnesota Valley R. Co.* 13 Minn. 442, Gil. 407.

The owner of land is entitled to recover for damages thereto caused by the wetting and sanding thereof resulting from the change of conditions brought about by the cutting of a ditch for the drainage of other lands, which turned a creek into the stream on which his land was situated at a point higher up than it had previously entered it, whether such act was the direct and only cause of the damage, or set in motion other causes which contributed thereto. *Cheeves v. Danielly*, 80 Ga. 114, 4 S. E. 902, 74 Ga. 712.

<sup>2</sup>*Cheeves v. Danielly*, 74 Ga. 712.

<sup>3</sup>*Newport News & M. Valley Co. v. Wilson*, 16 Ky. L. Rep. 202.

<sup>4</sup>*Watts v. Norfolk & W. R. Co.* 39 W. Va. 106, 23 L. R. A. 674, 45 Am. St. Rep. 804, 19 S. E. 521.

Where one grants to a railroad company a strip of land for its use in the construction of a railroad, all damages to the residue of the tract arising from the construction, which can be taken into consideration in the assessment of compensation under proceedings for condemnation, are released, and he cannot recover therefor against the company. Hence, where the company builds on the land granted a wall to stay and support its road and protect it against the inroads of a stream, and the wall diverts and obstructs the stream and diminishes and destroys the capacity of a waterwheel to operate the mills of the grantor, the grantor cannot recover against the company, where it appears that such damage could have been taken into consideration in the condemnation proceeding, and that the company had not been negligent in constructing the wall. Under the same rule the grantor cannot recover for injury to his private ferry by the construction of the road. *Ibid.*

**491. Rights conferred by change of channel.**—The sudden change of the course of a stream, whereby it flows upon the property of one whose land it did not formerly touch, gives him no right to the flow, but the one on whose land the change occurred may, in case he acts within a reasonable time, restore the stream to its ancient channel.<sup>1</sup> And in case the stream is turned out of its course to the injury of a lower owner, he may restore the stream to its ancient course or compel the one responsible for the change to do so.<sup>2</sup> Twenty years' adverse possession of a diverted water course is indispensably necessary to defeat the rights of the owner of the ancient channel in the absence of estoppel or other equity which will prevent assertion of the right.<sup>3</sup> So, a riparian proprietor's rights in an ancient stream are not lost by recent alteration in the stream made by him, such as straightening its crooked course so that it flows directly onto his land, where, before, it meandered a short distance down a lane bounding his premises and then onto his land.<sup>4</sup> But the one having the right to change the stream to its ancient course may estop himself from doing so by acts which will make it detrimental to another to do so.<sup>5</sup> In one case the court held that a riparian proprietor has no right to go upon another's land and restore to the old channel the water which has been suddenly diverted by the act of God so as to flow elsewhere.<sup>6</sup> The court bases

<sup>1</sup>*Pierce v. Kinney*, 59 Barb. 56; *Jones v. Turner*, 46 Barb. 527; *Slater v. Fox*, 5 Hun, 544; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301.

That one merely protected himself against the flow of the waters of a stream on his lands by draining it back into its old channel, from which it had previously been diverted by an adjoining landowner, is a good defense to an action by such adjoining landowner for damages for the overflow of his land caused thereby. *Harding v. Whitney*, 40 Ind. 379.

An appropriator has a right as against a subsequent purchaser from the United States to go upon the latter's land and remove obstructions in the bed of the stream so as to cause its waters to flow in their natural channel to the point of diversion. *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475.

<sup>2</sup>32 Ass. 2, Fitz. Assize, 309; *Roberts v. Roberts*, 55 N. Y. 275.

So one entitled to the use of a water course for the operation of his mill may have an injunction restraining an adjoining owner from preventing him from going onto such land for the purpose of repairing a weir or dam, where the injury was caused by such owner break-

ing ground and weakening the embankment close to the weir, and will prevent the mill owner from operating his mill from which he will suffer irreparable damage. *McSweeney v. Haynes*, 1 Ir. Eq. Rep. 322.

<sup>3</sup>*Campbell v. Smith*, 8 N. J. L. 172, 14 Am. Dec. 400.

<sup>4</sup>*Hall v. Swift*, 6 Scott, 167, 4 Bing. N. C. 381, 1 Arnold, 157, 7 L. J. C. P. N. S. 209.

<sup>5</sup>*Smith v. Musgrove*, 32 Mo. App. 241.

A riparian owner who filed an original bill to enjoin another from changing the channel of a natural water course, and afterwards, after an order of court directing such other to construct an artificial channel on the same level and of equal capacity to the natural channel, filed a supplemental bill seeking to compel such other to construct the artificial channel in accordance with the order of the court, abandons his right to have the water run in its natural channel and is estopped from claiming that the original order is unlawful. *Toldeo, St. L. & K. C. R. Co. v. Chicago, P. & St. L. R. Co.* 155 Ill. 9, 39 N. E. 809.

<sup>6</sup>*Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820, 49 Am. St. Rep. 64, 41 Pac. 31.

the decision upon the ground that after the stream has changed its course to the land of another it belongs to him. That is undoubtedly true so long as the water remains on his land, but it does not preclude the former owner from restoring the flow if he can do so. But the new channel of the stream may become its true channel by permitting it to be followed a sufficient length of time. A sale of property with reference to the changed condition would establish it as the true one; and so would the permission of improvements with respect to it. If, for a long period of time, the old channel has been free from the flow of the water, its owner may object to the restoration of the flow.<sup>7</sup> If the indications are that the change is not to be permanent, the owners upon the old channel cannot complain of a return of the water to its former channel.<sup>8</sup> So, where a new channel has been formed for a water course, and land purchased and improvements made on the faith that the new channel will be permanent, and it continues for the prescriptive period, the one on whose land the change was made will not be permitted to return it to the old channel.<sup>9</sup> And, if the channel of a stream is changed and it is permitted to flow in the new channel until the upper proprietor has expended money and made improve-

<sup>7</sup>*Withers v. Purchase*, 60 L. T. N. S. 819; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Woodbury v. Short*, 17 Vt. 388, 44 Am. Dec. 344; *Morningstar v. Young*, 2 Ohio Dec. Reprint, 294.

Where a stream has been diverted from its original channel and made to flow in an artificial one by the consent of all concerned, it cannot be turned again into its original channel even by a supervisor of highways without the consent of a purchaser of the land on which the original channel was. *Mcir v. Kroft* (Iowa) 80 N. W. 521.

<sup>8</sup>So held where the water was diverted for the purpose of a mill race, but the water was restored to the ancient channel whenever necessary or convenient for the purposes of the mill; and the mill owners are not responsible for damages to lower premises from overflow on the turning of the water into the old channel for purposes of repair, if they used reasonable care not to inflict unnecessary damage. *Peter v. Caswell*, 38 Ohio St. 518.

So, the owner of land on the line of a estate canal, whose low lands were relieved from the natural burden imposed upon them by the waters of a creek by its diversion from its natural channel and appropriation as a feeder for the canal, has no right, after the abandon-

ment of the canal by the state, to keep up its embankment for the protection of such low lands to the injury of the lands of others on which the waters of the creek are thrown through a breach in the abandoned work. *Longstreet v. Harkrader*, 17 Ohio St. 23.

And it has been held that, if water is diverted from a brook for a canal, and afterwards returned to it upon the abandonment of the canal, a riparian proprietor will have no right of action for injuries done to his land by the overflow of the brook at a time of high water, which results from the fact that the bed has become partially filled up during the time of the diversion. *Mason v. Shrewsbury & H. R. Co.* L. R. 6 Q. B. 578, 40 L. J. Q. B. N. S. 239, 20 Week. Rep. 14, 25 L. T. N. S. 239.

<sup>9</sup>*Smith v. Musgrove*, 32 Mo. App. 241. *Aberdeen v. Menzies*, reported in Morrison's Dictionary of Decisions, is referred to in *Withers v. Purchase*, 60 L. T. N. S. 819, as holding that a riparian owner who would have been entitled to erect a bulwark in a stream for the purpose of preventing a breach in the bank, was not entitled to erect such bulwark some years after the breach had been made, as such bulwark would interfere with the rights acquired by others in respect to the new channel.



ments upon the faith of its continuing in its changed position, the owner will not be permitted to restore it to its former channel.<sup>10</sup> But equity will not interfere after the defendant has gone upon the plaintiff's land and restored the water to its ancient channel, on the ground that the plaintiff had acquired a right by prescription to have the water flow in the new channel.<sup>11</sup> It would seem that true principle would give the riparian owner the right to maintain the stream in its natural condition, and it has been held that the upper owner might keep the flow of water free across the land of the lower owner.<sup>12</sup> But in *Rood v. Johnson*<sup>13</sup> it was held that the accumulation of a sand bar in a stream is one of those natural results which neither party has a right to interfere with by direct removal. That decision would, however, greatly interfere with the usefulness of the stream, and it cannot be regarded as the correct doctrine. In *Phelps v. Nowlen*<sup>14</sup> it was held that an embankment might be cut and the water restored to its ancient course, although it was done maliciously, with intent to injure the upper owner. And a prior appropriator has a right to remove obstructions which prevent the water from flowing to his ditch.<sup>15</sup> If the new channel is treated as the water course the rights of riparian owners will be the same as though the channel was the natural one.<sup>16</sup>

<sup>10</sup>*Ford v. Whitlock*, 27 Vt. 265.

<sup>11</sup>*Coalter v. Hunter*, 4 Rand. (Va.) 58 15 Am. Dec. 726.

<sup>12</sup>*Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688.

<sup>13</sup>26 Vt. 72.

<sup>14</sup>72 N. Y. 39, 28 Am. Rep. 93. Criticized in *Delhi v. Youmans*, 50 Barb. 320.

<sup>15</sup>*Crisman v. Heiderer*, 5 Colo. 589; *Ware v. Walker*, 70 Cal. 501, 12 Pac. 475.

<sup>16</sup>The owners of land along an artificial channel which is substituted for a natural water course passing through their several parcels of land will be under obligation to make the necessary repairs on the section of the structure within their respective premises, unless the nature and uses of the structure are such as to render that method of repairs impracticable and unreasonable. *Winslow v. Fuhrman*, 25 Ohio St. 639.

In *Baily v. Clark*, 86 L. T. N. S. 309, the court seemed to be in doubt as to whether an ancient cut, through which a portion of the water of a river left the main channel at one place and returned to it at about a mile and a half lower down, was an artificial or a natural stream. The cut had existed for several hundred years, during which time a mill

had been operated on the site of the mill owned by the plaintiff, who claimed that the cut was an artificial one, originally constructed for the exclusive use of the mill, and that he was entitled to all the water that flowed through it, and that other proprietors through whose land it flowed had no riparian rights. The decision of the question was of no practical importance in the case, as the court held that, even though the stream was an artificial one, there was no evidence that it was constructed for the exclusive benefit of the plaintiff's mill, and that his rights in it were no greater than the other proprietors, each having a right to the use of the water in a reasonable manner; but in discussing the question. Williams, L. J., said that the case had been argued on both sides upon the basis that the stream was an artificial one, and that, while he proposed to deal with it as such, he wished to safeguard himself by saying that he was not sure that it was an artificial stream; that with respect to a stream of this sort, which runs out of a river and, after making a detour, comes back again in the river, it is quite plain, *qua* the riparian proprietors on the river itself lower down than the point where the stream returns, that they and the riparian proprietors on the

The rights which grow out of the creation of artificial channels for water courses are considered in a subsequent chapter.<sup>17</sup>

**492. Remedy for injuries caused by change.**— Under the old procedure an assize of nuisance lay for the changing of a water course to the injury of the freehold of another.<sup>1</sup> At the present time, if the water is cast onto the land of the lower owner so as to constitute a trespass, the remedy will be an action of trespass; but for a mere alteration of the course of the stream so as to injure the adjoining property owner, the remedy is an action on the case.<sup>2</sup> Equity may enjoin the turning of a stream onto another's land to its injury.<sup>3</sup> But a preliminary injunction to restrain the operation of a dam so as to flow land situated below and wash refuse thereon will not be granted when full compensation can be made by money damages, and the injury done is inconsiderable, and the whole controversy can be decided by a suit at law, although a recovery has been had at law for such use of water.<sup>4</sup> And one injured by the change may maintain an action for his injury.<sup>5</sup> Abutting owners whose respective lots will be similarly

backwater do stand in the relation to each other of upper and lower proprietors, and that the obligations of the upper riparian proprietors, and to a certain extent their privileges, would, as between themselves and the people lower down on the river, be the same as in respect to a natural stream. That he was not called upon to decide that point, but was only suggesting that the cut might be treated as a natural stream, at all events for some purposes; and he mentioned that as one of the purposes. He said that in this case it made no difference how you treated the cut, as the basis of all rights in an artificial stream must be an agreement, either expressed or presumed, by the owners of the land through which it runs; and that the circumstances might be such, as the court held in this case they were, as to lead to a proper inference that the artificial water course was constructed on the terms that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream, and no more than those rights.

<sup>17</sup>See *post*, chapter XXV.

<sup>1</sup> Fitzherbert, N. B. 184.

<sup>2</sup> *Stewart v. Shaffer*, 6 Pa. Dist. R. 226.

<sup>3</sup> *Roberts v. Vest*, 126 Ala. 355, 28 So. 412.

A tenant of land who turns a stream out of its natural course onto the lands of a neighbor to his injury may be enjoined therefrom and is responsible for

damages. *Maxwell v. Shirts*, 27 Ind. App. 529, 87 Am. St. Rep. 268, 61 N. E. 754.

<sup>4</sup> *Wason v. Sanborn*, 45 N. H. 169.

<sup>5</sup> *Sanitary Dist. v. Ray*, 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048.

One who purchased land injured by reason of an existing ditch whereby an adjoining owner casts upon it the diverted waters of a creek may recover damages although the adjoining proprietor has not done anything to the ditch since the purchaser's acquisition of the land overflowed. *Chapman v. Copeland*, 55 Miss. 476.

But one who obstructs a water course on his own land is not liable therefor to those having no interest as riparian owners to the flow of water therein. *Schlag v. Jones*, 131 Pa. 62, 18 Atl. 1072.

A mill owner who has a lease of lands above his dam, conferring the same rights as he would have had if the lands had been taken in condemnation proceedings, may have the erection of two dams across the stream within the dead water above his dam and the cutting of a ditch, so that between the dams so built the water will flow in the ditch instead of in the old bed, restrained by injunction when these will cause a diminution in his reservoir and in the value of his franchise, and in times of high water will endanger his dam. *Culver v. Garbe*, 27 Neb. 312, 43 N. W. 237.

damaged by the threatened change of a water course may join in an action to enjoin the change, but cannot maintain a joint action for damages.<sup>6</sup> A cause of action for damages for turning a stream of water upon plaintiff's land by a railroad embankment cannot be united with one for breach of the statutory duty to construct a farm crossing.<sup>7</sup> The one committing the injury is the one primarily liable for damages caused by it.<sup>8</sup> The successor of the wrongdoer may, however, be liable in case he continues the nuisance after notice to abate it.<sup>9</sup> A landowner, if he is not connected in any way with the act, is not responsible for the act of his tenant in turning a natural stream out of its course onto a neighbor's land to his injury.<sup>10</sup> To entitle a complainant to relief he must show that defendant has committed a wrongful act to his injury.<sup>11</sup> But if the upper riparian owner, in attempting to change the channel of the stream, causes it to flow in such a way that a material portion of it is lost before it is returned to the natural channel, he will be liable for the injury.<sup>12</sup> The fact that the complainant has attempted to change the flow of water on his own land does not deprive him of the right to have it come to his land in its ancient course.<sup>13</sup> A recovery in an action for changing the channel of a stream in such a way as to flow

<sup>6</sup>*Geurkink v. Petaluma*, 112 Cal. 306, 44 Pac. 570.

<sup>7</sup>*Thomas v. Utica & B. R. Co.* 97 N. Y. 245.

<sup>8</sup>Damages caused by the vendor in obstructing a water course in which complainant has no interest as riparian owner cannot be recovered against the vendee, as they are properly chargeable to the one committing the trespass. *Schlag v. Jones*, 131 Pa. 62, 18 Atl. 1072.

Mere use of the water of a stream for watering stock and, occasionally, for irrigation, by a subsequent owner of land through which the stream was caused to run by the diversion thereof from its natural channel because of the erection therein of an obstruction by the former owner of such land, does not amount to a continuance of the nuisance for which he will be held liable to the purchaser of land from which the stream was diverted, without some act done by him to keep up the obstruction occasioning the diversion, after such purchaser acquires title. *Hughes v. Mung*, 3 Harr. & M'H. 441.

When the owner of a private stream which flows from his land onto a highway, and thence onto another's land, diverts the stream so that it does not flow in its natural channel on the lower pri-

vate lands, the municipal corporation is not bound to compel a restoration of the stream to its natural channel, and its failure to do so will not render it liable for the creation or maintenance of a nuisance. *Allebrand v. Duquesne*, 11 Pa. Super. Ct. 218.

<sup>9</sup>Where a lessee continuing a nuisance erected by his lessor, and which consisted of diverting water onto plaintiff's land by means of an embankment, had knowledge of its existence, he is not entitled to notice before being subjected to an action for damages. *Dickson v. Chicago, R. I. & P. R. Co.* 71 Mo. 575.

<sup>10</sup>*Mazwell v. Shirts*, 27 Ind. App. 529, 87 Am. St. Rep. 268, 61 N. E. 754.

<sup>11</sup>*Woodruff v. Lockerby*, 8 Wis. 369; *Schnitzius v. Bailey*, 48 N. J. Eq. 409, 22 Atl. 732.

A riparian owner can divert the channel of a river through his own land, provided by so doing he causes no injury to the rights of others; but if injury is caused, he is liable therefor in damages, and the cause of action arises, not from the time the act was committed, but from the time of the damage. *Valley R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88.

<sup>12</sup>*Pettibone v. Smith*, 37 Mich. 579.

<sup>13</sup>*Hale v. Oldroyd*, 15 L. J. Exch. N. S. 4, 14 Mees. & W. 789.

plaintiff's lands will not bar a subsequent action to recover damages for similar injuries arising since the commencement of the first suit.<sup>14</sup> While a riparian proprietor is liable if he diverts the flow of a stream onto another's land to his injury, he is not liable if the dam is placed in a new channel to turn the water into its accustomed bed, without damage to another's land, or for injuries not the direct result of the dam.<sup>15</sup>

**493. Contracts.**— There is nothing to prevent the owners of land traversed by a water course from agreeing to change its course. Contracts with that object in view, however, affect an interest in lands so as to be within the provisions of the statute of frauds, and therefore the agreements must be in writing to be enforceable, unless such a change of position has occurred in reliance upon the agreement as to give equity jurisdiction to enforce it.<sup>1</sup> One whose water rights have been injured by diverting a water course by a canal constructed across his land without his consent may make a valid contract for the continuance of the canal and a supply of water therefrom.<sup>2</sup> Contracts conferring power to make some alteration in the channel of a stream will be strictly construed so as not to permit any further change than was intended.<sup>3</sup> And the grant of a right to the free and unobstructed use of the waters of a spring branch for the purpose of washing iron and other ore and of operating such machinery as the grantee had erected or might erect, and the release of any damages arising "from any use of said spring branch," will not be construed to give grantees the right to pump water from other lesser streams into its washers, and thence into the spring branch, whereby the premises of grantor are greatly damaged.<sup>4</sup> A deed which grants nothing more than a water privilege does not justify an upper riparian proprietor in discharging water after its use for factory purposes, in an unlawful manner on the land of a lower proprietor.<sup>5</sup> So, a grant by a riparian

<sup>14</sup>*Beckwith v. Griswold*, 29 Barb. 291.

<sup>15</sup>*Oldenburg v. Oregon Sugar Co.* 39 Or. 564, 65 Pac. 869.

<sup>1</sup>*Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463.

<sup>2</sup>*Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

<sup>3</sup> A privilege of damming back water of a floatable stream for its utilization as a motive power does not confer power to divert it into a new channel or to excavate and deepen it. *State v. Duplin Canal Co.* 91 N. C. 637.

A right to cast water over the side of a race into the old channel will not be

implied from a contract between owners of mills on a race which is fed from a branch of a river and the owner of the branch and an island between it and the main stream, looking to the closing of the branch and the extension of the race across the island, to draw water from the river; but, in case a waste weir is placed there, the owner of the bed of the branch may close it. *Packer v. Rochester & N. R. Co.* 17 N. Y. 283.

<sup>4</sup>*New River Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

<sup>5</sup>*Woodworth v. Genesee Paper Co.* 18 App. Div. 510, 46 N. Y. Supp. 99.

proprietor of land bordering on the stream below that retained by him, and of the "water accustomed to flow in the stream," will not entitle the grantee to go upon the grantor's land to return to the stream waters suddenly diverted by an extraordinary freshet.<sup>6</sup>

**494. Limitation of actions; damages.**—An action for the damages resulting from the changing of the channel of a stream is within the operation of the statute of limitations. And the time begins to run, not from the time of the change, but from the time of injury done.<sup>1</sup> But where the injury to riparian land from the change of the channel of a stream is actual and apparent at the time the obstruction is finished, and discoverable, then, to be inevitably continuous, the statute of limitations begins to run at that time, although the injury gradually increases and does not become complete until some time afterwards.<sup>2</sup> And where, by the diversion of a stream from, and its return to, its natural channel, continuing injury is done to the land of a lower proprietor, the statute of limitations will not bar an action for the injury happening within the limitation period, although the original act was done prior to such period, unless the right to maintain the nuisance has been acquired by adverse possession.<sup>3</sup> The time within which the action must be brought will be governed by the character of the injury done and for which the compensation is sought.<sup>4</sup> The overflowing of land by the change of channel of a stream is a tort which gives a right to nominal damages, although no actual damages are proved.<sup>5</sup> If the change is permanent and a portion of the lower land

<sup>6</sup>*Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820, 49 Am. St. Rep. 64, 41 Pac. 31.

<sup>1</sup>*Mangold v. St. Louis, I. M. & S. R. Co.* 24 Mo. App. 52; *Ells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651.

The statute of limitations commences to run against an action for flooding lands by the construction of a permanent embankment and new channel for a water course of insufficient capacity, from the time the first flood occurred causing material injury. *Powers v. St. Louis, I. M. & S. R. Co.* 71 Mo. App. 540. (Biggs, J., dissented upon the ground that the statute did not commence to run at the time of the first flood, as it was not apparent at that time that the injuries sued for would actually occur, the injuries at that time being limited to injury to crops and fences, while the succeeding floods injured and washed away the soil.)

<sup>2</sup>*Powers v. St. Louis, I. M. & S. R. Co.* 158 Mo. 87, 57 S. W. 1090.

The overflow of land by the diversion of a natural stream into a drain constructed by a railway company is a permanent injury for which action must be commenced within six months of the time the damage is first sustained. *Patterson v. Great Western R. Co.* 8 U. C. C. P. 89.

<sup>3</sup>*Valley R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88.

<sup>4</sup>Damages to a crop on account of the overflow of land caused by the diversion of a natural stream through a drain constructed by a railway company is an injury for which action should be commenced within six months from the time of its occurrence. *Patterson v. Great Western R. Co.* 8 U. C. C. P. 89.

<sup>5</sup>*Eagle & P. Mfg. Co. v. Gibson*, 62 Ala. 369; *Chapman v. Copland*, 56 Miss. 476.

destroyed, the measure of damages is the difference in the value of the property before and after the change.<sup>6</sup> But, in case the change is not permanent, only damages actually incurred at the time of the trial can be recovered.<sup>7</sup> In an action to recover damages for the injury caused by casting the water of a stream upon land, when the reasonable cost of repairing the injury or the cost of restoring the land to its former condition is less than the diminution of the market value of the land by reason of the injury, the cost of restoration is the proper measure of damages.<sup>8</sup>

### V. DIVERSION OF WATER FROM STREAM.

**495. Right to divert for use on land of upper proprietor.**— In order to enable the riparian proprietor to make the utmost use of the water of a stream, it is necessary for him to remove some of it from its channel, and he has a right to do this provided he restores what he does not consume to the channel before the stream leaves his property. As has been seen in a preceding section,<sup>1</sup> reasonable quantities of the water may be consumed for certain purposes, although the opportunity for use on the part of the lower proprietor is thereby somewhat restricted.<sup>2</sup> But the water cannot be diverted for manufacturing purposes, and not restored to the stream, if the result is to injure a lower proprietor.<sup>3</sup> The manner in which the water is returned to the stream is immaterial to the lower owner provided it is returned before it reaches his land.<sup>4</sup> The upper owner may conduct the water through any part

<sup>1</sup>*Gulf, C. & S. F. R. Co. v. Clark*, 2 Ind. Terr. 319, 51 S. W. 962.

<sup>2</sup>*Markt v. Davis*, 46 Mo. App. 272.

Damages are not permanent and recovery cannot be had for prospective damages in an action where injury is caused by the erection of piers for a boom in a river by constructing cribs of logs and filling the cribs with loose stone, which construction causes the current to flow against and wash plaintiff's banks. *Rogers v. Coal River Boom & Driving Co.* 39 W. Va. 272, 19 S. E. 401.

<sup>3</sup>*Hertshorn v. Chaddock*, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997. Affirming 40 N. Y. S. R. 953, 16 N. Y. Supp. 714.

<sup>4</sup>See ante, § 465.

<sup>5</sup>*Brown v. Kistler*, 190 Pa. 499, 42 Atl. 885; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

It is not unreasonable for the pro-

prietor of a stream to take water therefrom through a conduit to his house and barn, and allow the water to run from the receptacle a little to prevent its freezing in winter and to keep it clear in summer, although the water is not returned to the stream, but is allowed to run upon the land and be wasted. *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 301.

But if an upper riparian proprietor takes water from an ancient water course for any other purpose than that of watering his own meadow, or if he does not turn what was not expended in that way into the ancient channel after using it for that purpose, he is liable for such misuse to a lower proprietor injured thereby. *Bent v. Wheeler*, 3 Dane Abr. 16.

<sup>6</sup>*Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255.

<sup>7</sup>*Gould v. Eaton*, 117 Cal. 539, 38 L.

of his land he desires, and he may use it to the same extent and for the same purposes as though it flowed there by a natural channel.<sup>5</sup> But the appropriation of the water of a non-navigable river by a riparian owner in such quantities as unreasonably to diminish the supply of other riparian owners is a private nuisance for which an injunction will lie.<sup>6</sup> In some of the early cases in which the court was inclined to think that the right to the flow of the water depended upon its having been appropriated by the lower owner, it was held that, if he had so appropriated it, the water could not be diverted from the stream to his injury.<sup>7</sup> And therefore it was held that pits for watering cattle could not be enlarged to the injury of a lower proprietor.<sup>8</sup> But, as will appear in a subsequent section,<sup>9</sup> the right of the lower owner does not depend on the use which he has made of the water; and the upper proprietor is not deprived of the right to exercise his right to use the water in a reasonable manner by the fact that the lower proprietor has begun to make some use of it.

**496. The water cannot be diverted from its course.**—The upper proprietor has no right to divert water from a stream in such a way as to destroy or materially diminish the water course, or so that it is wasted and rendered unavailable for the uses of the lower proprietor.<sup>1</sup> The

R. A. 181, 49 Pac. 577; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Webster v. Fleming*, 2 Humph. 518; *Cansfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220.

<sup>5</sup>*Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

<sup>6</sup>*Saunders v. Bluefield Waterworks & Improv. Co.* 58 Fed. 133, Reversed for want of jurisdiction, 11 C. C. A. 232, 25 U. S. App. 70, 63 Fed. 333.

<sup>7</sup>*Frankum v. Falmouth*, 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B. N. S. 26, 90; *Bealey v. Shaw*, 6 East. 208, 2 Smith, 321, 9 Revised Rep. 466.

<sup>8</sup>*Brown v. Best*, 1 Wils. 174.

<sup>9</sup>See post § 534.

<sup>1</sup>*Rice v. Norfolk & J. R. Co.* 130 N. C. 375, 41 S. E. 1031; *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118; *Pope v. Kinman*, 54 Cal. 3; *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219; *Rummell v. Lamb*, 100 Mich. 424, 59 N. W. 167; *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370; *Heltman's Appeal*, 4 Walk. (Pa.) 35; *Declaney v. Boston*, 2 Harr. (Del.) 489; *Hood v. Williamson*, 23 Dec. Ct. Sess. 2nd Series 496; *Haymes v. Gault*, 1 Me-

*Cord*, L. 543; *Perkins v. Dow*, 1 Root, 535; *Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Armendais v. Stillman*, 67 Tex. 458, 3 S. W. 678; *Coltrick v. Swindburne*, 105 N. Y. 503, 12 N. E. 427; *Sackrider v. Beers*, 10 Johns. 241; *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370; *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373; *Parker v. Griswold*, 17 Conn. 298, 42 Am. Dec. 739; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

An unlawful structure in a natural stream diverting the water from the usual channel to the injury of another riparian proprietor on the stream is a nuisance which the law will not regard as permanent so as to entitle a recovery for prospective damages. *Bailey v. Heintz*, 71 Ill. App. 189.

A right of action accrues to a servant proprietor injured by the diversion of a stream into a new channel, though re-entering the old before reaching his lands, if the new channel is obstructed at any time so as to send the water Heltman's Appeal, 4 Walk. (Pa.) 35; wholly in another course. *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220.

A seignior, by his grant from the Crown, acquires a right of property in

diversion of the water from the stream is a nuisance.<sup>2</sup> Under this rule the upper proprietor is forbidden to take the water from the stream for use on his own land, and not to return it to its channel until after it has passed the land of the lower proprietor.<sup>3</sup> There is a substantial diversion cognizable at law, where it is persistent and substantially reduces the natural level of the water.<sup>4</sup> A land owner cannot permit a lower owner to take water from the stream on his land, and not return it until it has passed the land of an intermediate owner.<sup>5</sup> And where the stream leaves an owner's land, to re-enter it farther down, he cannot connect the points of departure and re-entry so as to deprive the intermediate owner of the flow.<sup>6</sup> The upper owner cannot divert the water indirectly by sinking wells or digging drains.<sup>7</sup> A riparian proprietor cannot enlarge a natural channel, taking water out of the main channel of the stream, if by so doing he deprives a lower proprietor of the use of the water.<sup>8</sup> Nor can the water be diverted for the purpose of making repairs to the upper mill.<sup>9</sup> Breach of an agreement to deepen a stream is no defense to an action for diverting it by means of ditches dug above the plaintiff's land.<sup>10</sup> When one diverts a natural stream, though causing it to re-enter its channel before leaving his lands, but obstructs the new runway so that the water is made to take at times a wholly different course, a right of action accrues to a lower proprietor only as he is actually injured thereby; and until such action accrues, no prescription begins to run.<sup>11</sup> The fact that the title to the bed of the stream is in the state

the soil over which a river not navigable flows; but in the running water he has only a right of servitude, which does not authorize him to divert the stream or to use the water to the prejudice of other proprietors above or below him. *St. Louis v. St. Louis*, Stuart (L. C.) 575.

An action lies for diverting a water course originally flowing to a well. *Prickman v. Tripp*, Skinner, 389.

The mere fact that the stream reaches the lower proprietor through a tunnel will not prevent his maintaining an action for its diversion. *Holker v. Porritt*, L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, 21 Week. Rep. 414.

<sup>2</sup>*Shields v. Arndt*, 4 N. J. Eq. 234.

<sup>3</sup>*Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371.

<sup>4</sup>*Sanborn v. People's Ice Co.* 82 Minn. 43, 51 L. R. A. 829, 83 Am. St. Rep. 401, 84 N. W. 641.

<sup>5</sup>*Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24.

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So, a riparian proprietor owning a mill below plaintiff's land and also a water right above his land commits an improper diversion in taking the water from the stream at such point above plaintiff's land and carrying it by an artificial ditch to his mill, and there turning it into the stream below the plaintiff's land. *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.

<sup>6</sup>*Thorpe v. Coricini*, 20 N. J. L. 311.

<sup>7</sup>*Rhoveiy v. Hume*, 10 Or. 76; *Covert v. Valentine*, 50 N. Y. S. R. 516, 21 N. Y. Supp. 219.

<sup>8</sup>*Blanchard v. Baker*, 8 Me. 266, 23 Am. Dec. 504.

<sup>9</sup>In *Van Hoessen v. Coventry*, 10 Barb. 518, the court seems to make a distinction between diversion and retention, holding that in case of a retention it must be unreasonable, in order to hold the defendant liable.

<sup>10</sup>*Pattison v. Richards*, 22 Barb. 146.

<sup>11</sup>*Norton v. Valentine*, 14 Vt. 239, 39 Am. Dec. 220.



does not destroy the riparian right of access, although it may have some effect on the use he may make of the water; and therefore it has been held that if the title to the bed of the river is in the public, the lower proprietor, who has obtained no right from the public to build a dam, cannot maintain an action for the diversion of the stream from his dam; but he may maintain an action for the diversion of the stream so as to cut off his right of access to the water.<sup>12</sup>

Whether or not the flood water can be diverted from the course of the stream depends on the purpose for which the diversion is made. If it is for a useful purpose and no injury is done to the lower owner he cannot object to the diversion;<sup>13</sup> but the water cannot be merely drained away from its course to the injury of the lower proprietor.<sup>14</sup>

**497. Diversion for use on nonriparian land.**—As was seen during the discussion of the question of the right to use the water from the stream, there is no right to use it on nonriparian land.<sup>1</sup> This rule makes the diversion of the water for use there illegal.<sup>2</sup> So, a riparian proprietor cannot confer upon another person the right to divert water from a stream to use on nonriparian lands to the injury of a lower proprietor, since the riparian owner himself has a right to divert waters to riparian lands only.<sup>3</sup> There are some exceptions to the rule as thus broadly stated. Such a rule would impose a needless hardship on the upper owner, and confer no corresponding benefit on the lower owner. Therefore, to give the lower owner a ground of complaint, the quantity taken to the nonriparian land must be sufficient to inflict a perceptible injury on him.<sup>4</sup> And if the riparian owner wishes to enjoy his right by selling or leasing the water, he may be permitted to do so, although the right is to be enjoyed on nonriparian

<sup>12</sup>*Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603, 9 Am. St. Rep. 88, 15 Atl. 726; *Williams v. Fulmer*, 151 Pa. 405, 31 Am. St. Rep. 767, 25 Atl. 103.

<sup>13</sup>See ante, p. 615.

<sup>14</sup>See post, § 500.

<sup>1</sup>See ante, § 465.

<sup>2</sup>*Hayden v. Long*, 8 Or. 244; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; *Williams v. Wadsworth*, 51 Conn. 277.

A riparian proprietor has no right to divert the water of a stream into a reservoir for the purpose of supplying manufacturers and others with water, where the diversion amounts to a substantial diminution of the water. *Bel-fast Rope Works v. Boyd, Jr.* L. R. 21 Ea. 560.

<sup>3</sup>*Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24.

<sup>4</sup>*Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18.

The lower proprietor cannot maintain an action against the upper proprietor and his grantee on the ground that a grant has been made without right to use the water on nonriparian lands, if it is used and returned to the stream in such a manner as not to affect the water either in quantity or quality. *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 569, 52 L. J. Q. B. N. S. 608, 48 L. T. N. S. 784, 31 Week. Rep. 603, 47 J. P. 534, Affirmed in L. R. 27 Ch. Div. 122, 54 L. J. Ch. N. S. 19, 51 L. T. N. S. 862, 32 Week. Rep. 885.

land.<sup>5</sup> But in making such use of his right, he can make use of no more than his share of the water of the stream. Thus, in an action by a lower proprietor against an upper proprietor for constructing waterwheels and machinery, and pumping up water from the water course to a reservoir and conveying it thence by pipes to his dwelling house situated upon another estate at a distance from the stream, and to which point the water could not have flowed without the pump, the water diverted being but about one thirty-seventh part of the flow of the stream, it being about 9,000 gallons a day and the entire flow of the stream 333,000 gallons,—the court instructed the jury that it was for them to say whether or not the use of the water by the defendant was reasonable.<sup>6</sup> A rule for a new trial was discharged<sup>7</sup> and the court seemed to assume that the defendant's act in pumping the water into a reservoir, to be used on his premises distant from the stream, was proper. At least, the question does not seem to have been discussed by the court, which seems to have limited the case to the question which it said was the only important one, namely, whether the defendant had taken an unreasonable quantity under all the circumstances, and which it said was properly left to the jury. A riparian owner upon a brook cannot dispose of all its water if, at the place where it empties into a river, there is a public landing which requires the flow of the water from the brook.<sup>8</sup> An asylum, by purchasing a plot of ground on a stream just large enough for a pumping station, does not become a riparian owner or acquire the right to withdraw water for domestic uses of the institution to the injury of a mill owner below, and is liable for past and present damages by such act.<sup>9</sup>

**498. Right to divert water which has been added to the stream.—**

A lower owner cannot complain of the action of the upper owner, who has turned an extra quantity of water into the stream, in taking it out again before it reaches such lower proprietor, if there is no diminution of the quantity which should properly reach him.<sup>1</sup> But one

<sup>5</sup> A riparian owner may grant a part of his estate not abutting on the stream, for his own purposes and for sale to and, as appurtenant thereto, a right to others is, under all the circumstances, a draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right the grantee may maintain an action. *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. 56.

<sup>6</sup> *Norbury v. Kitchen*, 3 Fost. & F. 292.  
<sup>7</sup> 7 L. T. N. S. 685, 9 Jur. N. S. 132.  
<sup>8</sup> *Moulton v. Newburyport Water Co.* 137 Mass. 163.  
<sup>9</sup> *Bank of Hopkinsville v. Western Kentucky Asylum for the Insane*, 108 Ky. 357, 56 S. W. 525.

A riparian proprietor in the exercise of water rights appurtenant to his land may sell water to nonriparian proprietors, depending upon a decision of a jury whether such use of the water by him for his own purposes and for sale to others is, under all the circumstances, a reasonable use. *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18.

<sup>1</sup> *Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co.* 1

maintaining a canal across the land of another who has the right to water from it does not, by turning into it above such owner's land water from another canal, acquire the right to all the water from the main channel in violation of such land owner's rights.<sup>2</sup> And a mere apparent increase of the water in a field, evidenced by the formation or enlargement of marshes or swamps therein, subsequent to a decree partitioning that field to one person, but the waters rising from springs thereon to other persons, gives the former no right to appropriate the excess, where it does not appear in what mode the water rises in such marshes, nor that they are not fed from the same sources as the streams partitioned to the other parties.<sup>3</sup> And the fact that other water from a new source is brought to supply the place of that diverted will not prevent an injured party from recovering for the diverted water, to which he was entitled.<sup>4</sup> The water must be taken by the one who developed it before it has passed beyond his control, for, if he permits it to reach the land of the lower owner, the latter acquires rights in it which the upper owner cannot destroy.<sup>5</sup> Water artificially developed upon the land of an upper owner, turned into the stream and taken out by him through a pipe or flume across the land of a lower owner with the latter's acquiescence, together with the natural water of the stream, is, so long as it is so conducted, subject to use by the lower owner equally with the natural water of the stream flowing in such pipe, under a contract by which, in consideration of the grant of a right of way across the lower premises for the construction of ditches, flumes, and aqueducts, the owner thereof is given the right to use, during two days in the week, the water flowing "in any water ditch, flume, or aqueduct used, dug, or erected" upon his prem-

N. J. Eq. 157, 21 Am. Dec. 41; *Dyer v. Cranston Print Works Co.* 22 R. I. 506, 48 Atl. 701; *Brymbo Water Co. v. Lester's Lime Co.* 8 Reports, 329. he shows that he takes no more than he put in. *Wilcox v. Hausch*, 64 Cal. 481, 3 Pac. 108.

If, by excavations at the head waters of the stream and the opening of ditches to drain adjacent land into it, the flow of water remains the same as before a portion of it was taken out of the stream to supply railroad engines, a lower riparian owner will have no right of action for such diversion. *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

<sup>2</sup>*Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

The one who turned the water in will not be permitted to take any out unless

<sup>3</sup>*Glassell v. Verdugo*, 108 Cal. 503, 41 Pac. 403.

<sup>4</sup>*Aberdeen v. Bradford*, 94 Md. 670, 51 Atl. 614.

<sup>5</sup>*Druley v. Adam*, 102 Ill. 177, Affirming *Adams v. Slater*, 8 Ill. App. 72; *Schulz v. Succony*, 19 Nev. 359, 3 Am. St. Rep. 888, 11 Pac. 253.

A riparian proprietor will be restrained by injunction from diverting the surplus water power of a river created by an improvement thereof, and returning the same below the land of a purchaser thereof from the improvement company. *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373.

ises by the grantee of the easement.<sup>6</sup> In order to justify the reclamation of the water it must have been turned into the stream with that intention and not for the purpose of finding an outlet for it.<sup>7</sup>

**499. Complainant must be injured.**—As in other cases of the attempted use by one of a common right, in order to give a lower owner a right to complain of the diversion by an upper owner of the water from a stream, the former must show that his rights are interfered with in such a way as to cause injury to him.<sup>1</sup> There was a tendency among the earlier cases to carry this doctrine to the extent of holding that there could be no right of action if the lower owner was making no use of the water, so that he was not presently injured by its withdrawal by the upper owner.<sup>2</sup> But after the upper owner has made a particular use of the water for a long period of time, it is very diffi-

<sup>1</sup>*Mayberry v. Alhambra Addition Water Co.* 125 Cal. 444, 54 Pac. 530, 58 Pac. 68.

<sup>2</sup>If a canal company discharges surplus water from one of its levels into a river for the purpose of getting rid of it, it becomes a part of the river, and subject to the uses of the riparian owner, and the corporation cannot afterwards take it out of the river to the injury of such owner. *Adams v. Slater*, 8 Ill. App. 73.

<sup>3</sup>*Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989; *Lawrence v. Curtis*, 3 N. J. Eq. 422; *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18; *Burden v. Mobile*, 21 Ala. 309; *Potter v. Burden*, 38 Ala. 651.

A riparian proprietor whose land is not shown to be susceptible of cultivation or of being rendered productive, and which will not be injured by the diversion of water from the stream, is not entitled to an injunction to protect his riparian rights,—especially where the injunction, if issued, would not have the effect of causing the water to flow over or along such land, as it had been accustomed to flow. *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762.

The maintenance by a water company of a ditch and flume constructed at a lower level than upper lands, for the diversion of water from a stream, will not be enjoined at the suit of the owners of such upper lands, through which the stream flows under ground, where such diversion does not diminish the volume of the stream above the ditch or affect it in any way in its course through the upper lands, or cause any injury or damage to the owners thereof regardless

as to whether or not such diversion be unlawful or improper. *Yarwood v. West Los Angeles Water Co.* 132 Cal. 204, 64 Pac. 275.

If the lower proprietor can make use of the water only by means of dams which will flood the land of the proprietor above him, he cannot recover other than nominal damages for a diversion of the water from the stream. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254.

The construction of a dam by the owner of an outer mill seat, for the diversion of the water of a river into a canal, cannot be complained of by the owner of an inner mill seat if, after its construction, water will be left at the commencement of his head race in sufficient abundance for all the purposes of his mill seat. *Binney's Case*, 2 Bland. Ch. 99.

<sup>2</sup>In *Williams v. Morland*, 2 Barn. & C. 910, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579, the court said that the lower proprietor cannot recover damages for the diversion of water unless he has appropriated it to his use so that his use is injured by the act of the upper proprietor. But it was decided that there could be no recovery for merely changing the flow of the stream so that it was not as clear, smooth, and moderate as before.

In *Palmer v. Kellethwaite*, 1 Show. 64, Holt said: Suppose a water course runs to my ground and I have no use for it and one upon another ground diverts it before it comes to mine, will an action lie? And he intimates that it will not, although he states there will be further argument on the subject.

cult to show that he has no right to continue such use, and therefore the lower owner has a right to take steps to prevent the destruction of rights which belong to him, and which he may at some time wish to make use of, although he is not using them at the time he brings his suit. As stated in *Parker v. Griswold*,<sup>3</sup> some injury must be caused to the lower owner to give him a right of action. But it is sufficient that, in case the action is not brought, a prescriptive right will be acquired by the other party. And, therefore, in order to maintain the action, the lower owner need not show that the diversion interferes with his present use of the stream.<sup>4</sup> So that the obstruction of the right of the lower owner is a sufficient injury to entitle him to maintain the action.<sup>5</sup> The law will presume injury from such condition.<sup>6</sup> But the relief granted to complainant will be merely a vindication of his right, and he cannot recover special damages unless he shows that he has received special injury.<sup>7</sup> If the lower owner has no means of utilizing the water, he suffers no special injury which will entitle him to special damages.<sup>8</sup> But the mode in which the lower owner has been making use of the stream will be immaterial in case

<sup>3</sup> 17 Conn. 288, 42 Am. Dec. 739; *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194.

In *Glynne v. Nichols*, 2 Show. 507, an action on the case was brought for diverting a water course, which was defended on the ground that the use to which it was applied was not stated. But *Glynne v. Nicholas*, Comb. 43, states that judgment was given for the plaintiff.

<sup>4</sup> *Wciss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Haymes v. Gault*, 1 McCord, L. 543; *Harrop v. Hirst*, L. R. 4 Exch. 43, 38 L. J. Exch. N. S. 1, 19 L. T. N. S. 426, 17 Week. Rep. 164; *Standen v. New Rochelle Water Co.* 91 Hun, 272, 36 N. Y. Supp. 92; *Chace v. Warsaw Water-works Co.* 79 Hun, 151, 29 N. Y. Supp. 720; *Hilzinger v. Saugerties Water Co.* 66 Hun, 173, 21 N. Y. Supp. 121.

<sup>5</sup> *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230; *Bannatyne v. Cranston*, Mor. Dict. 12,769 "Property," cited in L. R. 2 App. Cas. 855.

<sup>6</sup> *Hart v. Evans*, 8 Pa. 22.

<sup>7</sup> *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

When one is entitled to take a certain amount of water from a stream, the

damming and diversion of the stream above the point at which he takes his water is an invasion of his rights, but will not entitle him to compel the removal of the dam, if, in spite of it, by sluiceway therein or otherwise, the quantity of water to which he is entitled comes into his pond. *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. 56.

Recovery for damages to a mill owner by loss of profits resulting from the diversion of water from a stream can be had only where the water diverted would have been sufficient, if added to the other sources of supply, to operate the mill. *Washington County Water Co. v. Garver*, 91 Md. 398, 46 Atl. 979.

Evidence of the statements of customers of a mill that they had withdrawn their custom because the mill had stopped grinding is admissible in an action for damages for the diversion of water from the stream on which such mill is located by the construction of a dam across a tributary thereof, on the question whether custom had been lost because the mill had stopped grinding on account of a lack of a sufficient supply of water. *White v. East Lake Land Co.* 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393.

<sup>8</sup> *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

he wishes to make a new use of it, with which the use by the upper proprietor will conflict.<sup>9</sup> And injury is shown by an averment that the hydraulic power of the water is destroyed or impaired to such a degree as to render it utterly insufficient and worthless for the use of the complainant.<sup>10</sup> Anything which shows that defendant prevented the water from reaching plaintiff's property is sufficient to support an allegation of diversion.<sup>11</sup> Where the doctrine of prior appropriation obtains, the right of the lower owner to relief depends upon his ownership or right of property in the water.<sup>12</sup> Equity may refuse to interfere with the upper owner's use of the stream if the lower owner is not injured by such use.<sup>13</sup>

**500. Means and purpose of diversion.**—The reasonableness or lawfulness of any diversion of water is in no wise affected by the mere mode of diversion.<sup>1</sup> The water cannot be diverted from the stream by percolation.<sup>2</sup> But one who constructs works which draw the water by percolation from the stream, under contract with another, is liable only from the time that the works begin to take the water from the stream.<sup>3</sup> A stream cannot be diverted by mining operations, but the

<sup>9</sup>*Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

<sup>10</sup>*Corning v. Troy Iron & Nail Factory*, 39 Barb. 311.

<sup>11</sup>*Shears v. Wood*, 7 J. B. Moore, 345, 1 L. J. C. P. 3.

Where a company constructing a navigable cut from a lake to the sea failed to construct proper locks so as to prevent the waters of a certain river from flowing into the lake and from thence to the sea, such conduct constitutes a diversion or abstract of the waters of such river in violation of a statute prohibiting such act. *Preston v. Norfolk R. Co.* 2 Hurlst. & N. 735.

<sup>12</sup>*Cash v. Thornton*, 3 Colo. App. 475, 34 Pac. 268.

<sup>13</sup>Although an upper riparian owner has no right to divert water and not return it before it reaches the land of the lower owner, in case it is necessary to do so to run his mill, and it can be used by the lower owner for his mill with equal advantage when taken from the tail-race as when taken from the channel of the river itself, a court of equity may refuse to enjoin the diversion of the water, and leave the parties to their remedy at law. *Mason v. Cotton*, 2 McCrary, 82, 4 Fed. 792.

The diversion of a portion of the water of a stream will not be restrained at the suit of a lower riparian owner, where the water diverted is all returned

to the stream without pollution or injury at a point above his land, upon the ground that such diversion, if continued for twenty years, would ripen into a right, as no right can be acquired so long as no injury is inflicted. *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 566, 52 L. J. Ch. N. S. 608, 48 L. T. N. S. 784, 31 Week. Rep. 603.

<sup>1</sup>*Charnock v. Higuerra*, 111 Cal. 473, 32 L. R. A. 190, 44 Pac. 171.

<sup>2</sup>*Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483, 24 L. T. 402, 19 Week. Rep. 569; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272, 21 N. E. 761; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 54 L. R. A. 190, 64 Pac. 735; *Van Wycklen v. Brooklyn*, 118 N. Y. 428, 24 N. E. 179; *Covert v. Brooklyn*, 6 App. Div. 73, 39 N. Y. Supp. 744.

An action may be maintained if, in digging a conduit for a water supply, the trench is so constructed that it draws the water from a stream to the injury of complainant's supply. *Covert v. Cranford*, 141 N. Y. 521, 38 Am. St. Rep. 826, 36 N. E. 597, Reversing, as to the allowance of permanent damages, *Covert v. Valentine*, 50 N. Y. S. R. 516, 21 N. Y. Supp. 219.

<sup>3</sup>*Covert v. Cranford*, 141 N. Y. 521, 38 Am. St. Rep. 826, 36 N. E. 597.

owner of a right to the use of the water of a stream cannot restrain the owner of land through which it flows from conducting mining operations under it, where such operations have not caused any diminution of the water, although they have lowered the level of the stream and the adjoining land about 4 feet.<sup>4</sup> All that the lower owner is entitled to in such a case is an undertaking that no further injury shall be done. The upper owner cannot divert the stream to avoid the effect of a dam and pond constructed by the lower owner.<sup>5</sup> And he cannot divert the stream for the purpose of effecting a drainage of his property.<sup>6</sup> So, the owner of land flowed by the back water from a lake, caused by the partial filling of the creek constituting its natural outlet, has no right so to drain his land of such back water as to divert the waters of the lake from their natural outlet to the detriment of an owner of lands through which it runs, but should remove the obstruction or cause of such back water.<sup>7</sup> Even when the stream is at an unusual height an upper owner cannot, merely for the purpose of relieving his land of the burden of the water, divert the water from its natural channel if thereby lower proprietors are injured, therefore one may not by a drainage ditch draw off or divert the waters of a lake when its waters are high as against one who has a mill using the water power of a stream in the main supplied by the waters of the lake which naturally flow into it.<sup>8</sup> The upper owner is not bound to prevent the diversion of the stream by natural causes.<sup>9</sup> But the fact that it has been practically diverted by such cause gives no right to treat the stream as destroyed and construct a dam to complete the diversion.<sup>10</sup>

**501. Stream must exist to make diversion illegal.**— In order to render the upper owner liable for diverting water which was accustomed to find its way to the land of the lower owner, there must in fact be a

<sup>4</sup>*Ellwell v. Crowther*, 31 Beav. 163, 31 L. J. Ch. N. S. 763, 8 Jur. N. S. 1004, 10 Week. Rep. 615, 6 L. T. N. S. 596.

<sup>5</sup>*Moffett v. Brewer*, 1 G. Greene, 348.

<sup>6</sup>An injunction will be granted to restrain the diversion of the water of a stream fed by a spring on marsh lands, used for irrigation and domestic purposes by the owner of land through which it flows from such marsh in a well-defined channel, where such diversion is made merely for the purpose of draining the marsh, which could be accomplished without inconvenience or extra expense by the adoption of a mode or means of drainage not injurious to such land owner. *Bartlett v. O'Connor* (Cal.) 36 Pac. 513.

In *Thayer v. Brooks*, 17 Ohio, 489, 49

Am. Dec. 474, the court, refusing to commit itself without a full investigation, suggests that the draining of a swamp upon one's own land for the improvement thereof, whereby filtration into a running stream is destroyed and the volume of water thus diminished to the injury of a mill owner on the stream, may, perhaps, present a case to which the maxim *De minimis non curat lex* is strictly applicable.

<sup>7</sup>*Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687.

<sup>8</sup>*Bennett v. Murtaugh*, 20 Minn. 151. Gil. 135.

<sup>9</sup>*Dunoon v. Bancroft*, 110 Mass. 267.

<sup>10</sup>*Paige v. Rocky Ford Canal & I. Co.* 83 Cal. 93, 21 Pac. 1102, 23 Pac. 875.

water course, and not merely surface or percolating water.<sup>1</sup> But if there is in fact a water course fed by springs, the water cannot be diverted, although the usual marks attending a water course may be somewhat imperfect.<sup>2</sup> In *Rawstron v. Taylor*,<sup>3</sup> the court held that the owner of land across which flows water which rises to the surface above his property, and which flows most of the time except after long drouths, but which follows no regularly formed ditch or channel, the place where it flows being constantly trodden on by cattle, although at times it flows through artificial troughs, may, for the purpose of draining his land and procuring a supply of water to property belonging to him, divert the same although it has flowed as described for more than twenty years. Plaintiff admitted in that case that the water was mere surface water and the decision must be limited strictly to such admission. Baron Parke's suggestion that the same rule would apply if the source was in a spring is not only out of harmony with sound principle, but also with later decisions in the same jurisdiction. In *Ennor v. Barwell*,<sup>4</sup> the court held that the owner of land has no right to divert the water of a pond located thereon, the supply of which is copious and continuous, consisting of water rising from the ground, although its flow, by reason of the spongy nature of the ground, has a poorly defined course. The court, in referring to the lack of a defined channel connecting the water of the pond with the adjoining lands, says: But when the matter is accurately looked at,

<sup>1</sup> The owner of land on a brook, rising in a morass fed by water oozing from surrounding hills, which flows intermittently and only when the snows melt and the rains are abnormally copious, cannot complain if the owner of the marsh drains it into a reservoir for storage and distribution to purchasers. *Boynston v. Gilman*, 53 Vt. 17.

<sup>2</sup> *Chenoweth v. Hicks*, 5 Ind. 224; *Leavenworth v. Prospect Rock Water Co.* 8 Kulp, 310; *Ennor v. Barwell*, 2 Giff. 410, 6 Jur. N. S. 1233.

The character of a stream as a water course having been determined by the fact that from a spring a stream of water from time immemorial has flowed in a perceptible current, carrying a large body of water, and from a short distance below the spring the stream flows in a well-defined channel,—the sources of the spring are immaterial in an action by a lower owner to restrain the diversion of the water thereof by the owner of the land on which the spring is located. *Chauvet v. Hill*, 93 Cal. 407, 22 Pac. 1066.

<sup>3</sup> 25 L. J. Exch. 33, 11 Exch. 369.  
<sup>4</sup> 6 Jur. N. S. 1233, 2 Giff. 410, 423.

In that case the openings were what might be called surface springs and were

always filled with water—water which percolated through the soil, probably rain water. They were located near the higher parts of the land and furnished a perennial supply of water. In speaking of them the court says: If the water from Stock's hill had been common surface water, and without any constant supply or defined course I should have been bound to hold that the case of the plaintiff as to the water from Stock's hill failed. But in my opinion, from the evidence it is clear that the water at Stock's hill is not common surface water. I think it is established that it is not an inconstant supply of water, but, more or less, that there is always water there. I think, also, that from the nature and situation of those surface springs, the channel cannot be expected to be very deeply furrowed or accurately defined. I am clearly of opinion this cannot be considered as water flowing along the surface of the ground. Therefore, I have come to the conclusion that, the water being supplied from surface springs flowing naturally into the plaintiff's land, the defendant, by intercepting it, has intercepted the legal right of the plaintiff.



the water rising to the surface of the ground in these ponds being close to the plaintiff's adjoining land, the ground of which is lower than the surface of the ponds, their very nearness to it does not admit of there being distance sufficient to have furrowed or made a clear and defined channel, for the ground which forms the circumference of these ponds or springs is wet and swampy. But by the law as established by *Wright v. Howard*<sup>5</sup> it is perfectly clear that the owner of land on which there are springs of water which would flow to the lower lands of his neighbor unless intercepted has no right so to use the water while on his land as to diminish the quantity which would flow to his neighbor below. Where the water of a spring flows from a regular channel into a brook, a person is not relieved from liability for diverting it by the fact that he took the water from the spring head before it flowed into the natural channel.<sup>6</sup> There is no liability for diverting the water from an artificial channel unless it is prevented by contract or prescriptive rights, or by a course of dealing with the channel which makes it, in effect, a water course.<sup>7</sup> The mere fact that the water is higher than usual in the stream at times of freshets gives no right to divert it if it is still within the banks of the stream.<sup>8</sup> The fact that the bed of the stream belongs to the public does not prevent the lower owner from maintaining an action in case the water is diverted to his injury. As stated in *Fulmer v. Williams*,<sup>9</sup> it is not the character of the stream as to navigability or ownership, but the character and consequences of the act of the owner of the

<sup>5</sup> 1 Sim. & Stu. 203, 1 L. J. Ch. 94, 24 Revised Rep. 169.

<sup>6</sup> *Dudden v. Clutton Union*, 26 L. J. Exch. N. S. 146, 1 Hurlst. & N. 627.

<sup>7</sup> On a petition to quiet title to a water course and to prevent the diversion of adits which emptied into the water course, it was questioned whether adits, either by custom or the stannary laws, were such fixed courses of water that they could not be diverted; and the court directed an issue at law to determine it. *Falmouth v. Innys*, Mosely, 87.

The construction of an artificial well round a spring, through which the water flows before passing into the channel into which it has been accustomed to flow, does not render the spring an artificial body of water so as to prevent riparian proprietors on the stream from complaining of the diversion of the water at the spring or well. *Mostyn v. Atherton* [1899] 2 Ch. 360, 81 L. T. N. S. 356. The only distinction between this case and that of *Dudden v. Clutton Union*, 1 Hurlst. & N. 627, 26 L. J. Exch. N. S. 146, where it was held that it was an unlawful to divert the water of a spring at the spring as it was to

divert it from the channel after it had left the spring, is the fact that the artificial well had been constructed round the spring at a remote period, and it was on this ground that an unsuccessful attempt was made to distinguish it from the *Dudden Case*.

A person is not liable for contempt on account of the act of an unknown party, who tears out dams erected by him in an artificial canal in compliance with an order of the court enjoining him from the unlawful diversion of water. *Stack v. Jefferson Turp.* (Mich.) 9 Det. L. N. 526, 92 N. W. 769.

<sup>8</sup> *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385.

<sup>9</sup> 122 Pa. 191, 1 L. R. A. 603, 9 Am. St. Rep. 88, 15 Atl. 726.

A riparian owner of land from which a navigable stream is wrongfully diverted can recover damages for loss of the advantages of the location, although not for the deprivation of the use of water power, to which he had no right and of which he could be deprived at any time by the state or those exercising its authority on the stream. *Williams v. Fulmer*, 151 Pa. 405, 31 Am. St. Rep. 767, 25 Atl. 103.

shore, that determines his liability to another riparian owner therefor. Riparian owners are bound to observe the obligations that grow out of their ownership and their proximity. The fact that before reaching the land of the lower owner the water disappears from the surface does not give the upper owner a right to divert it if there is in fact a stream, so that the water can be traced from the point of disappearance to the land of the lower owner.<sup>10</sup>

**502. Liability for injury caused by diverted water.**—Water out of its natural channel is liable to do vast harm, and one who undertakes to remove it from such channel assumes a grave responsibility. He is responsible for all injury it may do to other property during the course of its wanderings before it returns to its natural habitation.<sup>1</sup> A railroad company is liable to the owner of land for damages thereto resulting from the diversion by such company of the flow of a stream from its natural channel, and conducting it through a ditch to a point where it overflows such land.<sup>2</sup> When one's land is injured by the wrongful act of another in diverting a water course thereon, he must take all reasonable means to protect his property from increased injury by reason of the trespass; and he must avail himself of reason-

\*Water flowing in a natural channel, which reaches the banks of a stream and there disappears in the sand of the bed, will be presumed to augment the flow in the main stream by percolation until the contrary is shown; and the burden of proving that such waters do not mingle with the main waters of the stream is on the one diverting the same. *Platte Valley Irrig. Co. v. Buckers Irrig. Mill. & Improv. Co.* 25 Colo. 77, 53 Pac. 334.

A lower riparian owner may maintain an action, not only for the diversion of the water of a stream, depriving him of the direct flow thereof for use at his mill, but for a diversion thereof which cuts off the source of supply of a spring which flows into his dam, fed by the waters of the stream, which disappear through a sink-hole in the bed and reappear in the spring, where the underground flow between the sink-hole and the spring constitutes a stream, the channel or course of which is known. *Washington County Water Co. v. Garver*, 91 Md. 398, 46 Atl. 979.

*Quett v. Renaker*, 13 Ky. L. Rep. 782. If water is diverted from a stream, the one making the diversion is bound to care for it until it is returned to the stream. *Tucker v. Salem Flouring Mills Co.* 15 Or. 581, 16 Pac. 426.

Where a person builds a passageway through his lands for the flow of a nat-

ural stream, he must make it of sufficient capacity to take care of, not only the accustomed flow, but any increase in the flow caused by improvements above. *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

*East St. Louis & C. R. Co. v. Eisenbraunt*, 134 Ill. 96, 24 N. E. 760, Affirming 34 Ill. App. 563.

A railroad company which, by the construction of its roadbed near a creek, diverts a portion of the water thereof, during the wet season, from the natural channel into its ditches, is liable for damages to an adjoining landowner by the overflowing of his land, although it does not occur until several years after the construction thereof, resulting from the gradual enlargement of its ditches by such overflow of water, and a corresponding increase in the volume thereof which the ditches are insufficient to carry. *Davidson v. Oregon & C. R. Co.* 11 Or. 136, 1 Pac. 705.

If without necessity the water from springs opened by a railroad company in building its road is collected and conducted by an artificial trench to a point from which it percolates through the embankment and mingles with surface water, so as to flow over the land of an adjoining owner, which it would not otherwise reach, to his injury, the company will be liable therefor. *Curtis v. Eastern R. Co.* 98 Mass. 428.

able means to restore it to its original channel. But one who wrongfully diverts a water course on another's land is liable for diminution in the market value of the land as a result of floods resulting from the trespass, and from which it could not reasonably have been protected by the owner.<sup>3</sup>

**503. Permissive diversion.**—The right to divert the water of a stream may be acquired in various ways. The upper owner may contract for the right with lower owners who will be injured by the diversion. The right is subject to grant.<sup>1</sup> But the right is an incorporeal hereditament which can pass only by deed.<sup>2</sup> The right may be granted in gross.<sup>3</sup> A covenant as to the use of the water will control a prior artificial diversion of it.<sup>4</sup> A grant of a general privilege of part of the water in the stream will be construed most favorably to the grantee.<sup>5</sup> But the grant will not convey rights which are not named in it.<sup>6</sup> The fact that a riparian owner has obtained the right

<sup>3</sup>*Sweeney v. Montana O. R. Co.* 25 Mont. 543, 65 Pac. 912.

<sup>1</sup>A grant by a riparian owner to a corporation organized to supply water for irrigation, mining and manufacturing purposes, and general use, of the right to divert and appropriate all the waters flowing in a certain river, conveys, as against a subsequent grantee of the land fronting on the river, not only the waters flowing therein at the time of the grant to the corporation, but the waters thereafter flowing in the stream. *Doyle v. San Diego Land & Town Co.* 46 Fed. 709.

<sup>2</sup>*Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 142. Reversed in 21 N. J. Eq. 463 on the ground that if a corporation is given power by statute to acquire the right to divert water without deed, it may do so, although at common law such diversion would be an incorporeal hereditament which would necessarily be created by deed.

Under the old doctrine that the right to the flow of a stream depended on use it was held that one who by parol relinquishes the right to have water flow in its natural channel to his mill cannot after another has acted on it by cutting the bank and diverting the water require it to be restored to its former channel. *Liggins v. Inge*, 7 Bing. 692, 5 Moore & P. 712, 9 L. J. C. P. 202. But this doctrine is no longer tenable. The right to the flow of the water, being a parcel of the estate, must be parted with by the same formalities necessary to transfer the estate.

<sup>3</sup>*Lonsdale Co. v. Moica*, 1 Brun. Col. Cas. 655, Fed. Cas. No. 8,496.

<sup>4</sup>*Horn v. Miller*, 136 Pa. 640, 9 L. R. A. 810, 20 Atl. 706.

<sup>5</sup>*Dyer v. Dupui*, 5 Whart. 584.

<sup>6</sup>Under a proviso in a deed of land together with a water course, wherein the grantor retained the right to use the water of such water course for a certain purpose, the surplus or so much as remained after being used for the purpose mentioned, to be returned, he is liable for the diversion if he conveys the water into a lock-up well from which it is used by his tenants and none of it returned to the stream. *Raustrom v. Taylor*, 25 L. J. Exch. 33, 11 Exch. 369.

A riparian owner entitled to the waters of a stream for the irrigation of his land is not estopped by a recital in a grant of a right of way across his land for the conveyance of water in pipes, that the grantee is "about to divert" the waters of such stream, to assert his right to such waters and enjoin the diversion thereof, as such recital is not an admission that the grantee had a right to divert the same. *Zimmer v. San Luis Water Co.* 57 Cal. 221.

A grant of water to be used on an adjoining tract of land for waterworks and then to be conducted to where it formerly was will not authorize the diversion of the water of the stream entirely away from both tracts a distance of a mile or more, by means of iron pipes for the supplying of locomotives. *Pennsylvania R. Co.'s Appeal*, 125 Pa. 189, 17 Atl. 478.

from an upper owner to take the water from the stream on his land will not prevent him from maintaining an action for the diversion of water by an owner still farther up.<sup>7</sup> An absolute grant of mill rights will carry the water rights and reserve nothing in the grantor, although he has diverted the water for use on another tract.<sup>8</sup> One not connected with a covenant not to divert the water is not liable thereon.<sup>9</sup> Grants by the upper owner may prevent a diversion of the water.<sup>10</sup> Temporary rights to divert the water from the stream may be secured by license;<sup>11</sup> and the licensor may estop himself from revoking the license if he permits expenses to be incurred under the belief that the license is permanent.<sup>12</sup> But, in the absence of technical grounds of estoppel, a mere license to divert the water will not become irrevocable by being acted upon.<sup>13</sup> The license will be strictly con-

Where the owner of land across which flows a water course compromises an action against another for diverting the same by granting him, for a period of years at a stated consideration, the right to continue such diversion, a successor of the grantee who continues the diversion after the expiration of the period fixed by the grant is liable as upon an implied promise to pay for the use of the same, for which an action of assumpsit may be maintained. *Davis v. Morgan*, 6 Dowl. & R. 42, 4 Barn. & C. 8, 28 Revised Rep. 193.

<sup>7</sup>*Nuttall v. Bracewell*, L. R. 2 Exch. 1, 36 L. J. Exch. N. S. 1, 12 Jur. N. S. 989, 15 L. T. N. S. 313, 4 Hurlst. & C. 714.

<sup>8</sup>*Burden v. Stein*, 27 Ala. 104, 62 Am. Rep. 758.

<sup>9</sup>Where the legal fee of an estate is in a mortgagee, a devisee of the equity of redemption in lands through which flowed a water course is not liable on a covenant of the former owner not to divert or obstruct any part of a water course, as he is not the assignee of all the estate, right, title, and interest of the original covenantor. *Carlisle v. Blamire*, 8 East, 487, 9 Revised Rep. 491.

<sup>10</sup>A grant of the right to use the water of a stream for milling purposes, although not utilized upon riparian land, vests the grantee with a property right which cannot be impaired by a diversion of the water of the stream without making compensation to him. *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224.

The principle that the upper riparian proprietors may use the stream for all

reasonable purposes while on their lands, provided they send it on without perceptible decrease or diminution to the lower proprietors, does not apply where the upper proprietor has granted the use of the stream as it flows in a designated channel; and any change or interference with the channel by the upper proprietor is an invasion of the grantee's rights, although no material injury is inflicted. *Northam v. Hurley*, 1 El. & Bl. 665, 22 L. J. Q. B. N. S. 183, 17 Jur. 672.

<sup>11</sup>*Rathbone v. McConnell*, 20 Barb. 311; *Foot v. New Haven & N. Co.* 23 Conn. 214.

<sup>12</sup>An injunction will not be granted at the suit of a lower riparian owner to restrain the maintenance of a dam and race and the diversion thereby of the water of the stream, although such dam and race and a mill supplied thereby were constructed with his acquiescence in ignorance of the ultimate consequences, where such ignorance was mutual, the parties cannot be placed in the same situation in which they originally were, and such owner was guilty of improper delay in seeking equitable relief after he knew the full consequences to his premises of the diversion. *Thomas v. Woodman*, 23 Kan. 217.

Where a license to divert water from a stream is general, permitting diversion at any place, it is revocable except as to the places where it has been acted upon and expenses incurred; and after the revocation it will be improper to divert the water at any other place. *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118.

<sup>13</sup>A parol permission to construct a

strued and give no rights at points other than those mentioned.<sup>14</sup> The legislature cannot confer the right to divert the stream upon a private individual for a private purpose,<sup>15</sup> unless no injury will be caused by such diversion to another riparian owner.<sup>16</sup> And a right to divert the water in any event must be expressly conferred or it will not be held to exist.<sup>17</sup> But, for the public welfare, the right may be conferred to divert the water under the power of eminent domain,<sup>18</sup> upon payment of compensation for the injury done.<sup>19</sup> In cases where the injury caused by the diversion will be much less than that caused by refusal to permit it, the court may refuse injunction, and therefore, in ef-

culvert and flow the land of the grantor is not rendered irrevocable by the fact that the grantor actually co-operated and assisted in the construction of the culvert. *Foot v. New Haven & N. Co.* 23 Conn. 214.

<sup>14</sup>*Mason v. Hill*, 2 Nev. & Man. 747, 5 Barn. & Ad. 1, 2 L. J. K. B. N. S. 118.

<sup>15</sup>The King cannot grant a dispensation for diverting a water course though it be furnishable only by him, because such a dispensation would take away the right of action of those suffering particular injury by the offense. *Thomas v. Sorrell*, Vaughan, 340.

It is said in *Bottoms v. Breiver*, 54 Ala. 288, that conferring the right to divert or obstruct the flow of water is a taking away of private property, as well as a taking of land.

The legislature does not possess the power of authorizing the diversion of water from running streams upon condition of making compensation by storing storm and flood water and giving it out in dry times for the benefit of riparian owners as compensation for the diversion. *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385.

<sup>16</sup>Where no man will be damaged by the diversion of a water course the King may license such diversion. *Thomas v. Sorrell*, Vaughan, 341.

<sup>17</sup>The proviso in the joint acts of the legislatures of Pennsylvania and New Jersey in 1771, declaring the Delaware river a common highway, that no power is given thereunder to remove or alter certain existing milldams, nor to obstruct or hinder the owners of them, their heirs or assigns, from taking water for the use of such mills, is not a grant of the right to divert water, but amounts to no more than the present toleration of a nuisance previously erected, and, at most, to a license revocable at pleasure. *Rundle v. Delaware*

& R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12,139.

<sup>18</sup>A statute authorizing a company to take water from a certain river and conduct it to a city through the channel of a specified creek confers the right to take water from the river without limit or restriction as to quantity or place, and conduct the same by the route indicated. *Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co.* 33 Fed. 146.

A diversion of water from a private stream to the injury of a lower proprietor is none the less a tort because the appropriator has the right of eminent domain, if the conditions upon which this condition may be exercised have not been complied with. *Iroing v. Media*, 194 Pa. 648, 45 Atl. 482, Affirming 10 Pa. Super. Ct. 132, 7 Del. Co. Rep. 15.

A statute permitting the construction of a culvert to carry water from a stream under a highway to a mill will not protect the mill owner from liability to a lower proprietor for diversion of the water. *Neuchall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790.

<sup>19</sup>A statute requiring one diverting water from a stream to pay all damages sustained by the riparian owners will include injuries to one who uses the water for bleaching, cleansing, and other operations of print works, as well as to those who use the water for power. *Wattappa Reservoir Co. v. Fall River*, 134 Mass. 267.

But in a proceeding to assess damages for diversion of the water of a river on certain land under the right of eminent domain, evidence is not admissible of the amounts paid for the corresponding rights appurtenant to other lands, nor that of claimants on the same river. *Re Thompson*, 127 N. Y. 463, 14 L. R. A. 52, 28 N. E. 389.

fect, allow the diversion to be made.<sup>20</sup> In such case the only remedy is at law for the damages which have been inflicted on the lower owner. And a judgment that defendant was entitled to divert the stream to the extent to which he did so is conclusive between the same parties in subsequent actions.<sup>21</sup> But one recovery at law of damages is conclusive that the diversion was wrongful, and, unless permanent damages were awarded, the judgment is conclusive of a right to recover in a subsequent action.<sup>22</sup> The right of action of a riparian proprietor for the diversion of a stream is not defeated by an award of commissioners, under a statute authorizing the diversion of such stream for hydraulic purposes, which gives no damages for such diversion provided sufficient water is suffered to flow in the channel for ordinary farm purposes, as such award is void for uncertainty and indefiniteness, not fixing beyond doubt or question the rights and obligations of the parties.<sup>23</sup>

**504. Rights of tenants in common.**—A tenant in common may maintain an action against his cotenant for diverting the water from their common mill for separate use.<sup>1</sup> So, a tenant in common of land cannot, by a reservation to himself of the right to divert water therefrom in a conveyance of his interest in the common property, create an easement for the benefit of adjoining lands which he owns in severalty, as against a cotenant to whom is allotted in a subsequent partition suit the portion of the common property from which the diversion is made, but he will be enjoined at the suit of the latter.<sup>2</sup> Where several persons are tenants in common, with a right to the use of a water course, a portion of them cannot convey to another the right to divert any of the water of the stream; such a conveyance would only bind the persons making it and would only amount to a license

<sup>20</sup> An injunction will not be granted to restrain the cutting off of a stream of water supplying a pond or artificial lake by the laying out of lots and opening of streets and sewers on an upper tract of land, where, even though it be considered as a water course, the injury thereby to the owner of the premises on which such lake is situated and from the removal of the pond is greatly disproportionate to the injury it will work to the owners of such other tract in depriving them of the use of their property. *Dissette v. Lowrie*, 6 Ohio N. P. 392, 9 Ohio S. & C. P. Dec. 545.

<sup>21</sup> *Los Angeles v. Baldwin*, 53 Cal. 469.

<sup>22</sup> *Schock v. Foreman*, 3 Brewst. (Pa.) 157.

But in an action for the diversion of

water from a plaintiff's mill, a judgment previously recovered by one through whom plaintiff claims title, against tenants of defendant for damages for a similar diversion to that sued for, will not estop defendant from making his defense, since he was not party to the record in the other action nor capable of being substituted as such, as in ejectment, although he employed counsel and paid the costs therein for the benefit of his tenants. *Diamond v. Coleman*, 38 U. C. Q. B. 632.

<sup>23</sup> *McCord v. Sylvester*, 32 Wis. 451.

<sup>1</sup> *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322.

<sup>2</sup> *Pfeiffer v. Regents of University*, 74 Cal. 156, 15 Pac. 622.

to the grantee to use the water subject to the right of the remaining cotenants.<sup>3</sup> One tenant in common may have an injunction against another to restrain the diversion of water, where the diversion, if continued, would render the operation of the joint property impossible.<sup>4</sup>

**505. Remedy.**—An action on the case will lie for turning out of its course water which flows to plaintiff's mill.<sup>1</sup> But trespass is the proper remedy for diversion of water to the prejudice of riparian rights determined by covenant.<sup>2</sup> The diversion of waters from their right course is a purpresture.<sup>3</sup> An information lies for cutting down the bank of a river and diverting the water, although by statute it is made a private interest and a right of action given to private persons for damages inflicted.<sup>4</sup> Ejectment does not lie against one diverting or disturbing a water course, where the plaintiff does not have title to the land under the water, as his remedy is only by action on the case.<sup>5</sup> No *terminus a quo* need be alleged in an action for diverting a water course; any want of sufficient allegation of diversion is cured by verdict.<sup>6</sup> In an action by a mill owner for diverting the water of a mill, it is not necessary to allege the amount of water running to the mills, as that was not material; and a declaration that *magna pars aquæ cujusdam rivuli* was good.<sup>7</sup> A cause of action for damages for the diversion and pollution of the waters of a stream, and one for an injunction to restrain further diversion and pollution thereof, are properly joined.<sup>8</sup>

**505a. Equitable relief.**—The later decisions show a remarkable

<sup>1</sup>*Portmore v. Bunn*, 1 Barn. & C. 694, 1 L. J. K. B. 196, 3 Dowl. & R. 145.

<sup>2</sup>*Kennedy v. Scovil*, 12 Conn. 317.

<sup>3</sup>*De Grey's Case*, 21 Hen. VII, 30, pl. 5.

If a man diverts all the water from my water course to my mill, although I may have an assize therefor, an action on the case will lie at my election. *Kirbie's Case*, 1 Rolle Abr. 104.

In *Anonymous*, 2 Dyer, 248b (8 Eliz.), the question involved was whether an assize of nuisance or an action on the case was the proper remedy by the owner of a freehold in a water mill against a person for diverting the course of the water, where only part of the water was diverted. The report of the case does not show what termination of the case was made, but it refers to a case in which Wyke recovered judgment before Weston & Harper against Serle, on an assize of nuisance for the diversion of the major part of the course of the water, whereupon error was brought in King's Bench.

<sup>4</sup>*Horn v. Miller*, 136 Pa. 640, 9 L. R. A. 810, 20 Atl. 706.

<sup>5</sup>Glan. lib. 9, chap. 11.

<sup>6</sup>*King v. Stanton*, 2 Show. 30.

<sup>7</sup>*Challenor v. Thomas*, Yelv. 143.

But one attempting to construct a dam on a creek for the purpose of diverting water at that point in violation of the rights of the owners of a dam further down may be ousted by the latter from the possession of the grant at that point, in order to avert the injurious consequences. *Butts Table Mountain Ditch Co. v. Morgan*, 19 Cal. 609.

A general denial in an action for diversion of water, in which the complaint alleges plaintiff to be owner and in possession of the land, presents no claim of title. *Rathbone v. McConnell*, 21 N. Y. 466, Affirming 20 Barb. 311.

<sup>8</sup>*Prickman v. Trip*, Comb. 231.

<sup>9</sup>*Luttrell's Case*, 4 Coke, 86.

<sup>10</sup>*Watterson v. Saldunbebers*, 101 Cal. 107, 35 Pac. 432.

broadening of equitable jurisdiction from the principles upon which the original jurisdiction of that court was established. The result of the reformed procedure has been to blend the remedies available for the diversion of water, so that, in case an injunction will most effectually redress the wrong complained of, the court will be quite likely to grant it, although, according to the strict principles upon which the remedy was originally granted, it should not have been issued. Equity has no jurisdiction of a controversy in which damages alone are involved, although there is also a prayer for injunction.<sup>1</sup> Where the rights of the parties are not settled, and no distinct ground for the interference of equity is shown, an injunction will not ordinarily be granted,—especially if plaintiff has been guilty of delay in prosecuting his claim.<sup>2</sup> So, if the diversion is merely temporary, and one for which adequate damages may be awarded at law, equity will not interfere.<sup>3</sup> And, on the principle that no one has a right to complain of the diversion of water unless he is injured thereby, equity will not aid one who is not injured.<sup>4</sup> But some equity courts have interfered in case there was danger of the diversion ripening into an adverse right.<sup>5</sup> Under the strict rule governing equity procedure, it would

<sup>1</sup>*Fairhaven Marble & Slate Co. v. Adams*, 46 Vt. 496; *Myers & E. Co. v. Philadelphia, J. & C. Pass. R. Co.* 12 Montg. Co. L. Rep. 46.

Injunction will not lie to restrain the diversion of water from a stream merely to enforce payment by the defendant of compensation for the use of the water to one who had consented to the diversion under a lease which had expired prior to the diversion for which compensation is sought, where there is nothing to show that an action at law will not yield him any compensation to which he is entitled. *Watts v. Morris Canal & Bkg. Co.* 5 N. J. Eq. 410.

If a court of equity has power by decree to ascertain and order the payment of damages or grant an injunction in the alternative, it will not exercise such power where the defendant has permanently diverted water without authority of law or pretense of right; but the court can properly delay the issuance of an order of injunction to allow the parties to agree in regard to adequacy of compensation. *Pine v. New York*, 103 Fed. 337.

<sup>2</sup>*Haskell v. Thurston*, 80 Me. 129, 13 Atl. 273; *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532; *Rich v. Brantford*, 14 Grant Ch. (U. C.) 83; *Reid v. Gifford*, 6 Johns. Ch. 19.

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<sup>3</sup>*Westbrook Mfg. Co. v. Warren*, 77 Me. 437, 1 Atl. 246.

<sup>4</sup>*Loud Gold Min. Co. v. Blake*, 24 Fed. 249; *Pine v. New York*, 76 Fed. 418, Affirmed in 37 C. C. A. 665, 96 Fed. 1005; *Mason v. Cotton*, 2 McCrary, 82, 4 Fed. 792; *Creighton v. Kaweah Canal & Irrig. Co.* 67 Cal. 221, 7 Pac. 658.

An injunction will not be granted against the taking of water out of a brook by an upper proprietor when it is taken for domestic use and leaves a sufficiency of water for lower owners, and such owners have, without objection, seen the construction of a dam and erection of a pumping engine by the upper proprietor for the conveyance of the water. *Oilly v. Cincinnati*, 7 Ohio Dec. Reprint, 344.

During the process of constructing the dam and before it is in condition to make use of the water the owner cannot maintain an action for equitable relief against a third person for diversion of the water. *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 312.

The lower proprietor is not entitled to an injunction unless the flow to his land has been appreciably, or at least perceptibly, diminished by the diversion above. *Moore v. Clear Lake Waterworks*, 68 Cal. 146, 8 Pac. 816.

<sup>5</sup>*Moore v. Clear Lake Waterworks*, 68



seem that there was an adequate remedy at law to prevent the diversion from ripening into an adverse right, and the existence of such remedy would prevent the issuance of an injunction. If the title of the plaintiff is not in dispute, and there is a clear violation of his right, equity may take jurisdiction and award an injunction if it regards the remedy at law as inadequate.<sup>6</sup> And especially so where the remedy at law is inadequate.<sup>7</sup> And the remedy at law has been held to be inadequate where it would be merely a succession of suits in case defendant persisted in diverting the water.<sup>8</sup> The avoidance of a multiplicity of suits is an ancient ground for equity jurisdiction, and it permits equity to take jurisdiction of a suit to enjoin interference with water rights.<sup>9</sup> If continued diversion of the water will cause irremediable injury, equity will enjoin it.<sup>10</sup> And it may enjoin the diversion of the water for the purpose of wasting it.<sup>11</sup> And many late decisions have awarded an injunction to protect the plaintiff's right, although there was no distinct equitable ground upon which it could rest, other than that it was the most efficient remedy to apply in the case.<sup>12</sup> An injunction has issued even to restrain interference

Cal. 146, 8 Pac. 816; *Spargur v. Heard*, 90 Cal. 221, 27 Pac. 198; *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; *Brown v. Ashley*, 16 Nev. 311; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 50 N. E. 757; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577.

<sup>6</sup>*Reid v. Gifford*, Hopk. Ch. 416; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147; *Case v. Haight*, 3 Wend. 632; *Garicood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Wood v. Pendola*, 78 Cal. 287, 20 Pac. 678.

A suit for an injunction to restrain the alleged wrongful diversion of water under a fictitious claim of right interfering with an alleged prior right thereto may be maintained without resorting to an action at law to determine the plaintiff's title, where the allegations of the complaint are admitted by demurrer thereto. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

<sup>7</sup>Injunction lies at the instance of the owner of land for the diversion of the waters of creeks running through his land, which are essential to the full use and enjoyment thereof for agricultural and mining purposes, where the damages done and the financial condition of defendant are such as to make his remedy at law inadequate. *Graham v. Dahlonega Gold Min. Co.* 71 Ga. 296; *Fuller*

*v. Swan River Placer Min. Co.* 12 Colo. 12, 19 Pac. 836.

<sup>8</sup>*Shimer v. Morris Canal & Bkg. Co.* 27 N. J. Eq. 364.

<sup>9</sup>*Chace v. Warsaw Waterworks Co.* 79 Hun, 151, 29 N. Y. Supp. 729.

An injunction will be granted to restrain a continuous trespass on the part of numerous defendants whose constant and wrongful diversion of water is continually depreciating the value of the lands of the complainant. *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769.

<sup>10</sup>Where the wrongful diversion of water from a mill will cause irreparable injury, as the loss of trade and a destruction of the means of subsistence, courts of equity will not wait until the rights of the parties have been settled at law, but will interfere by injunction,—perpetual, if it has no doubts as to the rights of the parties in controversy; temporary, if such rights are doubtful, until the same are established by a court at law. *Wall v. Cloud*, 3 Humph. 181.

<sup>11</sup>*Campbell v. Grimes*, 62 Kan. 503, 64 Pac. 62.

<sup>12</sup>*Heltman's Appeal*, 4 Walk. (Pa.) 35.

Injunction will lie to restrain a threatened diversion of a water course from its ancient channel. *Shields v. Arndt*, 4 N. J. Eq. 234; *Kimberly & C.*

with contract rights.<sup>13</sup> The fact that the work effecting the diversion is all done, so that it is complete, will not prevent equity from taking jurisdiction.<sup>14</sup> And the jurisdiction will not be defeated by the fact that defendant will be compelled to do something to carry out the decree of the court, such as restoring the water to its ancient course.<sup>15</sup> But to give a court of equity jurisdiction of a suit to protect riparian rights from injury by another's dam raised to an unlawful height, it must have absolute jurisdiction of the *locus in quo*,<sup>16</sup> or of the person responsible for the injury, so that it may compel him to make the necessary changes, although the dam is not within the jurisdiction of the court. Relief may be refused if defendant's act is not unreasonable in view of all the circumstances of the case,<sup>17</sup> or where defendant has acted strictly within his rights, as, where he has merely taken out of the stream water which he had put into it.<sup>18</sup> So, the injunction will be refused where the injury to defendant will be greater than will result to plaintiff from its refusal.<sup>19</sup> An injunction restraining the diversion of water by an upper riparian proprietor will not be qualified by a permission to divert water to a specified extent, where there cannot be declared any definite extent to which water can be diverted without prejudice to the complainant.<sup>20</sup> A decree awarded a mill owner, enjoining the diversion of water so as to prevent its flowing freely to his premises, does not lose its force as an adjudication of his rights because of his abandonment of the mill and the

*Co. v. Hewitt*, 75 Wis. 371, 44 N. W. 303.

In a dispute between two riparian proprietors turning upon the extent of their respective riparian rights in the ordinary volume of the stream, an injunction will issue to restrain the upper proprietor from making a nonriparian use of the water, even if no appreciable injury is done to the lower proprietor. *Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co.* 6 Pa. Dist. R. 291.

An upper riparian proprietor will be enjoined at the suit of a lower proprietor from diverting the water in a township ditch running along the line of a depression where surface water had been accustomed to flow, where such ditch received the water from a flowing well and conveyed the water to the lower proprietor, who used it for watering stock. *Rummell v. Lamb*, 100 Mich. 424, 56 N. W. 167.

<sup>13</sup>*Dickenson v. Grand Junction Canal Co.* 15 Beav. 280.

<sup>14</sup>*Conkling v. Pacific Improv. Co.* 87 Cal. 296, 25 Pac. 399.

<sup>15</sup>*Goodrich v. Georgia R. & Bkg. Co.* 115 Ga. 340, 41 S. E. 659.

<sup>16</sup>*Morris v. Remington*, 1 Pars. Sel. Eq. Cas. 387.

<sup>17</sup>*Stanford v. Felt*, 71 Cal. 249, 16 Pac. 900.

<sup>18</sup>*Churchill v. Rose*, 136 Cal. 576, 60 Pac. 416.

<sup>19</sup>In *Walton v. Mills*, 86 N. C. 280, continuance of an injunction until settlement of the rights at law was refused to prevent the upper proprietor from abstracting water from the stream for use in washing gold ore, at the suit of one who desired to make a similar use of the water lower down the stream, where it appeared that plaintiff was not making any present use of the water, and might be compensated in damages in case the right of the upper owner was sustained, while the upper owner's loss would be irreparable in case he was compelled to fill up his trenches and cease using the water.

<sup>20</sup>*Chace v. Warsaw Waterworks Co.* 79 Hun, 151, 29 N. Y. Supp. 729.

transfer of his business to other points on the stream.<sup>21</sup> A decree dismissing, for want of jurisdiction, a bill filed to enjoin the diversion of a water course, cannot include a decree prohibiting complainant from again litigating the question of wrongful diversion of the water.<sup>22</sup>

**505b. Restoration of stream.**—Not only may the one who diverts the water from a stream voluntarily restore it to its ancient course,<sup>1</sup> but the court may require him to do so at the suit of the lower proprietor who is injured by the diversion.<sup>2</sup> In addition to this the lower proprietor may enter upon the property of the upper owner and restore the stream to its course.<sup>3</sup> The mere fact that the restoration of the stream will be of great damage to the defendant and of but slight advantage to the plaintiff will not prevent the court from compelling it.<sup>4</sup> In case the waters are lawfully diverted by a canal company, the riparian owner has no right to their restoration which he can transfer to another person.<sup>5</sup> If the upper owner is required to

<sup>21</sup>*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73.

<sup>22</sup>*Smith v. Adams*, 24 Wend. 585.

<sup>1</sup>*King v. Chicago, B. & Q. R. Co.* 71 Iowa, 696, 29 N. W. 406.

Whether a ravine is a water course or a conductor of surface water, one who has maintained a dam across it, holding back and diverting the waters for a year, may restore them to their original channel unless he is prevented upon the principles of equitable estoppel,—as, when he has represented that the change would be permanent, and the lower owner has therefore made improvements. *Canton Iron Co. v. Biwabik Bessemer Co.* 63 Minn. 367, 65 N. W. 643.

<sup>2</sup>*Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147; *Johnson v. Tulare County Super. Ct.* 65 Cal. 567, 4 Pac. 575.

In 32 Assize, 2, a writ of assize of nuisance was brought because defendant had turned a water course, and the nuisance assigned was that defendant had made a trench across the water course and diverted water from the plaintiff's mill; and the court awarded that the water should be removed to its right course at the cost of the defendant, and that the plaintiff recover his damages, and that defendant be imprisoned.

An upper mill owner will be required to remove an embankment the effect of which is to divert the natural course of a stream from its channel on the wester-

ly side of an island and cause it to flow down on the easterly side with greater rapidity, whereby a larger quantity of debris is carried against the plaintiff's bulkhead, although his damages are nominal and he receives the same amount of water as before, while the defendants get more benefit from the diversion than the plaintiff would get from the restoration. *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29.

<sup>3</sup>If a man makes a ditch which diverts the water from my mill, I may fill the ditch which the other dug. 9 Edw. 4, f/35.

If a riparian owner has been deprived of water which ought to flow in the stream, by the construction of a ditch by a highway commissioner, he may dam up the ditch and restore the water to the stream. *McCord v. High*, 24 Iowa, 342.

But the right of a riparian proprietor to enter upon the land of another to abate the nuisance of diversion exists only against the wrongdoer, and he has no right to enter upon or flow the land of an innocent person for the purpose of regaining the use of the diverted stream. *Agawam Canal Co. v. Edwards*. 36 Conn. 476.

<sup>4</sup>*Corning v. Troy Iron & Nail Factory*. 40 N. Y. 191.

<sup>5</sup>*Agawam Canal Co. v. Edwards*, 36 Conn. 476.

restore the water, the mere provision of means for the return of the diverted water is not sufficient to relieve him from liability if the water is not in fact returned to the stream.<sup>6</sup>

**506. Right to maintain action for diversion.**— Anyone injured in the enjoyment of his right may maintain an action for diversion of the water from the stream. It is not necessary that he should have an ancient mill, or have put the water to actual use.<sup>1</sup> In *Rutland v. Bowler*,<sup>2</sup> it is said that one cannot use the water which passes over his land to the damage of another. For injury to the property right, the action should be brought by the owner of the fee; but one in possession may bring an action for injury to his interests. It is not necessary that one should have title to the property in order to be entitled to maintain an action. One in possession, whatever may be his title, may maintain an action against a mere wrongdoer for diversion of water from the property.<sup>3</sup> And title, therefore, need not be alleged.<sup>4</sup> But a mere occupier cannot maintain the action unless he shows a special use or special injury.<sup>5</sup> The person in possession is ordinarily the proper one to protect the property against injury by the diversion.<sup>6</sup> But the injury is to the property right, and therefore the right of action may be founded<sup>1</sup> on possession of the property, and not on that of the mill.<sup>7</sup> Riparian ownership is sufficient to maintain the action.<sup>8</sup> The action cannot be maintained by one who is not entitled to the use of the water as matter of right.<sup>9</sup> And if the injury is to an alleged right to remove the water from the stream to nonriparian land, the one asserting the right must be the owner of the fee,

<sup>1</sup>*Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394.

<sup>2</sup>*Rutland v. Bowler*, Palm. 290; *Sury v. Pigot*, Popham, 169, 3 Bulst. 339.

<sup>3</sup>Palm. 290.

<sup>4</sup>*Eagle & P. Mfg. Co. v. Gibson*, 82 Ala. 360; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *McDonald v. Bear River & A. Water & Min. Co.* 13 Cal. 220.

Actual and peaceable enjoyment and possession of water at the time of the diversion thereof by one showing no better right thereto is sufficient to entitle the possessor to an injunction restraining interference with his rights. *Cardoza v. Calkins*, 117 Cal. 106, 48 Pac. 1010.

<sup>5</sup>*Glyn v. Nichols*, Comb. 43.

<sup>6</sup>*Mason v. Hill*, 5 Barn. & Ad. 27, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118.

<sup>7</sup>*Rathbone v. McConnell*, 20 Barb. 311.

<sup>8</sup>*Tucker v. Paren*, 7 U. C. C. P. 269.

<sup>9</sup>*Sandborn v. People's Ice Co.* 82 Minn.

43, 51 L. R. A. 829, 83 Am. St. Rep. 401, 84 N. W. 641.

But a bill to restrain the diversion of the waters of a stream cannot be maintained by one whose land was not originally touched or entered by the stream, and who has obtained no right by adverse possession. *Browne v. Wineloc*, 95 Mich. 441, 54 N. W. 960.

<sup>1</sup>*Crill v. Rome*, 47 How. Pr. 398.

A company authorized to improve, for commercial purposes, a harbor situated in a bay, and to erect wharves and warehouses, cannot claim compensation for the diversion of a river running into the bay, where they do not own the bed or banks of the stream, although such diversion of the river from its natural channel renders their wharves inaccessible for shipping. *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. (Mich.) 155.

because he could not obtain a prescriptive right to divert the water unless he owned the fee.<sup>10</sup> It is immaterial that plaintiff owns the land on only one side of the river,<sup>11</sup> as is also the value of the interest involved.<sup>12</sup> The action should be brought by one having the title at the time the injury was done. Therefore, it cannot be maintained by a subsequent grantee.<sup>13</sup> Conversely, a vendor of a mill and privilege cannot maintain case for diversion of water while the vendee is in possession although not entitled to a conveyance.<sup>14</sup> The equitable owner in possession of a tract of land bordering on a stream is entitled to relief in a court of equity against wrongful diversion of water therefrom.<sup>15</sup> A tenant may maintain an action for the injury inflicted upon him.<sup>16</sup> And the reversioner may also maintain an action for injury to the inheritance.<sup>17</sup> The fact that plaintiff is not a riparian owner does not deprive him of a right of action to prevent the

<sup>10</sup>*Scobell v. Skelton*, Skin. 36, 2 Show. 195.

<sup>11</sup>*Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.

<sup>12</sup>One owning a lot worth about \$350, through which a natural stream flows, is as much entitled to be protected from an unlawful diversion of the water thereon, although her damages resulting therefrom will not exceed \$25, as is the owner of more valuable land who would suffer greater damages from a diversion. *Duesler v. Johnstown*, 24 App. Div. 608, 48 N. Y. Supp. 683.

<sup>13</sup>*Moore v. Browne*, 3 Dyer, 319b.

An action to restrain a diversion of the waters of a stream by an upper riparian proprietor cannot be maintained by a lower proprietor whose grantor, previous to the conveyance of the land to him, had made an absolute and unconditional conveyance of the water rights appurtenant to the land; but if the grant be for a limited time, he would be entitled to maintain an action to protect his reversionary right. *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543.

But a grantee of land has a right of action for injuries caused by the refusal of a former lessee to restore water to its ancient channel. *Corning v. Troy Iron & Nail Factory*, 39 Barb. 311.

So, a riparian owner may maintain an action to restrain the unlawful diversion of water from a stream, although he purchased the land after the diversion had been commenced by the defendant, where the latter has not continued it so long as to acquire a prescriptive right. *Duesler v. Johns-*

*town*, 24 App. Div. 608, 48 N. Y. Supp. 683.

<sup>14</sup>*Ives v. Cress*, 5 Pa. 118, 47 Am. Dec. 401.

<sup>15</sup>*Luz v. Haggin*, 69 Cal. 255, 10 Pac. 674.

<sup>16</sup>*Re Water Comrs.* 4 Edw. Ch. 545; *Crook v. Heicitt*, 4 Wash. 749, 31 Pac. 28.

The owner of a milldam on a stream, having a mere easement to use the water thereof, and not owning the fee to the land covered thereby, cannot enjoin the wrongful taking of water therefrom in the absence of any injury thereby done to his easement, as he has no property in the corpus of the water. *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259.

Lessees for a term of years with a privilege of purchase may maintain an action for an injunction restraining the unlawful diversion of the water of a stream running through the leased premises, interfering with their use thereof on such stream for irrigation purposes. *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535.

<sup>17</sup>*Rogers v. Dickson*, 10 U. C. C. P. 481; *Woodbury v. Willis*, 50 Me. 403.

The diversion of water from a natural stream running through land is an injury done to the inheritance, for which an action may be maintained by the owner thereof while the land is in the possession of a tenant under a lease for a term of years, under a Code provision that a person having an estate in fee in remainder or in reversion may maintain an action for an injury done to the

diversion of the water of a stream onto land not riparian by an upper riparian owner, where plaintiff has, under a purchase from a riparian owner of the right to enter upon the land of the latter and divert the stream from the natural channel through an artificial one to land of his own, diverted and used such stream for a period of sufficient duration to presume a grant.<sup>18</sup> But a lessor of a mill and privilege cannot maintain case for diversion of water during the term of the lease, where rent has been received without diminution.<sup>19</sup> The owners of the several mill privileges on the stream, and not the reservoir company formed by them merely for the purpose of creating a convenient agency to own and manage the dam for the benefit of the mills, are the proper plaintiffs in an action for damages for diversion of the water of the stream.<sup>20</sup> But the corporation may maintain the action if there is injury to the property which it is organized to protect.<sup>21</sup> One tenant in common of a water power may maintain an action to protect his interest without his joining his cotenant.<sup>22</sup> But tenants in common may join in an action if they choose to do so.<sup>23</sup> And if the ownership of the water power or the interest in the stream is common, the various persons in interest may join in the suit, although their personal interests in the property affected are several.<sup>24</sup> But a joint action for damages from the diversion of the water of a stream, and for an injunction and settlement of the various rights of plaintiffs, cannot be maintained where their interests in such waters are not in common, but each claims separate and distinct portions thereof by appropriation.<sup>25</sup> All the persons residing upon a water

inheritance, notwithstanding an intervening estate for life or years, so that the statute of limitations runs from the commencement of such diversion; and a right to divert such water is acquired by the actual, continuous, open, peaceful, notorious, and adverse use thereof for the statutory period during such tenancy, so as to bar an action by such owner or his tenant to restrain the diversion and for damages. *Heilbron v. Last Chance Water Ditch Co.* 75 Cal. 117, 17 Pac. 65.

A lessor of land containing a water power is not estopped from compelling a restoration of the stream upon surrender of the lease, by permitting the lessee, without objection, to erect expensive machinery to divert the water from the stream for use elsewhere. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

*Williams v. Wadsworth*, 51 Conn. 277.

<sup>18</sup>*Moody v. King*, 74 Me. 497.

<sup>19</sup>*Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Elgin Hydraulic Co. v. Elgin*, 194 Ill. 476, 62 N. E. 929, Affirming 85 Ill. App. 182.

<sup>20</sup>*Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

<sup>21</sup>*Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73.

<sup>22</sup>*Stone v. Bromwich*, Yelv. 161; *Parke v. Kilham*, 3 Cal. 77, 68 Am. Dec. 310.

<sup>23</sup>*Ronnow v. Delmuc*, 23 Nev. 29, 41 Pac. 1074; *Lonsdale Co. v. Woonsocket*, 21 R. I. 498, 44 Atl. 929; *Beach v. Spokane Ranch & Water Co.* 25 Mont. 379, 65 Pac. 111; *Churchill v. Lauer*, 84 Cal. 233, 24 Pac. 107; *Reid v. Gifford*, Hopk. Ch. 416.

<sup>24</sup>*Schultz v. Winter*, 7 Nev. 130; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. 689; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94.

course may be required by statute to be made parties to a suit to settle the water rights on the stream.<sup>26</sup> But in a suit concerning only the question as to whether defendants are wrongfully diverting water from plaintiff's land, other owners who may be interested either in continuing or stopping the diversion are not necessary, although possibly proper, parties.<sup>27</sup> Whether or not the action will survive the death of plaintiff depends upon the language of the statute.<sup>28</sup>

**507. Who is liable for diversion?**—One who digs a trench whereby water is diverted from the premises of a lower riparian owner is liable for the damage sustained thereby after the completion of the work and because of the continuance of the wrong.<sup>1</sup> So, one is liable for a wrongful diversion of water from a stream, although he may have committed the nuisance on the land of a third party, and cannot enter to stop the continuance without committing a trespass.<sup>2</sup> But only those who are responsible for the diversion of the water or those who continue it for their own benefit are liable for the wrong. Therefore, a suit cannot be maintained against all the occupants of a mill site when the wrong complained of was committed by the owners of only one of the mills.<sup>3</sup> The fact that the defendant is the owner of the

<sup>26</sup> Intermediate owners on a stream, who are diverting the water thereof without any claim of right to do so, by appropriation or otherwise, for any beneficial purpose whatever, as against either plaintiff or defendants in an action brought by a lower proprietor against upper proprietors to abate and enjoin a nuisance created by their diversion of the waters of the stream, but which, on the hearing of questions of fact made by the pleadings, was treated as one to determine the rights of the parties to the use of specific quantities of water for beneficial purposes,—are indispensable parties thereto. *Bliss v. Grayson*, 24 Nev. 422, 6 Pac. 231.

A statute authorizing all parties claiming adverse water rights in the same stream or source, or who have wrongfully diverted water therefrom, to be made parties to a suit to determine their several rights and priorities, even though they reside without the county in which the suit is commenced, is not repugnant to a constitutional provision requiring actions to be brought in the county in which the same accrued, as that provision does not affect the common-law right to lay the venue in either county, where the cause of action, as in the case of adverse water rights, consists of different elements, some of

which arise in one county and some in others. *Deseret Irrig. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628.

<sup>27</sup> *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 75 Wis. 385, 44 N. W. 638; *Grand Rapids Water Power Co. v. Bensley*, 75 Wis. 399, 44 N. W. 640.

<sup>28</sup> An action on the case for diverting a water course dies with plaintiff. The diversion of a water course is not an injury to personal property within the meaning of a survival statute. *Holmes v. Moore*, 5 Pick. 257.

But an action to restrain the diversion and obstruction of water from a spring survives the death of the defendant, as it is based upon a wrong done the property rights or interests of another, within the meaning of 2 Rev. Stat. 447, § 1, authorizing the continuance of such actions. *Miller v. Young*, 90 Hun, 132, 35 N. Y. Supp. 643.

<sup>1</sup> *Covert v. Valentine*, 50 N. Y. S. R. 516, 21 N. Y. Supp. 219.

<sup>2</sup> *Smith v. Elliott*, 9 Pa. 345.

<sup>3</sup> *Westbrook Mfg. Co. v. Warren*, 77 Me. 437, 1 Atl. 246.

So, one of several part owners of a dam and flume, who acquired his interest subsequently to repairs made thereto which cause a diversion of waters from a mill owner below, is not liable to

bed of a stream which has been diverted by the act of a stranger does not make the defendant liable for such diversion or for his failure to remove the nuisance, where it was created without his consent, and where he offered to permit the persons injured by the diversion to enter and remove the nuisance, as he cannot be compelled to remove it and thereby subject himself to litigation with the parties creating it.<sup>4</sup> But one taking the benefit of the diversion may be liable although he did not participate in effecting it.<sup>5</sup> The grantee of a dam constructed by his grantor so as to divert water from a lower mill owner when certain of its gates were kept closed, which was usually when no work was being done by either, is liable without notice for diverting the water by closing the gates for a number of weeks, at all hours, the liability attaching for an unauthorized use by the grantee himself, and not merely by his continuance of a dam in the same condition that it was erected by others before his purchase.<sup>6</sup> The fact that one who has built a dam for unlawfully diverting water from a stream has leased his property, and the lessee is the one who is using the water, does not excuse the owner from liability to riparian owners.<sup>7</sup> The lessee of water power wrongfully diverted from a stream to the injury of a riparian owner thereon is not excused from liability because the place where he uses it is below the point at which it could be of avail to such riparian owner, and therefore the liability for such di-

him for any injury sustained from the continuance of the dam and flume in the same condition in which they were when he acquired the title, without notice or request to remove same; but his co-owners who made the repairs cannot benefit by want of notice to him. *Snow v. Cowles*, 22 N. H. 206.

Where two defendants under claim of right cut a trench through a bank for the purpose of diverting the water of a stream, which cut is immediately filled in by one claiming the right to the water, and reopened by one of the defendants, it is for the jury to say whether or not the other defendant sanctioned and concurred in the act so as to render them both liable. *Drewett v. Sheard*, 7 Car. & P. 465.

<sup>4</sup>*Saxby v. Manchester S. & L. R. Co.* L. R. 4 C. P. 198; 38 L. J. C. P. (N. S.) 153, (1869), 19 L. T. N. S. 640, 17 Week. Rep. 293.

<sup>5</sup>One claiming an interest in the waters of a stream which another diverts for his own benefit and that of such claimant and others, presumably made partly at such claimant's instance and

by his procurement, is jointly liable with the other claimants for the damages resulting therefrom, although the ditch has not yet been extended to his land. *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39.

In an action to restrain defendants from interfering with the water in a creek, a decree is properly granted as prayed for, when it appears that, at a place where the channel divides, a dam which has been placed in the main channel diverted the water into the other channel which had been artificially deepened, and, although removed on several occasions by the water commissioner, it was each time replaced by someone unknown; that defendants denied interfering in any way with the flow of water in the main channel, but that the water as diverted by the dam to the smaller channel was thereby conducted to their premises. *Barnes v. Gerberg*, 27 Wash. 126, 67 Pac. 568.

<sup>6</sup>*Snow v. Cowles*, 22 N. H. 206.

<sup>7</sup>*Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44, 9 Am. St. Rep. 203, 5 S. W. 49, 5 Ky. L. Rep. 663.



version would rest upon his lessor who caused the diversion from above such point, but in such case the act of each is the act of both, and he will be held liable as for the original diversion.<sup>8</sup> A joint action for damages and for an injunction restraining the diversion of the water of a stream may be maintained against persons making such diversion, although acting independently of each other, where the diversion of no one person would interfere with the rights of the plaintiff but the aggregate of their diversions reduces the volume below the amount to which he is entitled.<sup>9</sup> A joint action for the obstruction and the diversion and use of the waters of a stream cannot be maintained against two persons whose use and diversion were separate and without any collusion, arrangement, or understanding between them.<sup>10</sup> But it is no excuse for one sued that others contributed to the injury.<sup>11</sup> A riparian owner having a right to divert water by a certain dam is liable as for a nuisance if, in rebuilding it, he diverts a greater amount of water, either by raising its height or changing its location.<sup>12</sup>

**508. Estoppel.**—The lower owner may lose his right to relief by permitting the upper owner to make large expenditures to effect the diversion of the water, under the belief that he is acting within his legal rights.<sup>1</sup> But if the one making the diversion knows that he has no right to do so, the mere nonaction of the owner will not prevent his maintaining an action as soon as injured.<sup>2</sup> The lower owner is not estopped from maintaining an action by temporarily discontinu-

<sup>8</sup>*Druley v. Adam*, 102 Ill. 177.

<sup>9</sup>*Hillman v. Newington*, 57 Cal. 56; *Pacific Live Stock Co. v. Hanley*, 98 Fed. 327.

<sup>10</sup>*Evans v. Ross* (Cal.) 8 Pac. 88.

<sup>11</sup>*Heilbron v. Kings River & F. Canal Co.* 76 Cal. 11, 17 Pac. 933; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879.

<sup>12</sup>*Whetstone v. Boiser*, 29 Pa. 60.

<sup>1</sup>*Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239.

The owner of lands, who not only stands by and sees a ditch constructed at a large expense for the purpose of taking water from streams running through his lands without making objection, but who actually participates, for pay, in the construction thereof, will be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby, and from claiming damages to his mill site and mineral deposits, for the operating and working of which such water would have been available. *Southern*

*Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531.

The knowledge of the guardian of an infant riparian owner that a mill company is expending money and labor in the construction of a canal for the diversion of water above the infant's premises, to be returned below such premises, and his failure to object thereto, do not estop the infant from claiming the right to have the water flow through its natural channel without diminution or alteration. *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24.

<sup>2</sup>*Cornig v. Troy Iron & Nail Factory*, 40 N. Y. 191.

The plaintiff does not lose his right of action for a diversion of water by the fact that the defendant, knowing that the plaintiff disputed his right to divert the water, notified him that he was going to take the water and requested him to take legal proceedings by way of prevention, before expenses were incurred,

ing his use of the water.<sup>3</sup> Nor will a neglect to complain during the time that plaintiff is not injured estop him from maintaining the action.<sup>4</sup> But an owner of prior rights in the water of a stream cannot maintain an action for damages from a diversion thereof, and for an injunction to restrain such diversion and an abatement as a nuisance of a dam used therefor, where he had notice of the original construction thereof, purchased an undivided share in the dam and ditch, assisted in the work of repairing and tightening the dam, and acquiesced in the diversion by the others, so as to be deemed to have consented thereto.<sup>5</sup> The lower owner is not estopped from complaining of the act of the upper one by the fact that he has made some changes in the channel of the stream himself.<sup>6</sup> Mere laches on the part of the lower owner is not a bar to his action.<sup>7</sup> But equity will not restrain the wrongful diversion of a stream when the landowner permitted the defendant to proceed with the erection of works and diversion of the water at a very heavy expense, without taking any legal steps to prevent it for so long a period as seven years.<sup>8</sup>

**509. Procedure and defenses.**— An action for diverting the water of a river by digging trenches may be brought either in the county where the trenches were dug or in the county where plaintiff's damage

which plaintiff neglected to do until after defendant had incurred expense in diverting the water. *Williams v. Wadsworth*, 51 Conn. 277.

Where a mine owner upon his own responsibility expends large sums of money in opening up and developing his property, and for the construction of hydraulic works and reservoirs for the operation thereof, a lower proprietor has the right to assume that none of his rights will be injured, and is not estopped by his silence from later asserting his rights. *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814.

Riparian proprietors will not be estopped from objecting to the diversion of water from the river by the fact that they knew that ditches were being constructed at great expense to convey away the water, and that they permitted the work to go on without objection. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

*Farrell v. Richards*, 30 N. J. Eq. 511.

*Anaheim Water Co. v. Semi-Tropic Water Co.* 64 Cal. 185, 30 Pac. 623.

*Churchill v. Baumann*, 104 Cal. 369,

36 Pac. 93, 38 Pac. 43, 95 Cal. 541, 30

Pac. 770.

In the case of *Watercourses v. Anon.* 2 Eq. Cas. Abr. 522, it was held that a person will be restrained from proceed-

ing with an action to recover damages for diversion of a water course where he knowingly permitted and connived at the diversion and failed to object to the same, but rather acted to the contrary.

The nature of the connivance does not appear in the report of the case. It is founded upon the case of *Short v. Taylor*, which the court cites, where Short in constructing his house laid part of the foundation on Taylor's lot, Taylor failing to object to it, and, as the court says, encouraging it; and he was restrained from bringing an action at law. These two cases are approved in 1 Craig

& P. 97, where the court held that one might so encourage the construction of a nuisance that equity would restrain him from bringing even his action at law. What would constitute sufficient encouragement the court did not decide.

*Hall v. Swift*, 4 Bing. N. C. 381, 1 Arnold, 157, 6 Scott, 167, 7 L. J. C. P. N. S. 209.

*Irving v. Media*, 10 Pa. Super. Ct. 132.

*Pennsylvania R. Co.'s Appeal*, 125 Pa. 189, 17 Atl. 478. In this case the court capitalized the annual damages and awarded that sum in lieu of all damages and for a continuance of the diversion.

was suffered.<sup>1</sup> The question of the materiality of the diversion is for the jury.<sup>2</sup> The statute of limitations does not begin to run until the injury is caused.<sup>3</sup> An appeal and stay of execution from a decree finding the title to certain water rights to be in the plaintiff does not suspend the running of the statute of limitations as to his right to bring an action for damages for a wrongful diversion of the water.<sup>4</sup> A riparian owner cannot, to defend an action against it for exhausting the water supply of the stream, set up that plaintiff wishes to use the water for manufacturing purposes, which are not shown to be unreasonable or wrongful.<sup>5</sup> So, it is no defense to an action for diverting the water, that plaintiff was using it in such a way as to constitute a nuisance.<sup>6</sup> It is no excuse for the unlawful diversion of water that others are doing likewise.<sup>7</sup> In the absence of a finding that some definite quantity of water was diverted by a defendant, neither his plea of prescription nor that of estoppel can be supported, in an action to determine water rights.<sup>8</sup>

**510. Damages.**—In case the upper owner is making an unreasonable and unauthorized diversion of the water, the lower one is entitled to recover nominal damages therefor, although he cannot show that he has received actual injury.<sup>1</sup> In order to recover substantial damages,

<sup>1</sup>*Leveridge v. Hoskins*, 11 Mod. 257, 258; *Deseret Irrig. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628.

An action for the diversion of the water of a stream from a ditch through which it is taken for sale for agricultural purposes, by the subsequent construction of another ditch, is properly brought in a county other than that in which the respective points of diversion are located, where the ditch from which the water is so diverted is located in both counties, and the consequences of the act operate upon, and are injurious to, the whole thereof. *Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co.* 60 Cal. 408.

<sup>2</sup>*Hogg v. Connellsville Water Co.* 168 Pa. 456, 31 Atl. 1010.

<sup>3</sup>The statute of limitations is not a bar to an action for the diversion of water, when a municipal corporation constructs upon its land, near a stream fed by an underground channel, an intake well having an overflow pipe by which the water is returned to the stream unless pumped out and distributed through a pipe to the town, for the reason that the proximate cause of the diversion was not the mere construction of the well, but was the pumping, which

was a continuous injury. *Aberdeen v. Bradford*, 94 Md. 670, 51 Atl. 614.

<sup>4</sup>*Toombs v. Hornbuckle*, 3 Mont. 193.

<sup>5</sup>*Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 563.

<sup>6</sup>*Blessing v. Blair*, 45 Ind. 546; *Chemowith v. Hicks*, 5 Ind. 224.

<sup>7</sup>*Heilbron v. Kings River & F. Canal Co.* 76 Cal. 11, 17 Pac. 933; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879.

<sup>8</sup>*Hayes v. Silver Creek & P. Land & Water Co.* 136 Cal. 238, 68 Pac. 704.

<sup>1</sup>*Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Chatsfield v. Wilson*, 27 Vt. 670; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Stein v. Ashby*, 24 Ala. 521; *Stowell v. Lincoln*, 11 Gray, 434; *Butman v. Hussey*, 12 Me. 407; *Munroe v. Stickney*, 48 Me. 462; *Blodgett v. Stone*, 60 N. H. 167; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Oreighton v. Evans*, 53 Cal. 55.

Complainants who have established their right to divert water from a stream through a canal for mill or other uses are entitled to at least nominal damages against one entitled to use water for irrigation purposes only, who has inserted a flume or culvert in the banks

their existence and amount must be shown;<sup>2</sup> and only those claimed in the complaint can be recovered.<sup>3</sup> But compensatory damages may be recovered if their amount is established.<sup>4</sup> If the diversion is permanent and cannot be suppressed, the measure of damages is the difference in value of the property immediately before and immediately after the diversion of the water is effected, or the value of the land with the water flowing to it and its value without such flow.<sup>5</sup> It has been held that the damages could be assessed on the basis of supplying power in the place of that destroyed.<sup>6</sup> But in *Sparks Mfg. Co. v. Newton*,<sup>7</sup> it is said that the difference between the market value of the mill before and after the diversion is a safer criterion than estimates of the possible cost of restoring the power by steam. Permanent damages cannot be recovered if there was no right to make a permanent diversion of the water.<sup>8</sup> The fact that no use has ever been made of the water will not prevent the recovery of substantial damages.<sup>9</sup> Where one wrongfully digs a ditch on the lands of another so

of the canal and drawn water therefrom in excess of his reasonable requirements. *Lonsdale Co. v. Moies*, 2 Cliff. 538, Fed. Cas. No. 8,407.

<sup>2</sup> When the diversion of water does not appear to have been continued for more than twelve days, and no estimate is given for the loss occasioned by the diversion for that period, and, while there is evidence of loss to plaintiff by the failure of his crops, there is nothing to show how much of this loss was due to the diversion of the water or how much to the natural failure of water,—there is no evidence in the case from which damages can be estimated. *Churchill v. Rose*, 136 Cal. 576, 69 Pac. 416.

<sup>3</sup> One claiming only such damages as he has suffered by reason of being deprived of water for his stock and having his fencing washed away by reason of the diversion by one above of a stream from its natural channel as it had formerly flowed through his land cannot recover the damages caused thereby to his land. *Judd v. Renaker*, 13 Ky. L. Rep. 782.

But under the North Carolina practice, the damages sustained between the bringing of the action and the rendition of the judgment may be included in an action to recover damages for the unlawful diversion of water. *Rice v. Norfolk & O. R. Co.* 130 N. C. 375, 41 S. E. 1031.

<sup>4</sup> *Marsh v. Delaware, L. & W. R. Co.* 35 N. Y. S. R. 719, 12 N. Y. Supp. 376;

*Aberdeen v. Bradford*, 94 Md. 670, 51 Atl. 614.

<sup>5</sup> *Southern Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531; *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. 615; *Gallagher v. Kingston Water Co.* 25 App. Div. 82, 49 N. Y. Supp. 250; *Syracuse v. Stacey*, 45 App. Div. 249, 61 N. Y. Supp. 165.

The measure of damages for the diversion of water from lands on which there are mineral deposits, for the working of which the diverted water would have been available, is the difference in value of such land with and without the diverted water, or of such deposits themselves, with and without such water, where they have never been opened or worked or put in a state of preparation for applying the water to them. *Southern Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531; *Hanover Water Co. v. Ashland Iron Co.* 84 Pa. 270.

<sup>6</sup> *Irving v. Media*, 10 Pa. Super. Ct. 132.

<sup>7</sup> 60 N. J. Eq. 399, 45 Atl. 596.

<sup>8</sup> *Craig v. Shippensburg*, 11 Pa. Super. Ct. 490.

A permanent damage cannot be presumed to have been suffered by a diversion of water by a pipe placed in the stream by the upper riparian owner; but, plaintiff's right having been established in a first suit, subsequent actions may be brought for a continuance. *Barr v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42.

<sup>9</sup> *Trent-Stoughton v. Barbados Water Supply Co.* [1893] A. C. 502, 62 L. J.

as to connect the waters of two channels running through such lands, the measure of damages would be the cost of filling up such ditch so as to restore said lands to their original condition, and not the difference in the value of the land before and after the digging of the ditch, as in case of a permanent injury.<sup>10</sup> If the diversion is temporary, the most satisfactory measure of damages is the diminished rental value of the property during the continuance of the diversion to the time of trial.<sup>11</sup> But evidence of the use to which the land had been put is necessary to show its rental value. As said in *Clark v. Pennsylvania R. Co.*<sup>12</sup> the estimated annual value of a mill site, as such, and independent of the land, is fanciful, conjectural, and speculative, for it is based upon its value as applied to some sort of a mill. It cannot be used as a measure of special damages claimed by reason of a diversion of water therefrom. If the water has been used for propelling a particular kind of mill, the net profits which have been lost by the inability to run the mill because of the diversion may be considered in arriving at the rental value of the property.<sup>13</sup> In case the land was used for agricultural purposes, the value of the crops lost because of inability to use the water may be considered.<sup>14</sup> What the land would have produced the year a diversion was made from a slough thereon of water used for irrigation purposes, if water could have been procured to irrigate it as preparations had been made to do, is direct and not speculative or uncertain in character, and may be

P. C. N. S. 123, 1 Reports, 403, 69 L. T. N. S. 164.

<sup>10</sup>*Doss v. Billington*, 98 Tenn. 375, 39 S. W. 717.

<sup>11</sup>*Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427.

The measure of damage to a mill pond by the diminution of water in a running stream by digging a deep trench and constructing an aqueduct across the valley of the stream is the difference in the value of the use of the pond from the time of the wrongful act to the commencement of the suit to recover therefor, and not the diminution in the permanent value of the property. *Covert v. Valentine*, 50 N. Y. S. R. 516, 21 N. Y. Supp. 210; *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

<sup>12</sup>145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

<sup>13</sup>*Ehrgood v. Moscow Water Co.* 4 Lack. Legal News, 151; *Washington County Water Co. v. Garver*, 91 Md. 398, 46 Atl. 979; *Fitzsimmons v. Munch*, 79 Ill. App. 538.

But anticipated profits arising from the running of a mill which has never been erected cannot be recovered in an action for the diversion from a stream running through the land of water which would have been available for running such a mill, if constructed. *Southern Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531.

<sup>14</sup>*Ellis v. Tone*, 58 Cal. 289.

In an action for damages resulting from depriving a riparian proprietor of his appurtenant water rights, the difference in the crops produced on such land before and after the diversion is material in determining whether or not there has been a change in its rental value. *Soper v. New York*, 71 App. Div. 618, 75 N. Y. Supp. 969.

The measure of damages for the loss of a crop by the wrongful diversion of water from a stream so as to deprive the owner of irrigation privileges is the market value thereof, over and above the cost of producing, harvesting, and marketing the same. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254.

shown in an action to recover damages for such diversion.<sup>15</sup> And if permanent injury has been caused to the property by the diversion of the water, that may be considered as well as the diminution in rental value.<sup>16</sup> But only such damages as have been occasioned up to the time of the trial can be recovered where the injury is not permanent.<sup>17</sup> And in such cases a recovery will not bar an action for the damages which subsequently accrue.<sup>18</sup> In an action by a riparian proprietor to restrain the diversion of water from a stream, and for damages for prior diversion, alleged damage to tracts of his land not bordering on the stream and to cattle pastured on such land cannot be shown.<sup>19</sup>

## VI. INTERFERENCE WITH STREAM FOR CONVENIENCE OF PUBLIC.

### 511. Right to interfere with stream for public convenience.—

As has already been seen there is no right to divert the water from a stream to furnish a public water supply.<sup>1</sup> And the same rule applies in case of an attempted diversion of the water by a corporation which has undertaken to furnish a supply of water for any public purpose. It will be enjoined from taking the water from the stream unless it has acquired a right to do so.<sup>2</sup> So, persons engaged in making improvements which are intended to be for the benefit of the public have no right to interfere with the course of streams to the injury of riparian owners. A railroad company is liable for diverting the water from a stream for its own convenience in constructing its roadbed, to the lower proprietor who is thereby deprived of the use of the water; and, in case it attempts to change the channel of the stream, it will be liable for injuries caused by casting the water onto the lower property in an unusual manner to its injury.<sup>3</sup> So the company has no right to construct embankments which will deflect the flow of the water to

<sup>1</sup>*Ellis v. Tunc*, 58 Cal. 289.

<sup>2</sup>*East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631.

<sup>3</sup>*Williams v. Camden & R. Water Co.* 79 Me. 543, 11 Atl. 600; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Rogers v. Dickson*, 10 U. C. C. P. 481.

Where, in the construction of a railroad, rock is, by blasting, thrown in a creek, and the same is diverted from its natural course, and where it appears that such obstruction in the stream is not necessary for the maintenance of the road, the damage resulting from the diversion of the stream is not permanent, and only past damages may be re-

covered. *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L. R. A. 674, 45 Am. St. Rep. 894, 19 S. E. 521.

<sup>1</sup>*Covert v. Brooklyn*, 13 App. Div. 188, 43 N. Y. Supp. 310.

<sup>2</sup>*Heinlen v. Fresno Canal & Irrig. Co.* 68 Cal. 35, 8 Pac. 513.

<sup>3</sup>See *ante*, § 137.

<sup>4</sup>*Gallagher v. Kingston Water Co.* 25 App. Div. 82, 49 N. Y. Supp. 250.

<sup>5</sup>*Union P. R. Co. v. Dyche*, 31 Kan. 120, 1 Pac. 243; *Wells v. New Haven & N. Co.* 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724; *Gulf, C. & S. F. R. Co. v. Jones*, 3 Tex. App. Civ. Cas. (Willson) § 21, p. 39; *Van Orsdol v*

the injury of an adjoining landowner.<sup>4</sup> It will not be permitted, either to save itself expense or to improve its roadbed, by changing the flow of a stream of water to the injury of private property owners.<sup>5</sup> The acquisition by the company of land on the bank of a stream gives it no more control over the water than its grantor had.<sup>6</sup> The mere acquisition of a right of way across property does not include a right to change or divert streams which are crossed by the right of way.<sup>7</sup>

*Burlington, O. R. & N. R. Co.* 56 Iowa, 470, 9 N. W. 379; *Illinois O. R. Co. v. Miller*, 68 Miss. 760, 10 So. 61; *Gordon v. Pennsylvania R. Co.* 6 W. N. C. 405, 6 Rep. 727.

The fact that a railroad company changed the channel of a water course within the corporate limits of the municipal corporation under the authority of the latter, by virtue of a statute conferring upon municipal corporations power to change the channel of water courses within their limits, does not relieve the railroad company from liability for damages suffered by a property owner from flooding caused by such diversion, where the change was made entirely for the private benefit of the company. *Rock Island & P. R. Co. v. Krapp*, 74 Ill. App. 158.

A railroad company having built its line across a water course and provided no culvert, thus diverting the stream, and by the same act deflected surface water in the same direction, which caused the confluent waters to successively fill two abandoned quarries on adjoining land, so that, in a freshet, the flood burst through the division wall to a quarry beyond belonging to another owner, must answer in damages for the resulting injury to the latter, notwithstanding such result could not have been foreseen, and the broken dividing wall would have kept back the water had it not been weakened by encroachments from the farther side, antecedent to the construction of the road. *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213, 36 Am. St. Rep. 802, 26 Atl. 70.

The knowledge of officers of a company purchasing a railroad as to the existence and continuance by it of a nuisance created by the acts of its former owners in diverting a water course onto adjoining land will be deemed the knowledge of such company where the work creating the nuisance was done under the directions of such officers while they were serving in similar capacities for the old company. *George v. Wabash Western R. Co.* 40 Mo. App. 433.

\*Successive actions may be maintained to recover for injuries to plaintiff's land resulting from the construction of an embankment which caused the water of a stream to flow on to his land, such flowing occurring annually to the injury of crops planted each year and the injury varying in extent with the volume of water discharged upon the land. *Van Hoesier v. Hannibal & St. J. R. Co.* 70 Mo. 145; *Dickson v. Chicago, R. I. & P. R. Co.* 71 Mo. 575.

\**George v. Wabash Western R. Co.* 40 Mo. App. 433; *Parker v. Norfolk & C. R. Co.* 123 N. C. 71, 31 S. E. 381.

One who is injured by the diversion of a stream during the building of a railway embankment is entitled to damages for the injury already occasioned thereby, and to an order directing the construction of a proper passageway, and an injunction perpetually restraining such diversion, even after lapse of time, where he has not acquiesced in the diversion, but has been active in opposition thereto. *Young v. Chicago & N. W. R. Co.* 28 Wis. 171.

\**Parker v. Norfolk & O. R. Co.* 123 N. C. 71, 31 S. E. 381.

\**Stodghill v. Chicago, B. & Q. R. Co.* 43 Iowa, 26, 22 Am. Rep. 211.

Where a railroad company diverts one branch of a stream into another branch, above their natural junction, unless it was necessary to do so in order to make the best provision for the safety of passengers and property to be transported over the road, it incurs liability for at least nominal damages, and for such actual damages as it causes, as such an injury did not reasonably follow from the condemnation of the land for railroad purposes. *Adams v. Durham & N. R. Co.* 110 N. C. 325, 14 S. E. 857.

A landowner who has granted a right of way to a railroad company to cross his land may not, when the construction of the railway has diverted a stream of water, in proceedings by the railway to condemn land for a ditch in lieu of the original channel of the water course, claim damages for the diversion.

The benefit which may result to the public from a change of the course of a stream is, however, such that the legislature may permit the acquisition of the right to make the change under the power of eminent domain.<sup>8</sup> General authority to construct a railroad across a particular parcel of property does not include the right to change the flow of water courses therein, unless such change is necessary for the public accommodation. As said in *Pugh v. Golden Valley R. Co.*<sup>9</sup> a railroad company in constructing its road may divert the course of a stream only when it constitutes an actual obstacle to the construction of the line, and not merely for the purpose of saving the company expense, under a statute authorizing it so to do when necessary for making, maintaining, or altering the railway. The appropriation of land upon which to construct a new channel for a stream, across a bend or loop of which a railroad is constructed, is, however, when required by such construction, to all intents and purposes an appropriation of the land for the railroad, within the provision of a statute authorizing the company to appropriate land deemed necessary for its railroad.<sup>10</sup> In case the railroad company attempts to change the channel of the stream without right, it may be compelled to restore the same to its former course.<sup>11</sup> Even a successor in title of a railroad company

He will be left to his remedy for damages for the diversion of the stream in a suit wherein the question as to whether the diversion was or was not contemplated in the conveyance of the right of way can be properly presented. Had there been no conveyance of the right of way he might have claimed damages for the diversion of the stream in an action to condemn the right of way. *Jackman v. Missouri P. R. Co.* 15 Neb. 524, 19 N. W. 497.

<sup>8</sup>*March v. Portsmouth & O. R. Co.* 19 N. H. 372; *Reusch v. Chicago, B. & Q. R.* 57 Iowa, 687, 11 N. W. 647.

Sufficient necessity for the condemnation of the right of a riparian proprietor to have a natural stream flow through his land is shown where the object of the diversion is to place a railroad company in a position to increase the safety of its tracks by constructing solid embankments in the place of bridges across the river, it appearing that the bridges are in danger of being injured by ice gorges, thereby endangering persons and property and making a suspension of traffic probable; and it also appearing that the diversion of the stream and the building of the embank-

ments are the only methods by which the increase in safety can be effectually obtained. *Bigelow v. Draper*, 6 N. D. 152, 60 N. W. 570.

<sup>9</sup>*L. R.* 15 Ch. Div. 330, 49 L. J. Ch. N. S. 723, 42 L. T. N. S. 863, 28 Week. Rep. 863, Affirming *L. R.* 12 Ch. Div. 274.

But the right permanently to divert the water of a stream into a new channel when necessary to the construction of a railroad across a bend or loop therein is conferred by a statute declaring that it shall be lawful, whenever it may be necessary in the construction of a road to cross any stream of water, to divert the same from its present bed, but that such a stream shall, without unnecessary delay, be placed "in such condition as not to impair its former use,"—the latter requirement not necessitating its restoration to its former place or condition. *Valley R. Co. v. Bohm*, 34 Ohio St. 114.

<sup>10</sup>*Valley R. Co. v. Bohm*, 34 Ohio St. 114.

<sup>11</sup>*Wright v. Syracuse, B. & N. Y. R. Co.* 49 Hun, 445, 3 N. Y. Supp. 480, Affirmed in 124 N. Y. 668, 27 N. E. 854.

When a railroad company in the con-



which diverted the waters of a stream for purposes of construction may be compelled by mandamus to restore the waters to their ancient channel.<sup>12</sup> The negligent change of the course of a river or of the flow of its water is as much a wrong to be prevented, as though it was intentionally effected.<sup>13</sup>

**512. Obtaining right by condemnation or contract.**— It being established that the right to change the channel of a stream must be acquired by right of eminent domain, the questions in each case are as to whether or not the one attempting to do so had been given authority by the legislature and whether or not the right had been actually acquired by the proper proceedings and the payment of damages. The mere changing of the channel of the stream is not an act which will take a parol agreement for the sale of lands out of the statute of frauds.<sup>1</sup> But it is, nevertheless, an act which, to be justified, must be expressly authorized, and the right to do so must be acquired in lawful manner. The damages must be ascertained in the manner provided by statute, and, if the railroad company is acting under

struction of its road across a natural water course covers up a spring from which a part of the supply of water issues, builds a large embankment, and by other means totally diverts the water from the land of a person, through which it naturally flowed before the construction of the road, such person is entitled to a mandatory injunction against the railroad company restraining the diversion of the water from his land; and that such owner has another water course running through the same land does not affect his right thereto. *Atchison, T. & S. F. R. Co. v. Long*, 46 Kan. 701, 26 Am. St. Rep. 165, 27 Pac. 182.

But a riparian owner, across the corner of whose land a creek flows which is of little value for any purpose, and, in wet seasons a menace, will not be granted a mandatory injunction for the restoration of the stream after a railroad company, at large expense and without any objection on the part of the owner, but with his knowledge, has diverted the channel of the creek. *Slocumb v. Chicago, B. & Q. R. Co.* 57 Iowa, 675, 11 N. W. 641.

<sup>12</sup>*Lefurgy v. New York & N. R. Co.* 21 N. Y. S. R. 113, 3 N. Y. Supp. 302.

<sup>13</sup>An injunction will lie to prevent a railroad company from entering upon the land of another near its line for the purpose of obtaining sand and soil therefrom for sale, without the owner's permission, the offering of compensation.

or the institution of condemnation proceedings therefor, the taking of which will endanger his property owing to the probability that it will produce a deflection of the channel of a nearby river, thus producing irreparable injury,—especially as such contemplated act would exceed the powers granted such railroad company by its charter. *Cobb v. Illinois & St. L. R. & Coal Co.* 68 Ill. 233.

<sup>1</sup>The changing by a railroad company of the channel of a brook so as to conduct it along the alleged dividing line between its property and that which it agrees to release to the person from whom its right of way was taken cannot be considered in determining whether or not there was such performance of the agreement as to take the case out of the statute of frauds. *Barnes v. Boston & M. R. Co.* 130 Mass. 388.

So, an agreement by a railroad company, in consideration of the consent of the owner of an artificial water course to permit the filling of the channel thereof and diversion of the water therefrom into another channel on other lands in the construction of the railroad, that it will open the old channel and restore the water thereto whenever requested by such owner is not a contract for an interest in land within the meaning of the statute of frauds, but merely a promise to perform work and labor. *Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co.* 29 Ohio St. 341.

statutory authority, an action at law cannot be maintained.<sup>2</sup> The fee of the land under the stream need not be taken.<sup>3</sup> If the intention to change the course of the stream was manifest, the award of damages for the right of way will be presumed to have included all injury to result from the change.<sup>4</sup> If the railroad company has power to change the course of the stream, permanent damages for the change may be assessed in one proceeding so as to give it the right to maintain the stream in its new channel.<sup>5</sup> If the railroad company obtains the right by contract to change the channel of the stream, it is not an insurer of the sufficiency of the new channel, but is bound only to take reasonable care that the channel provided shall be adequate to carry the water which formerly flowed in the old channel.<sup>6</sup> Permission to change the course of the stream does not authorize the change of the

<sup>2</sup>*Little v. Dublin & D. R. Co.* 7 Ir. C. L. Rep. 82; *Aldrich v. Cheshire R. Co.* 21 N. H. 359, 53 Am. Dec. 212.

When, after prescribing a particular mode in which damages shall be ascertained and compensated, the legislature authorizes the construction of a railroad the necessary and natural consequence of which is to divert the waters of a permanent spring supplying a dwelling-house with water, the railroad corporation cannot be held liable as a wrongdoer by the owner of the spring. *Aldrich v. Cheshire R. Co.* 21 N. H. 359, 53 Am. Dec. 212.

<sup>3</sup>*Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

<sup>4</sup>Commissioners appointed under an act of the legislature to assess damages caused by the construction of a railroad, who make an assessment of damages under full power to consider all injuries that an owner has sustained, in order not to deprive them of the power of independent action intended to be conferred upon them by the legislature must be conclusively presumed to have included therein the injury arising from the diversion of a spring supplying a dwelling-house with water, although such diversion was not caused until after the award was made. *Aldrich v. Cheshire R. Co.* 21 N. H. 359, 53 Am. Dec. 212.

The right to divert, within the limits of land condemned, a stream flowing across the proposed line of a railroad may, under a charter conferring power to acquire by condemnation land for the construction of the railroad, be obtained by condemnation of the land, duly confirmed, and payment or tender of the

damages awarded, on proof *dehors* the inquisition that the attention of the jury of inquisition was directed to the intended diversion at the time of taking and before they signed the same; and the owner of land condemned is not entitled to an injunction restraining the diversion thereof on the ground of irreparable injury, since it is to be presumed that the jury estimated in their inquisition the damages to result from such diversion. *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310.

<sup>5</sup>*Fowle v. New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106; *Fowle v. New Haven & N. Co.* 107 Mass. 352; *Stodghill v. Chicago, B. & Q. R. Co.* 53 Iowa, 341, 5 N. W. 495.

Permanent damages may be assessed against a railroad company at its request for damage resulting from its diversion or obstruction of a water course, although the sole damage was done by one freshet. *Hocutt v. Wilmington & W. R. Co.* 124 N. C. 214, 32 S. E. 681.

<sup>6</sup>*St. Louis, I. M. & S. R. Co. v. Walbrink*, 47 Ark. 330, 1 S. W. 545.

A railroad company changing a water course under the authority given by a deed of its right of way is not liable for flooding the grantor's land by the construction of a new channel of insufficient capacity, unless the channel as constructed was of a less capacity than the river bed. *Powers v. St. Louis, I. M. & S. R. Co.* 71 Mo. App. 540.

When a railroad purchases land for the express purpose of turning a stream of water, so as to avoid bridging it, and changes the course skillfully and with due care to prevent damage, it is not

flow of streams from other lands so as to cast them upon lands of the grantor to his injury.<sup>7</sup> Permission to change the channel imposes upon the railroad company no duty, and it need make only such changes as will further its own interests.<sup>8</sup> And only such structural work is required as will perform the work which the company has promised to do in consideration of the permission to make the change; and it need not construct the best class of work.<sup>9</sup> Where a license to fill up an artificial water course in the construction of a railroad across it is obtained from a corporation in possession of such water course as owner, in consideration of an agreement by the licensee to re-open and restore the water course when requested so to do, the licensee, when sued for the breach of his promise, is estopped from setting up that the ownership and maintenance of such water course by the corporation was *ultra vires*.<sup>10</sup> In addition to the change of the channel of the stream there are other injuries which may result by interference with a stream by the construction of a public improvement. The work may be constructed in such a manner as to interfere with the obtaining of power by a mill. In a proceeding to condemn land for a right of way across a mill pond where the plan of construction will materially affect the question of damages to the mill property not taken by reason of the cutting off of more or less of the water supply, the railroad company should present a plan of construction of its road over the premises, which should be preserved in the records of the court, so that if there should be a departure therefrom to the said owner's damage, he may have his remedy for such increased damages

liable to the grantor, if subsequent action of the stream in its new channel has the effect to wash away portions of the grantor's adjoining meadow. *Norris v. Vermont C. R. Co.* 28 Vt. 99.

<sup>7</sup>*St. Louis, I. M. & S. R. Co. v. Harris*, 47 Ark. 340, 1 S. W. 609.

<sup>8</sup>A total diversion by a railroad company of the waters of a stream from their natural channel so as to completely drain it is not required by a stipulation in a deed of land to it with the right to divert the waters of the stream as may be required in the alteration of the location of the railroad so as to run it in a straight line across, instead of following a semi-circular bed of, the stream, providing that a culvert in the road on its new location shall be so placed as to drain "as far as practicable" the former bed of the stream after the waters are diverted therefrom, where

the road cannot be safely constructed across the stream in such a manner as to make a total diversion, since that provision is subordinate to the main object of the purchase, which was the new and safe construction of the railroad bed across the river; and the company is not bound by its construction, in the first instance, of a solid embankment at the point of diversion, where such construction proves unsafe and is destroyed by flood, but may rebuild the road with a solid embankment below and an open trestle above, so as to permit the flowing of the water into the old bed over the top of the solid part of the embankment in case of high waters. *Oursler v. Baltimore & O. R. Co.* 60 Md. 358.

<sup>9</sup>*Oursler v. Baltimore & O. R. Co.* 60 Md. 358.

<sup>10</sup>*Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co.* 29 Ohio St. 341.

resulting from the departure.<sup>11</sup> When the improvement is to be constructed in such a manner as to interfere with the power of a mill, the damages are to be fixed at such sum as will place the mill owner in as good a position as though the improvement had not been made.<sup>12</sup>

**513. Liability for injuries.**— If the statute imposes upon the railroad company the duty to restore the stream to its former state of usefulness, the railroad company cannot create a new channel, turn the water into it, and then abandon it, so that in the course of a few months it escapes from the channel and is lost to the abutting owner.<sup>1</sup> The Indiana court has taken a somewhat peculiar view of the duties of the railroad company. In *Cleveland, C. C. & St. L. R. Co. v. Wischart*,<sup>2</sup> it appeared that a railroad company was authorized to change the course of streams, provided that it should restore them to their former state. An owner of land lying along a stream alleged that there was a stream flowing across his property, and that the railroad company in constructing its roadbed changed its course so as to make it flow along its right of way into a river; and that it subsequently attempted to substitute a solid embankment for a trestle, and in so doing permitted the dirt to spread off from its right of way and fill the ditch so as to dam the water back onto plaintiff's land to his injury. The court held that the complaint was demurrable because of an entire absence of averments of fact to show that the injury or grievance complained of was due either to negligence or wilfulness of appellant, stating that the company, in building its road upon or across a stream or water course, is not to be considered or held an absolute insurer against all injury or damage to property of others, but is only required to exercise proper care and skill under the circumstances, in order to avoid injury or damage to the property of another; but beyond that it is not required to go. To render tortious the act of appellant in allowing or causing the dirt used in the construction of the embankment to spread or fill up the ditch or water way as alleged, there should be some averment or allegation to show that the act of filling up the ditch on its own land, and thereby ob-

<sup>11</sup>*Illinois & St. L. R. & Coal Co. v. Scitcer*, 117 Ill. 399, 57 Am. Rep. 875, 7 N. E. 664.

<sup>12</sup>In assessing the damages to mill property not taken for a right of way for a railroad track across a mill pond, the construction of which will destroy the pond as a source of water supply for the mill, the railroad company may show, for the purpose of affecting the amount of the damage caused thereby,

that a waterworks company would furnish the mill with an ample supply of water at a less cost than that of pumping from the pond, and also that a creek flowing nearer the mill than the pond has a capacity to furnish better water in abundance for the use of the mill.

*Ibid.*

<sup>1</sup>*Cott v. Lewiston R. Co.* 36 N. Y. 214.

<sup>2</sup>67 N. E. 993.

structing the flow of the water, was either wilfully or negligently done to the injury of appellee. The rule is well settled that, if a person does a lawful act on his own premises, he is not liable for damages resulting therefrom, unless the act was so done as to constitute negligence. There are several points in which the reasoning of the court is wholly inapplicable to the case which it had to decide. In the first place a landowner is not permitted to obstruct the flow of a stream of water on his land to the injury of an adjoining proprietor, whether he acts negligently and intentionally or merely passively. He is forbidden to interfere with such flow, or is liable for the resulting injury. And, when a railroad company has created an artificial channel to receive the flow of the stream, the same rule applies to it and it cannot obstruct such channel to the injury of the abutting owner. In the case before the court the railroad company, for its own convenience, changed the channel of the stream and left it flowing upon its property. It then proceeded to fill that channel so that the water could no longer flow in it. Its duty was to see that it did not do so, and all that was necessary to render it liable was to show that it did so, and it was not necessary to show that it acted negligently, wilfully, or in any other manner. Its liability followed and depended on the fact of injury. The judgment of the court cannot be supported by any principle of law. Whether or not a railroad company which changes the channel of a creek on its own premises and creates a new outlet therefor into a river for the safety of its bridge will be responsible for damages to crops on lands on the opposite side of the river from the overflowing of such land, due to the breaking down, by a flood, of levees on the opposite bank, which had been undermined by a change of the current of the river resulting from the formation of a sand bar at the new mouth of the creek, caused by the change of the creek channel, depends upon whether, under all the known circumstances, a person of ordinary prudence would have anticipated increased danger to such opposite bank in case of unusual, but not unprecedented, floods; and if such danger would not have been so anticipated, and reasonable care was exercised in the construction of the new channel, any damage resulting from the formation of such bar at the new mouth of the stream is *damnum sine injuria*.<sup>5</sup> In case a bar of gravel is carried upon the land of an adjoining owner by a stream diverted from its course by a railroad company in constructing a culvert under its tracks, and compensation is made by the

<sup>5</sup>*Railroad Co. v. Carr*, 38 Ohio St. 448,  
43 Am. Rep. 428.

company for the diminished value of the land because thereof, the owner is not required to remove the bar so that he is not prevented from recovering for a subsequent flood caused by the inadequacy of the culvert, by the fact that the bar may have contributed to the deflection of the course of the flood.<sup>4</sup> One merely alleging himself to be in possession of land under a contract of sale, without any allegation as to title, is not entitled to equitable relief against the diversion of a stream from its natural channel by the construction of the roadbed of a railroad, causing it to set back over the premises in question, as from such allegation there can be no presumption of either a legal or equitable title in him whereby the nuisance complained of can work to him an irreparable injury, interminable litigation or a multiplicity of actions, or a continuous or constantly recurring injury entitling him to such relief, his remedy at law being adequate.<sup>5</sup> Where, by the terms of a lease, a landlord was to have a share of the crop as rent, he may maintain an action for injuries to it caused by the diversion of the water of a stream onto the land.<sup>6</sup> To relieve a railroad company from the duty of maintaining a passage across its right of way for a water course on the ground that the adjoining owner has changed the course into a new channel, the intention to make a permanent change must be evidenced by an unequivocal and decisive act evincing a purpose to abandon the old channel.<sup>7</sup> The cause of action for the wrongful flooding of an owner's land by the construction of a railroad so as to divert a water course from its natural channel accrues only at the time of the flooding, and not at the time the improvements were constructed.<sup>8</sup> Liability may exist for injury to an existing body of water as well as for attempted diversion of it or change of its course. If in the construction of a railroad a pond is diminished in size or the water polluted the owner is entitled to recover damages from the railroad company.<sup>9</sup> But the

<sup>4</sup>*Easterbrook v. Erie R. Co.* 51 Barb. 94.

<sup>5</sup>*Denner v. Chicago, M. & St. P. R. Co.* 57 Wis. 218, 15 N. W. 158.

<sup>6</sup>*Van Hoozier v. Hannibal & St. J. R. Co.* 70 Mo. 145.

<sup>7</sup>*Mississippi C. R. Co. v. Mason*, 51 Miss. 234.

<sup>8</sup>*Rook Island & P. R. Co. v. Krapp*, 74 Ill. App. 158. Affirmed in 173 Ill. 219, 50 N. E. 663.

<sup>9</sup>The owner of land containing a reservoir and stream leading thereto may recover the depreciation in its market value by the diminution in the size of the reservoir and pollution of the water

through the construction of a railroad. *H. C. Frick Coke Co. v. Painter*, 198 Pa. 468, 48 Atl. 302.

Damages must be paid for injuries occasioned by the construction of a railroad through a mill pond authorized by the legislature to be raised in a navigable river, although in erecting the dam for raising the pond the conditions of the charter were not complied with. *White v. South Shore R. Co.* 6 Cush. 412.

Assumpsit will lie for damages caused by diminishing the quantity of water in a mill pond, against one entitled under a release, with right to claim future damages, to maintain a railroad bridge.

right of the owner of a mill pond to claim damages for any injuries to his water power which may be caused by future alterations to a bridge constructed over a portion of it by his authority is destroyed by his conveyance of that portion of the pond to another, although it is expressly made subject to the rights conferred upon the owner of the bridge.<sup>10</sup>

**514. Damages.**— The measure of damages for the permanent diversion of a water course by the construction of a railroad is the diminished market value of the property.<sup>1</sup> And for injuries caused by the diversion of a water course by a railroad company in constructing a culvert to carry the stream under its tracks the measure of damages is the diminished value of the property injured, and does not necessarily contemplate the cost of removing a bar of gravel carried upon the land by the stream.<sup>2</sup> A landowner may recover damages for injury to his land from overflow and the depositing of noxious substances thereon, occasioned by the diversion of a stream from its natural course by the construction of a railroad upon adjoining premises, as for a deterioration in the value of his premises occasioned by the nuisance, in which case all damages for past and future injury are taken into consideration; and one recovery in such case is a bar to all future actions for the same cause.<sup>3</sup> If the construction of the road will cut a portion of a farm off from access to water, either for the use of stock or for irrigation, that fact may be taken into consideration in estimating the damages to be awarded.<sup>4</sup> If the construction of the roadbed will destroy springs or water courses, that fact may also be considered.<sup>5</sup> The effect of the construction of the

across a pond, but who substitutes a solid foundation for one of piles. *Goodrich v. Eastern R. Co.* 37 N. H. 149.

<sup>10</sup>*Goodrich v. Eastern R. Co.* 37 N. H. 149.

<sup>1</sup> In ascertaining this it is proper to consider the fact that the premises are frequently overflowed, and soil is washed away, and that there are cast upon the property by such overflow sewer filth and other noxious substances. *Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 573; *Rock Island & P. R. Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663, Affirming 74 Ill. App. 158.

Where a railroad company changes the bed of a stream so as to cut into and wash away adjoining land, the measure of damages is the injury done to the soil and consequent diminution of its salable value. *Illinois C. R. Co. v. Smith*, 110 Ky. 203, 61 S. W. 2.

<sup>2</sup>*Easterbrook v. Erie R. Co.* 51 Barb. 94.

<sup>3</sup>*Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 573.

<sup>4</sup>*Chicago, P. & St. L. R. Co. v. Greiney*, 137 Ill. 628, 25 N. E. 798; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Rockford, R. I. & St. L. Co. v. McKinley*, 64 Ill. 338; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind. 479; *Gulf, C. & S. F. R. Co. v. Abney*, 3 Tex. App. Civ. Cas. (Willson) § 413, p. 485.

<sup>5</sup>*Winklemans v. Des Moines N. W. R. Co.* 62 Iowa, 11, 17 N. W. 82; *Robbins v. Milwaukee & H. R. Co.* 6 Wis. 636.

In ascertaining the damages to be awarded an owner of land for a right of way for a railroad through the same, an alleged injury to such owner from the loss of the beneficial enjoyment of a spring is a proper subject for the consideration of the jury; and if he could

road upon a stream of water flowing through the property may be considered.<sup>6</sup> Upon an assessment of damages caused by the laying out of a railroad, the liability of a portion of the owner's land to wash away or cave in is an element of necessary damage which the jury must allow for, if resulting unavoidably from the building of the road in a suitable and proper manner; and the mere fact that the road was already built and the jury assessing the damages could see the actual conditions, instead of anticipating them, will not make it an element of damage resulting from an improper construction, for which a separate action must be had.<sup>7</sup> And the fact that the land not taken will be depreciated in value by the washing of the soil and the filling of a tank on it with dirt is a proper element of damages.<sup>8</sup> Damages may be allowed for the construction of the road in such a way as to deprive property not taken, of the advantage of having fertilizer carried upon it by flood water from the river.<sup>9</sup> And they may be allowed for injury to water power.<sup>10</sup> But evidence that a railroad company has erected a dam across a creek and backed water upon plaintiff's land and covered 2 or 3 acres, worth \$100, is inadmissible on the question of damages for the part of plaintiff's land taken for railroad purposes.<sup>11</sup> In estimating the compensation for land taken, its potential value for any use to which it was adapted must be taken into consideration. Therefore, if there was a valuable water power and mill site upon it which was destroyed by the taking of the property, that fact should form an element of damages, although it had never been utilized.<sup>12</sup> So, the fact that the property

only enjoy it by a conveyance of the water across the railroad track, then they could consider his loss a total deprivation thereof unless the company would give him a perpetual license to flow the water across its right of way. *Peoria & R. I. R. Co. v. Bryant*, 57 Ill. 473.

<sup>6</sup>*Dreher v. Iowa S. W. R. Co.* 59 Iowa, 599, 13 N. W. 754.

<sup>7</sup>*Dearborn v. Boston, C. & M. R. Co.* 24 N. H. 179.

<sup>8</sup>*Gainesville H. & W. R. Co. v. Waples*, 3 Tex. App. Civ. Cas. (Willson) § 400, p. 483.

<sup>9</sup>*Concord R. Co. v. Greely*, 23 N. H. 237.

<sup>10</sup>*Lake Superior & M. R. Co. v. Greve*, 17 Minn. 322, Gil. 299.

<sup>11</sup>*Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178.

<sup>12</sup>*Haslam v. Galena & S. W. R. Co.* 64 Ill. 353.

The owner of a water privilege on

land, with the right to enter so much thereof as may be necessary for the construction of an abutment on one bank of a river, has such an interest in the land as to require a railroad company, in condemning a right of way over such land, the construction of whose roadway would affect such water privilege, to ascertain in the mode pointed out by the statute what damage such owner will sustain thereby before it can appropriate the land to its own use. *Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494.

In arriving at the value of land taken and the damages to the residue by the construction of a railroad over an owner's mill site, evidence is admissible to show the market value of water power which could be used for operating the mill, and its adaptability to the operation of other machinery in the vicinity, although not actually used for those purposes at that time; also to show the cost of making certain changes in the



had a value for mill purposes,<sup>12</sup> or for dock purposes,<sup>14</sup> or the cutting and harvesting of ice,<sup>15</sup> may be taken into consideration. The value of the property cannot be enhanced by its value to the railroad for a pumping station.<sup>16</sup> The railroad company is entitled to allowance for any diminution of the injury by its method of construction. Therefore, if openings are to be left in the roadbed which will preserve the natural conditions, that fact may be considered.<sup>17</sup> And the owner of land bordering a stream has the right, in a proceeding by a railroad company to condemn a right of way for its tracks thereon and as a support for an abutment of a bridge to be constructed by it over the stream at that point, to require such railroad company to exhibit the plan and profile of its proposed railroad across the land and the bridge across the stream before the trial, so as to enable such owner to intelligently prove the extent of his damages, not only for the land taken, but to his remaining lands.<sup>18</sup> The railroad company may show that the landowner is not injured by the

flume, rendered necessary by the construction of the road, and the loss of water power which would be thereby occasioned. *Colorado M. R. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87.

As to the consequential damages to plaintiff's mill shoal by the location of a railroad on land taken therefor, the plaintiff may show what was the actual cash value of the mill shoal at the time the defendant's road was located on his land, and how much and to what extent that cash value of his mill shoal was diminished by such location of defendant's road at the time it was so located. *Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178.

The statement of a witness that by reference to a book issued by a company advertising the sale of turbine wheels, he came to the conclusion, taking into consideration the fall that could be obtained, that a twenty-horse power could be obtained, is altogether too uncertain and speculative in its character to establish the value of plaintiff's land taken for railroad purposes, the book not being in court and the witness testifying only from his recollection of the statements therein. *Ibid.*

<sup>12</sup>*Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97, 3 N. E. 720.

<sup>14</sup>*Rock Island & P. R. Co. v. Leisy Brewing Co.* 174 Ill. 547, 51 N. E. 572; *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764.

The plot of a proposed improvement

to lots, showing water fronts of proposed docks along a river, is admissible in evidence in estimating the damages to land not taken in a condemnation proceeding for a railroad right of way across such lots, for the purpose of showing their adaptability for dock purposes, such adaptability being claimed as enhancing their present market value, which would be destroyed by the construction of the proposed railroad. *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764.

<sup>15</sup>The increased value of land abutting upon a river by reason of the privilege of harvesting ice and storing the same in icehouses erected upon the owner's banks may be taken into consideration in estimating the damages to be awarded such owner in a condemnation proceeding to take the land for railroad purposes, where, although the right to the ice and to harvest it still remains in such owner, the taking of the property for railroad purposes will deprive him of the possibility of making any use of the ice privilege connected with the land. *Rock Island & P. R. Co. v. Leisy Brewing Co.* 174 Ill. 547, 51 N. E. 572.

<sup>16</sup>*Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178.

<sup>17</sup>*Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Terr. 38, 13 Pac. 186.

<sup>18</sup>*Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589.

diversion of the flow of the stream, because it had become so polluted as to be of no value.<sup>19</sup> The jury are entitled to consider any increased value to the property by reason of its susceptibility of enlargement and extension by filling up submerged portions adjoining a river.<sup>20</sup> The injury to the owner of flats appropriated for a receiving basin for water from a mill basin accrues so as to entitle him to his damages, when the water is excluded from the basin to fit it for such purpose.<sup>21</sup> The testimony of a witness as to what he would give for plaintiff's shoal and water power for the purposes of a pork-packing business is inadmissible on the question of damages for the taking of the land for railroad purposes, as such evidence is entirely too speculative and uncertain to prove what was the actual value of plaintiff's land at the time it was so taken for the railroad.<sup>22</sup>

## VII. POLLUTION OF STREAM.

**515. Stream must not be polluted.**—The right of the riparian owner to have the stream maintain its natural flow through his property includes the right to have the water retain its natural purity so far as possible, while permitting the upper owners to make such reasonable use of the water as they are entitled to. Increased population along the banks of the stream and the use of the water for the purposes to which the upper owners have a right to use it will necessarily result in some contamination of the water, and no riparian owner can insist on having the water come to him in its natural purity, to the destruction or impairment of the rights of the upper owners.<sup>1</sup> But, as in the case of the diversion of the water, each owner has a right to make only such use of the water as he can without interfering with or destroying the equal rights of others. Therefore, the upper owner cannot use the water, or his land adjacent thereto, in such an unreasonable manner as to unnecessarily pollute the water to the injury of the lower owner.<sup>2</sup> Any use that materially fouls and adulterates the

<sup>19</sup>*Kiernan v. Chicago, S. F. & C. R. Co.* 123 Ill. 188, 14 N. E. 18.

<sup>20</sup>*Rook Island & P. R. Co. v. Leisy Brewing Co.* 174 Ill. 547, 51 N. E. 572.  
<sup>21</sup>*Boston & R. Mill Corp. v. Newman,* 12 Pick. 467, 23 Am. Dec. 622.

<sup>22</sup>*Selma, R. & D. R. Co. v. Keith,* 53 Ga. 178.

<sup>1</sup>*Valparaiso v. Hagen,* 153 Ind. 340, 48 L. R. A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062.

<sup>2</sup>*Com. v. Yost,* 11 Pa. Super. Ct. 323; *Jessup & M. Paper Co. v. Ford,* 6 Del.

Ch. 52, 33 Atl. 618; *Gladfelter v. Walker,* 40 Md. 1; *McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656; *Richmond Mfg. Co. v. Atlantio DeLaine Co.* 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611; *Ferguson v. Firmerick Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

Damage to a riparian proprietor by the pollution of a stream, is not distinguishable in results from an appropriation, as he has a property right in the

water, or the deposit or discharge therein of any filth or noxious substance that so affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower proprietor.<sup>3</sup> This rule prevents the upper owner from casting into the stream chemicals from his manufacturing plant,<sup>4</sup> or dyes from his dye house.<sup>5</sup> A manufacturer of gas cannot permit refuse from his works to enter the stream to the injury of lower owners.<sup>6</sup> A tanner cannot turn the contents of his pits into the stream.<sup>7</sup> So, the refuse from a distillery cannot be turned into the stream.<sup>8</sup> Nor can the refuse from a slaughter house.<sup>9</sup> Sewage cannot be turned into the stream to the injury of the lower proprietor.<sup>10</sup> The discharge into a water course of water in which flax has been steeped constitutes an unlawful pollution, and a prescriptive right to do so cannot be acquired.<sup>11</sup> A riparian owner may be enjoined from felling trees into a stream if the water is thereby made unfit for the domestic use of a lower riparian proprietor; but it must appear that the

water. *Rudolph v. Pennsylvania S. and v. Bell*, 42 App. Div. 409, 59 N. Y. Valley R. Co. 186 Pa. 541, 47 L. R. A. Supp. 203.  
782, 40 Atl. 1083.

<sup>3</sup>*Baltimore v. Warren Mfg. Co.* 59 Md. 96; *Dwight Printing Co. v. Boston*, 122 Mass. 583.

<sup>4</sup>*Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; *Muncie Pulp Co. v. Martin*, 23 Ind. App. 558, 55 N. E. 796; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335.

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it appeared that the upper proprietor on a stream was making such use of the stream as to foul the water and make it corrode plaintiff's machinery when he attempted to use it in his mill; and the court said: "We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused as against a riparian owner of land on the same stream below."

<sup>5</sup>*Richmond Mfg. Co. v. Atlantic Dr. Laine Co.* 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611; *Gladfelter v. Walker*, 40 Md. 1.

One engaged in the manufacture of plush, who discharges into a stream water colored by the dyes used in the manufacture to such an extent that the stream is rendered unfit for domestic or culinary purposes, will be restrained by injunction on the ground that such use of the stream is unreasonable. *Town-*

<sup>6</sup>*Carhart v. Auburn Gaslight Co.* 22 Barb. 297; *Keiser v. Mahanoy City Gas Co.* 143 Pa. 276, 22 Atl. 759.

A gas company, though acting without negligence, is liable for the pollution of water, under a statute providing that if it should at any time cause or suffer to be conveyed or flow into any stream or place for water, any washings or substance, it shall be subjected to a penalty, as the effect of the statute is to make it liable whether negligent or not. *Hipkins v. Birmingham & S. Gaslight Co.* 1 L. T. N. S. 303, 5 Hurlst. & N. 74, 29 L. J. Exch. N. S. 169, 8 Week. Rep. 182.

<sup>7</sup>13 Hen. VII., B; *Aldred's Case*, 9 Coke, 58.

<sup>8</sup>*Corley v. Lancaster*, 81 Ky. 171; *Greene v. Nunnemacher*, 36 Wis. 50; *Davis v. Lambertson*, 56 Barb. 480.

<sup>9</sup>*Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296; *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, Affirmed in 21 N. J. Eq. 340.

<sup>10</sup>*Trerett v. Prison Asso.* 98 Va. 332, 50 L. R. A. 564, 81 Am. St. Rep. 727, 36 S. E. 373.

It is no defense in an action to restrain a hotel proprietor from polluting the waters of a stream with sewage, that he has been required to discharge the sewage into the stream by order of the board of health. *Mann v. Willey*, 51 App. Div. 169, 64 N. Y. Supp. 589.

<sup>11</sup>*Trall v. M'Allister, Jr.* L. R. 25 Eq. 524.

quality of the water is impaired.<sup>12</sup> Liability for the pollution of a stream is not affected by the fact that it is not a public highway.<sup>13</sup> A riparian owner's right to the use of water as it naturally flows over his land—unpolluted—is not affected by the fact that he can procure pure water from another source.<sup>14</sup>

**516. Reasonable use the test.**— The correlative rights of the owners along a water course being equal, so that one may make all the use of the water he can so long as he does not interfere with the rights of others, the test in any case of the rightfulness of the use which one owner is attempting to make of the stream is whether or not such use is reasonable under all the circumstances of the case.<sup>1</sup> Upon the question of the reasonableness of the use by the upper proprietor, the character and extent of his business, as well as the use to which the lower proprietor is putting the water, may be taken into consideration. The fact that the business cannot be conducted without polluting the stream is no excuse which the court will entertain, if the lower owner is injured thereby.<sup>2</sup> But it has been held that an injunction will not be issued where it appears that the effect to defendant will be to stop his works, while the plaintiff is not seriously injured by the pollution of the stream.<sup>3</sup> A riparian owner is not entitled to maintain an action for the pollution of a stream by the proprietors of a factory, where the latter's use of the water is reasonable and does not render it unfit for manufacturing, mechanical, or domestic purposes.<sup>4</sup> In no case is abatement of a business innocent in itself justified on the ground that, in carrying it on, a stream is polluted, but it is only necessary to stop the objectionable mode of conducting the business.<sup>5</sup> It is not a reasonable use for the upper owner to locate his stables so near to the stream, or to maintain such large numbers of cattle upon its banks, as to render the wa-

<sup>12</sup>*Fisher v. Feige*, 137 Cal. 39, 69 Pac. 618.

<sup>13</sup>*Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970.

<sup>14</sup>*Stevenson v. Ebervale Coal Co.* 203 Pa. 316, 52 Atl. 201.

<sup>1</sup>*Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167.

Whether the acts of a person in connection with a stream of running water cause the pollution of its water or create a nuisance are questions of fact for the jury. *Abraham v. Fremont*, 54 Neb. 391, 74 N. W. 834.

<sup>2</sup>*Gladfelter v. Walker*, 40 Md. 1; *Philadelphia v. Carmany*, 18 W. N. C. 152.

<sup>3</sup>*Elmhirst v. Spencer*, 2 Mann. & G. 45.

Where a tannery was the principal industry of a place and had existed for a long period, the court refused to restrain it from polluting a small stream, at the suit of one who had purchased lower down on the stream with knowledge, where the injunction would have destroyed the industry. *Claude v. Weir*, 4 Mont. L. Rep. 197.

<sup>4</sup>*Townsend v. Bell*, 167 N. Y. 462, 60 N. E. 757.

<sup>5</sup>*Messersmidt v. People*, 46 Mich. 437, 9 N. W. 485.

ter unfit for the use of the lower owner.<sup>6</sup> So, the use of the water to extract salt from the earth is not reasonable where it is returned to the stream so impregnated with salt that cattle will not drink it, and it kills vegetation or injures machinery.<sup>7</sup> It is not a reasonable use to drain a cemetery into the stream.<sup>8</sup> A person cannot, for the purpose of having the water pure for growing watercresses, enjoin the drainage into the stream of water from gravel pits.<sup>9</sup> The fact that the lower owner uses the water only for bathing purposes, and to drive a turbine wheel, does not deprive him of the right to relief against an upper proprietor who discharges sewage into the stream.<sup>10</sup> In *Barnard v. Sherley*<sup>11</sup> the Indiana court made a decision which as it first appeared was somewhat startling, and seemed to be a long step toward the overthrow of the rights of the riparian owner. The court held that an upper proprietor may turn into a stream, which is the natural water course of the basin, water which has been taken from an artesian well and used to bathe sick persons, if the work is conducted in a proper manner so as to do no injury to any person which proper care would avoid; and in such case a lower proprietor is not entitled to an injunction,—especially where he stood by and assented to, and acquiesced in, the expenditure of a large sum of money in erecting a bathing establishment, and acquiesced in the fouling of the water in that way for more than a year. In that case the sickness was of the most infectious kind, so that its spread might not, perhaps, be prevented by the utmost care. A second trial of the case, however, developed a state of facts which made the case much less startling than it was on the first trial. It seems that the stream was so badly polluted before receiving defendant's contribution as to be unfit for general use.<sup>12</sup> This fact will not, as a rule, defeat the action; but it would seem to furnish more reason for denying relief against a single defendant than though he alone rendered the water unfit for use.

**517. Complainant's right must be infringed to give right of action.—**

<sup>6</sup>*Barton v. Union Cattle Co.* 28 Neb. 350, 7 L. R. A. 457, 26 Am. St. Rep. 340, 44 N. W. 454; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 214, 40 Pac. 486; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; *Smiths v. McConathy*, 11 Mo. 517.

<sup>7</sup>*Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142.

<sup>8</sup>Equity will enjoin as a nuisance the connection of a cemetery sewer with a brook, where the same will render the

waters thereof unhealthy for drinking and domestic purposes, the watering of cattle and harvesting of ice. *Barrett v. Mt. Greenwood Cemetery Asso.* 159 Ill. 385, 31 L. R. A. 109, 50 Am. St. Rep. 168, 42 N. E. 891, Reversing 57 Ill. App. 401.

<sup>9</sup>*Weeks v. Heward*, 10 Week. Rep. 557.

<sup>10</sup>*Mann v. Willey*, 51 App. Div. 169, 64 N. Y. Supp. 589.

<sup>11</sup>135 Ind. 547, 24 L. R. A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

<sup>12</sup>*Barnard v. Shirley*, 151 Ind. 160, 41 L. R. A. 737, 47 N. E. 671.

Since the rights of all riparian owners are equal, one of them cannot maintain an action to contest the use which an upper owner is making, unless his own rights are interfered with. But the fact that the injury may be similar to all persons living along the stream does not make the injury a public nuisance in such a sense as to deprive one who is injured by it of maintaining a private action for the injury.<sup>1</sup> And the fact that the stream is a public navigable stream does not deprive a riparian owner of the right to protest if he is injured by the pollution.<sup>2</sup> To enable a riparian owner to maintain an action for damages for the pollution of the stream, he must show not only that defendant has done some act which tends to injure the stream, and which he has no legal right to do, or which is in excess of his legal right so as to be an unreasonable use thereof, but also that the detriment of which he complains was the result of that cause.<sup>3</sup> As stated in *Columbus Gaslight & Coke Co. v. Freeland*,<sup>4</sup> to enable a landowner to recover for the pollution of water as for a nuisance, he must have suffered a real, material, and substantial injury,—what amounts

<sup>1</sup>*Smith v. Sedalia*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; *Corley v. Lancaster*, 81 Ky. 171.

An action to restrain the pollution of the waters of a stream used by a large number of landowners for irrigation purposes, by the operation of stamping mills, thereby rendering the waters unfit for irrigation purposes and injuring the land by the deposit of sediment thereon, tenders an issue of a private, and not of a public, character for the control of which the court will not assume original jurisdiction under a constitutional provision authorizing such assumption when the case is one *publici juris*, although it involves a large number of individuals residing in different localities, and its ultimate determination may seriously affect either the agricultural or mining prosperity of four counties. *People ex rel. Wolpert v. Rogers*, 12 Colo. 278, 20 Pac. 702.

<sup>2</sup>*Watson v. Toronto Gaslight & Water Co.* 4 U. C. Q. B. 158.

But where the water of a public navigable stream is polluted and rendered unwholesome by the construction of dock works, a brewing company which had been accustomed to draw water from such river by pumps and pipes is not entitled to compensation by reason of the water being rendered unfit for brewing, under the Bristol dock act, giving compensation where, by means of the dock

works or in the progress of execution thereof, damage may be done to any houses, lands, or tenements, or the same may be rendered less valuable thereby. This brewing company had not acquired any special right to the use of the water in its natural state by way of particular easement to their own properties, but had merely a use which was common to all the King's subjects; and the injury, if any, is the subject-matter of indictment, and not of action. Lord Ellenborough, C. J., stated that the cases where persons had been permitted to maintain an action for the pollution of a public stream were where the owners of the property injured had, by long enjoyment, acquired special rights to the use of the water in its natural state, as it was accustomed to flow, by way of particular easement to their own properties, and not merely a use which was common to all the King's subjects. But here the injury, if any, is to all the King's subjects; and this is a subject-matter of indictment, and not of action; otherwise, every person who had before used the water of the river might equally claim a compensation. *King v. Bristol Dock Co.* 12 East, 429, 11 Revised Rep. 440.

<sup>3</sup>*Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592.

<sup>4</sup>12 Ohio St. 392.

to such an injury being a question for the jury.<sup>5</sup> But since, as in other cases of the excessive use of a stream of water, the continued use may ripen into a prescriptive right, the lower owner may maintain an action to prevent that result.<sup>6</sup> In view of these facts, injury will be implied from the continued pollution of the stream.<sup>7</sup> And the fact that the complainant is making no use of the water is immaterial.<sup>8</sup> And the action will not be defeated by the fact that the possibility of making some beneficial use of the water has not been entirely destroyed.<sup>9</sup>

**518. Pollution by mining operations.**—The doctrine stated in the preceding section, that the importance of the business of the upper proprietor was not enough to justify him in polluting the water of the stream to the injury of the lower proprietor, has been tested and fully substantiated in cases involving the right of persons engaged in mining operations to pollute the stream. In the operation of any mine there are large quantities of refuse which must be moved and stored, and an easy method of disposing of them was found to be to permit them to be washed into the streams, to be carried away by the action of the water; and this was especially true with respect to hydraulic mining, where the earth was actually removed from its place by the force of the water. When the system of hydraulic mining became perfected, it was found that the *débris* from the mines was being carried down the streams with disastrous effect. Large stretches of country covered with buildings and hamlets were buried, in some instances, above the tops of the houses. Even cities had to fight to maintain their existence, and the navigability of some of the largest streams was being imperiled. In this condition of affairs resort was had to the courts for relief. After a severe fight the lower proprietors finally obtained a decision from a United States court in which, with an exceedingly valuable historical opinion, it was held that persons mining by the hydraulic process may be enjoined from

<sup>5</sup>*Tiede v. Schneidt*, 105 Wis. 470, 81 N. W. 826.

<sup>6</sup>*Gladfelter v. Walker*, 40 Md. 1; *Young v. Bankier Distillery Co.* [1893] A. C. 691, 69 L. T. N. S. 838, 58 J. P. 100.

A riparian owner may have an injunction restraining the systematic pollution of a stream by one above, though the waters are not in actual use by him and he suffers no actual damage by the pollution, while great damage will be caused the party enjoined, and the land below was bought while the nuisance existed and the purchaser's motive in so

purchasing it was bad. *Townsend v. Bell*, 62 Hun, 306, 17 N. Y. Supp. 210.

<sup>7</sup>*Smiths v. McConathy*, 11 Mo. 517.

<sup>8</sup>*Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, 16 L. T. N. S. 433, Affirming L. R. 3 Eq. 296; *Townsend v. Bell*, 167 N. Y. 462, 60 N. E. 757.

<sup>9</sup>A riparian proprietor may maintain an action for polluting the stream though the water remain potable by cattle, and inhabitable by fish. *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167.

discharging the *débris* into a river, whence it flows to the valley below, burying valuable farms and creating a public and private nuisance.<sup>1</sup> And this rule prevents the casting of *débris* from the mine into the stream, or abandoning it so that it will find its way there in such a manner as to injure the lower proprietor.<sup>2</sup> So, it prevents the miner from casting his tailings into the stream in such a way as to injure lower owners.<sup>3</sup> The same rule applies to culm from a coal

<sup>1</sup>*Woodruff v. North Bloomfield Gravel Min. Co.* 8 Sawy. 628, 16 Fed. 25, 9 Sawy. 441, 18 Fed. 753.

In *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152, an injunction was granted against hydraulic mining, which filled a navigable stream with *débris* so as to interfere with navigation and damage adjacent lands, although others than the defendant also deposited *débris* therein from their mines; and *Keyes v. Little York Gold Washing & Water Co.* 53 Cal. 724, in which relief was denied because of misjoinder of parties, is stated to have been overruled in *Hillman v. Newington*, 57 Cal. 62.

In *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753, it was said that a custom or usage to discharge mining *débris* into rivers to be carried down to the valleys, devastating the lands of private owners, without first acquiring the right to do so or payment of compensation, violates both the Constitution of the United States and that of the state of California.

An action by a lower riparian proprietor to enjoin the dumping of *débris* from hydraulic mining operations into a creek to his injury, under an adverse claim of an easement to flow and deposit *débris* on his premises, is in effect an action to quiet title as against the defendant's claim of an easement, within a constitutional provision requiring actions to quiet title to real estate to be commenced in the county in which the real estate, or any part thereof affected by the action, is situated. *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867.

<sup>2</sup>*Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Hobbs v. Amador & S. Canal Co.* 66 Cal. 161, 4 Pac. 1147; *Wison v. Bear River & A. Water & Min. Co.* 24 Cal. 367, 85 Am. Dec. 69; *York v. Davidson*, 39 Or. 81, 65 Pac. 819; *Robinson v. Black Diamond Coal Co.* 57 Cal. 412, 40 Am. Rep. 118; *Tennessee Coal, I. & R. Co. v. Hamilton*, VOL. II.—WATERS, 107.

100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167.

The owners of a mining claim are responsible for damages done to a ditch below, by the running down and depositing of mud and sediment therein. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

Mining operations cannot be permitted to fill up a dam and cut and injure a ditch through which water, essential to the irrigation of gardens and orchards on a homestead established prior to the mining claims, is diverted from a stream, and overflows the premises to the injury of trees and vegetables thereon and a spring used for domestic purposes. *Levaroni v. Miller*, 34 Cal. 231, 91 Am. Dec. 692.

It is no defense to an invasion of the rights of a lower proprietor by dumping mining *débris* into a water course, that the work of the upper proprietor was conducted cautiously and carefully, and in the only feasible way of conducting mining business. *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814.

<sup>3</sup>*Logan v. Driscoll*, 19 Cal. 623, 81 Am. Dec. 90; *Nelson v. O'Neal*, 1 Mont. 284; *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416.

"The doctrine of the authorities is that each mine owner or proprietor must take care of his own mining *débris*, and he can acquire no right, by custom or otherwise, to use the land of his neighbor as a dumping ground, without his consent, either by carrying and depositing the *débris* thereon, or by casting it into the stream and allowing it to be washed down by the force of the current." *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814.

Each person mining in the same stream is, however, entitled to use in a proper and reasonable manner both the channel of the stream and the water flowing therein; and where, from the situation of different claims, the working of some will necessarily result in injury



mine.<sup>4</sup> In *People v. Gold Run Ditch & Min. Co.*<sup>5</sup> it is said that "undoubtedly the fact must be recognized, that, in the mining regions of the state, the custom of making use of the waters of streams as outlets for mining *débris* has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity; for without it, hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and, upon the strength of it, mining operations involving the investment and expenditure of large capital have grown into a legitimate business, entitled equally with all other business pursuits in the state to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and, when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights,

to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*. *Esmond v. Oheo*, 15 Cal. 137. But in this case the court considered as without justification the gradual extension of a flume several hundred feet on an adjoining claim and the deposit thereon of tailings to a depth of 25 to 30 feet, covering up a sluice and blacksmith shop thereon. *Esmond v. Oheo*, 15 Cal. 137.

*Elder v. Lykens Valley Coal Co.* 157 Pa. 490, 37 Am. St. Rep. 742, 27 Atl. 545; *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209.

A mine operator wrongfully throwing coal dirt into a river, to the injury of a lower owner, is liable for damage done thereby, such as the extra cost of steam and the cleaning out of the dam, but not for the cost of a new arrangement of the gateways to keep the dam clear in the future, when that injury will be obviated by the injunction which is granted. *Keppel v. Lehigh Coal & Nav. Co.* 200 Pa. 649, 50 Atl. 302, Reversing, as to cost of new gates, 9 Pa. Dist. R. 219. Balance affirmed.

In an action of trespass and to recover damages for injuries to a cellar, caused by deposits of coal dust in a stream, which raised its bed and thus prevented drainage from the cellar, where the evidence is conflicting as to whether the action of the water will not in time carry away the deposits, the question as to whether the bed of the

stream has been permanently raised by the deposit is properly left to the jury. *Bailey v. Mill Creek Coal Co.* 20 Pa. Super. Ct. 186.

In an action to recover damages for injuries to a cellar caused by the deposit of coal dust in a stream, thus raising its bed and preventing drainage from the cellar, the opinion of a witness as to the difference in value of the property, due to the conditions complained of, should not be admitted when, from his testimony, it appears that he has no definite knowledge of the difference between the level of the cellar and the creek. *Ibid.*

A coal mining company, by placing its coal slack and refuse on its land so near the banks of a stream that it might have been anticipated by a man of prudence and intelligence that heavy rains or floods would wash them into the stream, will be presumed to have done so with that intention, and will be liable for damages caused thereby to lower proprietors; and it is no excuse that its business is useful and for the public good, or that such is the custom among mining companies, or that it was necessary to the successful conduct of its business to so deposit such refuse. *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630.

But there is no liability in case the culm is carried into the stream by means of extraordinary floods. *Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74.

<sup>4</sup> 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

and cannot be invoked to justify the continuance of the business in an unlawful manner. A mill for the reduction of ores cannot be permitted to throw its refuse into the stream to the injury of lower property.<sup>6</sup> The right to turn *débris* into the stream cannot be acquired by custom or prescription, so far as it affects public interests.<sup>7</sup> But it may be acquired by prescription against private individuals.<sup>8</sup> One who receives a special injury from the casting of *débris* into a public water course may maintain an action therefor.<sup>9</sup> One of several mine owners, acting independently, is liable for only the proportion of the injury which he causes.<sup>10</sup> A lower riparian proprietor whose land is injured by culm, etc., thrown into the stream by an upper proprietor cannot have his damages assessed as for a permanent injury unless it be averred and proved, as the law will not presume a permanent injury.<sup>11</sup> An injunction restraining an upper mill owner and proprietor from polluting the stream by the flow of tailings will not be granted at the suit of a lower mill owner, where, at the commencement of the action, the defendant had constructed reservoirs in which he impounded the tailings or sediment from his mill, which did not flow into the stream to such an extent as to interfere with the plain-

<sup>6</sup>*Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co.* 9 Colo. App. 407, 48 Pac. 828; *Montana Co. v. Gehring*, 21 C. C. A. 414, 44 U. S. App. 629, 76 Fed. 384.

A stamp mill will not, however, be enjoined at the suit of one who purchased for a speculation lands in the bottoms below it, on which it is depositing sand, which he then attempts to sell at an exorbitant price to the mill company, and, failing, files his bill for an injunction. *Edwards v. Allouez Min. Co.* 38 Mich. 46, 31 Am. Rep. 301.

<sup>7</sup>*Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753.

<sup>8</sup>The privilege of washing away sand, stone, and rubble in the working of a tin mine, and of having the same sent down a natural stream running through the plaintiff's land, may be had by prescription, as such a privilege, although injurious to the plaintiff to a great extent, is one lying in grant, and not in livery, and therefore is the proper subject of a prescriptive right. *Carlyon v. Loring*, 26 L. J. Exch. N. S. 251, 1 Hurst. & N. 784, 5 Week. Rep. 347.

A custom by which the operators of mines within a certain district, in the ordinary working of their mines, cast sand, stones, and rubbish into a water course, is not open to the objection that

it is unreasonable and indefinite, on the ground that the exercise might go to the destruction of the land adjoining the stream, as the user is limited to the necessary working of the mine and has no tendency to destroy the plaintiff's land, but merely to pollute the water of the stream. *Ibid.*

<sup>9</sup>*Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753.

A tenant in common of riparian land which is damaged by mining *débris* deposited upon it by the current of the river may, without joining his cotenant as party plaintiff or defendant, maintain a suit to enjoin mine owners from discharging such *débris* into the river. *The Mining Débris Case*, 8 Sawy. 628, 16 Fed. 25.

An action may properly be commenced in the name of the county to enjoin the running of water and *débris* from a mine upon and over a public highway and plaza in a town in said county, obstructing the free use of both highway and plaza. *Sierra County v. Butler*, 136 Cal. 547, 69 Pac. 418.

<sup>10</sup>*Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209.

<sup>11</sup>*Hoffman v. Mill Creek Coal Co.* 16 Pa. Super. Ct. 631.

tiff's use of the water flowing down the channel; nor is it a ground for granting the injunction that the defendant would not be thereby injured and the plaintiff would be protected from possible future injury.<sup>12</sup>

**518a. Washing of ore.**—The water of the stream cannot be used for washing ore if it is thereby rendered unfit for the use of a lower proprietor.<sup>1</sup> Case, and not trespass, is the proper remedy for consequential injuries for the pollution of the water in that manner; and an action for permanent injuries to the land may be brought by the executor in possession of the land.<sup>2</sup> The liability of one making such use of the water extends only to his own act, and he cannot be made liable for the acts of others which contribute to the injury.<sup>3</sup> It is said in *Clifton Iron Co v. Dye*,<sup>4</sup> that in the development of the mineral interests of the state, in which large sums of money have been invested, the washing of ores for the purpose of utilization necessities, in some measure, the placing of sediment where it may flow in a stream which constitutes the natural drainage of the section where the ore banks are situated, which must cause a deposit of sediment on the lands below; and that, while this invasion of the rights of the lower riparian owner may produce injury entitling him to redress, the great public interests and benefits to flow from the conversion of those ores into pig metal should not be lost sight of. The burden of proof is on the defendant in an action for damages for the pollution of a stream by the washing of ore, to show that such use is reasonable, if the evidence establishes the fact that its washer polluted the water.<sup>5</sup>

**518b. Drainage of mine.**—The rule which prevents the pollution of a stream to aid in the working of a mine prevents the drainage of the mine water into the stream so as to injure the lower proprietor.<sup>1</sup> The

<sup>12</sup>*Otaheite Gold & S. Min. & Mill. Co. v. Dean*, 102 Fed. 929.

<sup>1</sup>*Drake v. Lady Ensley Coal, I. & R. Co.* 102 Ala. 501, 24 L. R. A. 64, 48 Am. St. Rep. 77, 14 So. 749; *Lentz v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219; *Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74; *Crittenton v. Alger*, 11 Met. 281.

The erection of a dam across a stream by an upper proprietor, in order to utilize the water for washing ore, polluting the water thereof and so filling it with mud and dirt as to cause an unhealthy and unpleasant stench from the bed of the stream during the summer season when the water ceases to flow through the land below by reason of such obstruction, is a positive, continuous, and

tortious act by such upper proprietor, and not a mere act of negligence requiring the exercise of due care by the lower proprietor to avoid the consequences thereof in order to entitle him to recover. *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677.

<sup>2</sup>*Drake v. Lady Ensley Coal, I. & R. Co.* 102 Ala. 501, 24 L. R. A. 64, 48 Am. St. Rep. 77, 14 So. 749.

<sup>3</sup>*Gallagher v. Kemmerer*, 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970.

<sup>4</sup>87 Ala. 408, 6 So. 192.

<sup>5</sup>*Tennessee Coal, I. & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167.

<sup>1</sup>*Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286. Affirmed in 55 N. J. Eq. 824, 41 Atl. 1117; *Hunter v.*

legislature cannot authorize the pollution of a stream for mining purposes even upon the making of compensation, since it would be the exercise of a private right, for which the power of eminent domain cannot be used.<sup>2</sup> There may possibly be an exception to this rule in case of coal mines. The people at large are so dependent upon a supply of fuel for comfort and health as well as for securing power to carry on manufacturing operations that the securing of it may be regarded as a public purpose for which the power of eminent domain may be exercised. It has been suggested by good authority that the mines themselves might be taken for public use under the power of eminent domain and if so certainly such things as are necessary to make their operation successful may be taken. The facts that the drainage of a coal mine is necessary for its operation and that the same is done in a proper manner do not relieve its owner from liability for draining into a stream water from the mine which is so impregnated with copperas as to render the water of the creek unfit for domestic and farming purposes and capable of killing vegetation whenever the creek overflows its banks.<sup>3</sup> The Pennsylvania court had a severe struggle with this question in the case of *Sanderson v. Pennsylvania Coal Co.* In that case mine water had been drained in a creek to the injury of a lower riparian owner, and the court, on the first hearing, followed the general rule and held that such act was unlawful.<sup>4</sup> This rule was adhered to when the case again came before the court,<sup>5</sup> which further held that no custom can sanction the throwing of acidulous mine water into a clear stream rightfully used for domestic purposes, as it would be unreasonable and unlawful, as a taking of private property for private use, and that without compensation. And the rule was adhered to a third time,<sup>6</sup> the court holding that the riparian owner could recover compensatory damages for the injuries which had been caused prior to the bringing of the

*Taylor Coal Co.* 16 Ky. L. Rep. 159, A. C. 691, 69 L. T. N. S. 838, 58 J. P. 190; *Hodgkinson v. Ennor*, 4 Best & S. 100. In that case it is said that a riparian proprietor is not entitled to use water for secondary purposes except upon condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired.

<sup>2</sup>*Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286, Affirmed in 55 N. J. Eq. 824, 41 Atl. 1117.

<sup>3</sup>*Hunter v. Taylor Coal Co.* 16 Ky. L. Rep. 159, 190.

<sup>4</sup>86 Pa. 401, 27 Am. Rep. 711.

<sup>5</sup>94 Pa. 302, 39 Am. Rep. 785.

<sup>6</sup>102 Pa. 370.

Mine water cannot be turned into a stream in such a way as to pollute it, although the pollution is nothing more than to render the water, which was before soft and suitable for distilling purposes, hard and unfit for such purposes. *Young v. Bankier Distillery Co.* [1893]

suit, but not permanent injuries, because the act was a nuisance which might be abated. And that it was immaterial that the injury was caused by the ordinary, reasonable, and proper mode of conducting the mine. But, when the case came before the court the fourth time, it yielded to the demands of the mining interests and departed from its former position and from true principle and held that individual interest must give way to the mining interests.<sup>7</sup> The court distinguished the decisions upon the question of casting material into the water which fouled it, on the ground that water coming from the mine in the case before the court was in its natural state, and the stream was used merely for natural drainage purposes. And held that a mine owner may lead the water which percolates into his workings into a stream which forms the natural drainage of the basin in which his mine is located, although the quantity and quality of water in the stream be affected thereby, as he is entitled to the natural user of his land without being liable for inconvenience to others caused thereby. No comment is necessary upon that decision. The very course which the court took is sufficient to overthrow it. But this question of the paramount right of the mining interest had come before other courts, and in *Wixon v. Bear River & A. Water Co.*<sup>8</sup> where the controversy was between the owner of an orchard which had been planted on the banks of a stream and one claiming the water for mining purposes, the California court held that the miner must use the water so as not to injure the orchard, saying: "The requested instructions are founded upon the theory that, in the mineral districts of the state, the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or modes of their acquisition; thus annihilating the doctrine of priority in all cases where the controversy is between the miner or ditch owner and one who claims the exercise of any other kind of right or the ownership of any other kind of industry. To such a doctrine we are unable to subscribe." And the rule is general and sound that mining operations will be enjoined if they cannot be carried on without destroying interests of other owners along the stream.<sup>9</sup> The Pennsylvania rule does not apply so as to permit the mine owner to take the water out of its true course and cast it into a stream in an-

<sup>7</sup> 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. Am. Dec. 692; *Eureka Lake & Y. Canal Co. v. Yuba County Supr. Ct.* 66 Cal. 453.

<sup>8</sup> 24 Cal. 367, 85 Am. Dec. 69.

311, 5 Pac. 490; *McLaughlin v. Del Re.*

<sup>9</sup> *Leraroni v. Miller*, 34 Cal. 231, 91 71 Cal. 230, 16 Pac. 881.

other watershed.<sup>10</sup> And the court has intimated that the right will not extend to the interference of the source of a municipal water supply.<sup>11</sup> It has also been held that equity will enjoin a mine operator from draining his mine into a water course required for the economical working of his mine so far as it would injure the lower owner and is contrary to his rights. He will be restrained from overflowing such owner's banks when it appears that within that limit no harm will result from the mixture of acidulated water into the stream.<sup>12</sup>

**518c. Remedy for injury.**—The only remedy which is adequate to compel the owner of a mine to desist from polluting a stream to the injury of a lower proprietor is injunction; and therefore equity has jurisdiction to issue such a writ.<sup>1</sup> And an injunction restraining a mining company from discharging into a river or its tributaries any *débris* or refuse matter from its mines is violated by a discharge of mining tailings into such river in the process of drift mining, although the bill in the injunction suit describes the operations carried on by the respondent, by means of which the *débris* is thrown into the streams, as hydraulic mining.<sup>2</sup> A preliminary injunction may be granted in a proper case without notice.<sup>3</sup> Equity may refuse to grant the injunction if the injury is merely nominal.<sup>4</sup> Mere delay

<sup>10</sup>*Getting v. Union Improv. Co.* 7 Kulp, 493; *Williams v. Union Improv. Co.* 1 Pa. Dist. R. 288.

A miner, not riparian, must not, if preventable by practical means within his power and knowledge, artificially discolor a natural stream to the injury of a lower owner. *Sterling Iron & Zinc Co. v. Sparks Mfg. Co.* (N. J. Eq.) 38 Atl. 426.

<sup>11</sup>See ante, § 137a.

<sup>12</sup>*Getting v. Union Improv. Co.* 7 Kulp, 493.

<sup>1</sup>*Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 778; *Kepel v. Lehigh Coal & Nav. Co.* 200 Pa. 649, 50 Atl. 302, Affirming 9 Pa. Dist. R. 219; *Fricke v. Quinn*, 188 Pa. 474, 41 Atl. 737; *Lamborn v. Covington Co.* 2 Md. Ch. 409.

<sup>2</sup>*Re North Bloomfield Gravel Min. Co.* 11 Sawy. 590, 27 Fed. 795.

<sup>3</sup>The granting of an injunction without notice, restraining the depositing of tailings or *débris* in the channel or bed of certain streams or their tributaries and the selling to others or permitting or suffering the use of their waters by others for the same purpose to the injury of plaintiff, was sustained on certiorari to review contempt proceedings, in *Eureka Lake & Y. Canal Co. v. Yuba*

*County Super. Ct.* 66 Cal. 311, as not suspending the general or ordinary business of the defendant corporation in mining by hydraulic process and selling waters to others to be used for like purposes, within a Code provision that an injunction suspending the ordinary or general business of a corporation cannot be granted without notice.

So, also, in *Golden Gate Consol. Hydraulic Min. Co. v. Yuba County Super. Ct.* 65 Cal. 187.

<sup>4</sup>*McCauley v. McKeig*, 8 Mont. 389, 21 Pac. 22; *Atchison v. Peterson*, 1 Mont. 561.

While a court of equity will not restrain mining operations because, as a mere incident thereto, some sand and tailings happen to be washed upon the land of a lower proprietor, such locator has no legal right to dump his mining *débris* into the channel of a stream, and allow it to be carried by the water down to the land of a lower proprietor to his injury. *Carson v. Hayes*, 39 Or. 97, 65 Pac. 914.

An injunction will not be granted if complainant has another water supply, and the stream into which the mining *débris* is turned is also polluted to some extent by sewage from a city, while complainant has been guilty of laches and

in filing the bill will not defeat the right to relief if there was a good excuse therefor.<sup>5</sup> Indictment will not lie where the only injury is to a riparian owner.<sup>6</sup> Hydraulic mining is not so unlawful as to entitle a lower proprietor to an injunction against one who is selling water for the purpose, if there is nothing to show that he knows that the *débris* is being disposed of so as to injure plaintiff's bridge and highways.<sup>7</sup> The decisions which refused to permit the miner to turn his *débris* into the stream rendered necessary some method of obviating the difficulty, and the remedy resorted to was the creation of the impounding dam. This was provided for by Federal statutes,<sup>8</sup> and, if a sufficient impounding dam is maintained to remove the *débris* from the water, the mining operations will not be enjoined.<sup>9</sup> A statute making water the property of the riparian owner while it is on his land, but which forbids him to adulterate it so as to interfere with the enjoyment of it by the next owner, does not give him the right to use it for washing ore, if the effect is to render it unfit for the use of the next owner.<sup>10</sup> The rights of the parties may be controlled by contract.<sup>11</sup> The damages recoverable for the pollution of

defendant is able to respond in damages for the injuries. *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192.

<sup>5</sup>*Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753.

<sup>6</sup>*Com. v. Lyon*, 1 Pittsb. 466.

<sup>7</sup>*Yuba County v. Cloke*, 79 Cal. 239, 21 Pac. 740.

<sup>8</sup>March 1, 1893, chap. 183, § 15 (27 Stat. at L. 509, U. S. Comp. Stat. 1901, p. 3557).

<sup>9</sup>*United States v. North Bloomfield Gravel Min. Co.* 53 Fed. 625.

But an impounding dam should not be held sufficient, if the determination of its sufficiency rests on the opinions of engineers apparently equally intelligent and whose opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character. *Hardt v. Liberty Hill Consol. Min. & Water Co.* 11 Sawy. 611, 27 Fed. 788.

A mining company enjoined from discharging *débris* and refuse matter into a certain river will not be held guilty of contempt because the water in its tunnel, about 30 or 40 feet from its mouth and 2 miles from the mine, is muddy, where the *débris* from the mine is run into a settling pool, and sand, gravel, and other *débris* would find their way into the tunnel irrespective of the defendant's mining operations. *Woodruff v. North Bloomfield Gravel Min. Co.* 45 Fed. 129.

The Colorado statute makes it the duty of the miner to take care of his own tailings upon his own property, or be responsible for the injuries that may arise from them. *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12, 19 Pac. 836. <sup>10</sup>*Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677.

<sup>11</sup>Under a conveyance to an ore company of the right to wash its ore upon a stream that ran through the grantor's land, and to discharge through it dirt upon his meadow lot lying below upon the stream, the grantees are not liable for an injury to plaintiff's pasture lot adjoining, resulting from the flow of the water surcharged with the dirt upon said pasture lot, as a grant is presumed to convey everything necessary for its reasonable enjoyment. *Bushnell v. Proprietors of Ore Bed*, 31 Conn. 150.

One who sells land on a creek for mining purposes, with full knowledge of the use to which it is to be put, and consenting that the "tailings" of the mine shall be drawn off through the creek, and consequently through a reservoir which he had for operating a mill lower down the creek than the mine, cannot complain if such drainage is used and his reservoir injured thereby. *Palmour v. Mitchell*, 69 Ga. 750.

a stream by its use for washing ore, rendering the water unfit for watering stock, impairing the fertility of the land by sediment deposited, and destroying the usefulness of some portions thereof for cultivation, are not limited to diminution of rental value, but may include the difference in the value of the land with and without the permanent injury.<sup>12</sup>

**519. Right to cast debris into stream.**— As, in case of the operation of mines, it is convenient to leave the waste to be carried away by the water, so with the operation of some kinds of mills. The easiest and most expeditious way of disposing of the waste from saw and planing mills is to let the waste fall into the stream and float away on the water. The inevitable effect of this is to cause injury to lower proprietors, and therefore there is no right to make such use of the stream. The owner of a sawmill cannot permit sawdust to fall into the stream and float down and be deposited along the property of a lower owner to its injury.<sup>1</sup> And, when the effect is to render the water unfit for domestic and culinary purposes, the disposing of the sawdust in the stream will be enjoined.<sup>2</sup> Such use of the stream may, however, be made, as, under all the circumstances of the case, will be reasonable in view of the capacity of the stream compared with the amount of sawdust which is placed in it; and the question whether

<sup>12</sup>*Drake v. Lady Ensley Coal, I. & R. Co.* 102 Ala. 501, 24 L. R. A. 64, 48 Am. St. Rep. 77, 14 So. 749.

The measure of damages in an action for the pollution of a stream by the washing of ore therein, where the pollution has ceased by the discontinuance of the use of the washer, is the injury suffered from the actual pollution of the water while it lasts and from the boggy deposits therein, until its injurious effects were or shall become relieved by the washing out of the stream. *Tennessee Coal, I. & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167.

The measure of damages for wrongfully filling another's dam with coal dirt is the cost of its removal in any amount up to the value of the entire property, which it cannot exceed. *Stevenson v. Ebervale Coal Co.* 201 Pa. 112, 88 Am. St. Rep. 805, 50 Atl. 818.

The damages for the pollution of a water course by a coal company may be measured by the cost of removing the culm or coal dirt, unless the expense of removal exceeds the value of the entire property injured, in which case the value of the property is the limit of the measure of damages; and in no event

can there be a recovery in excess of the entire property. *Stevenson v. Ebervale Coal Co.* 203 Pa. 316, 52 Atl. 201.

<sup>1</sup>*Mitchell v. Barry*, 26 U. C. Q. B. 416.

The mere fact that a sawmill as constructed cannot be operated without permitting the sawdust to fall into the stream is not sufficient to justify such conduct, unless it is further shown that the mill was properly constructed. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 191, 15 N. W. 167.

If a mill owner has the right by twenty years' enjoyment thereof, to the water of his stream for his mill, any deposit of sawdust in the stream is an injury to the right, although the working of the mill has not been injured, since enjoyment of such a use for such a length of time begets a right thereto. *Mitchell v. Barry*, 26 U. C. Q. B. 416.

<sup>2</sup>*Kytle v. Hess*, 10 Kulp, 302.

One in whose favor an injunction has been granted restraining upper riparian proprietors from depositing sawdust in the stream cannot thereafter maintain an action to recover damages due to sawdust placed in the stream before the issuance of the injunction, but which is alleged to have injured the plaintiff



or not the use is reasonable is for the jury.<sup>3</sup> The use of a stream to the injury of a lower riparian owner by a miller, for the purpose of disposing of sawdust and other refuse, when the only occasion or necessity for such use results from the mistake or carelessness of the miller in locating and constructing his mill, is not a reasonable use.<sup>4</sup> Sawdust and mill refuse cast into a brook is not such a "putrid, nauseous, and offensive substance," under the criminal laws, as to be indictable, if it is not specifically named, as the courts have judicial knowledge that it is not such a substance, and the criminal laws are to be construed strictly.<sup>5</sup> The rule applicable in case of sawdust applies also in case of edgings, slabs, and other mill waste.<sup>6</sup> The owner of a sawmill is not bound to keep the refuse from the mill wholly out of the stream for the benefit of the owner of a starch mill below. Nor can he wantonly and needlessly throw refuse into the stream to the injury of the starch mill.<sup>7</sup> A claim to a special right to the use of

since. *Inderlied v. Whaley*, 85 Hun, 63, 32 N. Y. Supp. 640.

*Prentice v. Geiger*, 74 N. Y. 341, affirming 9 Hun, 350; *Dallmar v. Wilcox*, 23 N. Y. Week. Dig. 231.

The jury are to take into consideration the size and character of the stream and for what purposes it is used, the extent of the pollution, the benefit to the manufacturer, and the injury to the landowner. *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105.

But evidence of usage in the deposit of similar waste is inadmissible. *Ibid.*

*Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167.

*State v. Mitchell*, 47 W. Va. 789, 35 S. E. 845.

*Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228; *Threatt v. Brewer Min. Co.* 49 S. C. 95, 26 S. E. 970.

In a suit against a mill owner for damages by reason of the slabs and other waste material from his mill being placed in a public river, a log owner will be held a contributor to such nuisance who leaves a guide boom in the river when not in use, although the said waste may have made it inconvenient to remove it; and he may recover only nominal damages. *Veasie v. Duinell*, 50 Me. 479.

It is only when absolutely indispensable to the beneficial use of the water, and to the least possible extent consist-

ent therewith, that a mill owner may discharge refuse into a stream where it injures another proprietor. *Casfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

In *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105, the court, by Bellows, J., said that the act of a manufacturer in depositing the waste from his mill in a stream which carried it upon the meadow land of a lower proprietor differs from that of depositing it directly upon the lower proprietors by way of teams and the like; in the former case the discharge of waste, so far as reasonable, must rather be regarded as an incident of the right to use the stream for the manufacture which produces such waste.

A mill owner throwing slabs and other refuse into a stream contrary to the statutes is liable also for the special damage done to a lower proprietor by reason of the obstructing of the inlet to his mill race. *Austin v. Snyder*, 21 U. C. Q. B. 299.

A mill owner is liable for the creation of a private nuisance when he deposits upon the ice of his river, edgings, sawdust, slabs, or other waste stuff from saw or shingle mills, and, leaving them to be floated away without his care or oversight, they are carried onto the land of a lower riparian proprietor by reason of an ice jam, and there deposited and left to the injury of the complainant. *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246.

*Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

a river as a depository of sawmill refuse, being more beneficial to the claimants and more burdensome to the riparian proprietor below than the natural right to the reasonable use of the river, must be established by either grant or prescription.<sup>8</sup> So, tanbark cannot be cast into the stream to the injury of the lower owner.<sup>9</sup> So, also, with respect to corn cobs;<sup>10</sup> and the refuse from coke ovens;<sup>11</sup> and shives from a flax mill.<sup>12</sup> The right to permit the refuse to find its way into the stream may be acquired by contract.<sup>13</sup> And it may be forbidden by statute.<sup>14</sup> One whose mill is obstructed by sawdust and other refuse thrown into the stream by an upper mill owner may recover as damages the decreased rental value of the premises.<sup>15</sup>

**520. Other injuries.**—The pollution of a stream by the construction of a railroad alongside of it may be taken into consideration in awarding damages for the right of way, under a statute authorizing the making of a fair and just comparison of both advantages and disadvantages.<sup>1</sup> The right of a riparian owner to have the water of the

<sup>8</sup>*Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

<sup>9</sup>*Howell v. M'Coy*, 3 Rawle, 256; *Thomas v. Brackney*, 17 Barb. 654; *Honsee v. Hammond*, 39 Barb. 89.

When the question of the reasonableness of using a stream is doubtful in its nature,—as, by a tannery for the discharge of bark which fouls the mill-wheel of a lower proprietor,—and is not so long settled by common consent, or so obvious in itself that it is determinable as a matter of law, such as use for irrigation, watering stock, and propelling machinery, it is one of fact, upon which evidence of a general custom of the country, long maintained without objection, and that such use is indispensable, is admissible. *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723.

A lower riparian owner can recover damages resulting from a tanner putting or turning his refuse ground bark into the stream, where the said damage has resulted to him during only the preceding six years, although the tanner has put or turned said refuse into that stream for more than twenty years. *Crosby v. Bessey*, 49 Me. 539, 77 Am. Dec. 271.

The dumping of tanbark and other refuse from a tannery into a stream is not such a necessity as to be appurtenant to the grant of the tannery privilege, as against a suit for damages by the grantor. *Howell v. M'Coy*, 3 Rawle, 256.

<sup>10</sup>*Panton v. Norton*, 18 Ill. 496.

<sup>11</sup>*Lentz v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219.

<sup>12</sup>*O'Riley v. McOhesney*, 3 Lans. 278.

<sup>13</sup>A parol grant, in consideration of establishing a sawmill in a certain locality, of the right to throw sawdust into a stream running through grantor's lands, is a license, and not an easement. *Thompson v. McElarney*, 82 Pa. 174.

Custom as to the use of a stream for depositing sawdust and other refuse from a sawmill, although not conclusive of the right, affords some evidence of the tacit consent of the parties to such use. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167.

<sup>14</sup>*State v. Howard*, 72 Me. 459.

<sup>15</sup>*Young v. Hurd*, 16 N. Y. S. R. 335, 1 N. Y. Supp. 819.

<sup>1</sup>*Rudolph v. Pennsylvania & S. Valley R. Co.* 186 Pa. 541, 47 L. R. A. 782, 40 Atl. 1083.

In that case the court held that a single tract of land used for the purposes of a papermill is not severed by the taking of a strip for a railroad and the conveyance of an additional strip for coal and freight sidings, so as to prevent consideration of injury to the water which supplies the mill on one side of the road, when assessing consequential damages to the mill property on the other side of the road. In contrast with this case, however, is that of *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, sub

stream flow through or by his land in its natural purity, and without appreciable pollution caused by owners above him, is not modified by the fact that the flow of the stream has been increased by reservoirs built along its upper course.<sup>2</sup> The riparian owner has a right to complain of the placing in the stream of substances which kill or drive away the fish.<sup>3</sup> The fact that the water finds its way into the stream through underground passages will not prevent the injured property owner from obtaining relief.<sup>4</sup>

**521. Rights acquired by prescription.**—A prescriptive right may be acquired, as against the rights of a private individual, to pollute the waters of a stream to a greater extent than is permissible of common right.<sup>1</sup> But if the use of the stream by the upper proprietor is such

*nom. Trinity & S. R. Co. v. Meadows*, 3 L. R. A. 505, 11 S. W. 145, where, by reason of the construction of the road, sand was loosened which was washed into the stream, filling up a millpond and interfering with the wheel, and the court held that an action for damages would not lie. The court says, if a corporation does an act which it acquires a right to do by virtue of its franchise granted for a public use, and if a person having no franchise could not have done the act lawfully, and the property of another is directly damaged, the one doing the act will be liable for the injury notwithstanding the franchise. In other words, the Constitution prohibits the grant of franchises to a corporation which will carry with them immunity for damages which may proximately result to property from the exercise of the privileges granted. The court concludes, however, that in the present case the act done was lawful for any owner of the land to do without authority from the legislature, and hence, as to the railroad company, it was not an act unlawful but for the franchises granted to it.

<sup>1</sup>*Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611.

<sup>2</sup>*Thrent v. Brewer Min. Co.* 49 S. C. 95, 26 S. E. 970.

A riparian owner is entitled to an injunction to prevent an owner of land further up the stream from fouling the water in such a way that it is not fit for the raising of trout, to which use the lower owner had put it. *Seaman v. Lee*, 10 Hun, 607.

An action for polluting a stream and driving away fish may be maintained by one claiming under a grant from the lord of the manor of the exclusive right of fishing in a defined part of the river, as

such a grant is not a mere license to fish; but, as it constitutes a grant of the right to carry away the fish caught, it grants a profit *a prendre* and is an incorporeal hereditament. *Fitzgerald v. Firbank* [1897] 2 Ch. 96, 66 L. J. Ch. N. S. 529, 76 L. T. N. S. 584.

<sup>4</sup>A person discharging foul water into swallets which consist of rents in the rocks or hills, having an open, funnel-shaped mouth in the surface of the rock on the summit of the hills through which water flows into the mouth and is conveyed by an underground passage until it arrives at an outlet from which it escapes into an open stream,—is not relieved from liability for such pollution by the fact of the water taking this underground course; and the case of *Chasemore v. Richards* does not apply. *Hodgkinson v. Ennor*, 9 Jur. N. S. 1152, 4 Rest & S. 229, 241, 32 L. J. Q. B. N. S. 231, 8 L. T. N. S. 451, 11 Week. Rep. 775.

The owner of a farm who sustains damage from a dam which diverts surface waters impregnated with salt, by seepage, percolation, or otherwise, so that they find their way into a stream flowing into a stock farm, rendering the water unfit for stock, may recover therefor. *Mann v. Retsof Min. Co.* 49 App. Div. 454, 63 N. Y. Supp. 752.

<sup>3</sup>*Jones v. Crow*, 32 Pa. 398; *Masonic Temple Asso. v. Harris*, 79 Me. 250, 9 Atl. 737.

In an action for the pollution of a stream, no relief will be granted where it appears that defendant and his predecessors had from time immemorial carried on the business of tanning, which caused the pollution complained of, that it was the principal industry of the town and of great advantage to the inhab-

as to constitute a public nuisance, or if the use is unlawful or forbidden by statute, no prescriptive right can be acquired even as against lower proprietors on the stream.<sup>2</sup> In order to acquire a right by prescription, the use must be under claim of right and be of such a nature that it will infringe upon the rights of the lower owner by inflicting injury on him.<sup>3</sup> The mere fact that the defendant's grantor had made use of the stream in the manner complained of is not sufficient to show a prescriptive right.<sup>4</sup> And one claiming a prescriptive right has the burden of showing its existence.<sup>5</sup> The right is limited strictly by the user which has been made of the stream during the time that the right is being acquired.<sup>6</sup> Under this rule a manufacturing concern claiming a prescriptive right to cast foul water into a stream cannot subsequently change the character of the materials

itants thereof, and that other causes also contributed to the pollution of the stream. *Weir v. Claude*, 16 Can. Sup. Ct. 575.

Equity will not restrain a riparian proprietor from throwing refuse from his dye mills into a stream under his prescriptive right, acquired without the creation of a nuisance, when there has been no increase of his user. *Warren v. Hunter*, 1 Phila. 414.

<sup>2</sup>*Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Meiners v. Frederick Miller Brewing Co.* 78 Wis. 364, 10 L. R. A. 586, 47 N. W. 430; *Traill v. M'Allister*, Ir. L. R. 25 Eq. 524.

<sup>3</sup>*Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Ch. 349, 14 L. T. N. S. 154, 14 Week. Rep. 582, 35 L. J. Ch. N. S. 382, 12 Jur. N. S. 208, Affirming L. R. 1 Eq. 161, 13 L. T. N. S. 352, 14 Week. Rep. 92; *Schumacher v. Shawhan*, 93 Mo. App. 573, 67 S. W. 717; *Murgatroyd v. Robinson*, 7 El. & Bl. 391, 26 L. J. Q. B. N. S. 233, 3 Jur. N. S. 615, 5 Week. Rep. 375; *Gladfelter v. Walker*, 40 Md. 1.

A prescriptive right to a passage for waste material through a sluice in a dam on a lower mill privilege is not acquired by the owner of the upper privilege by casting the slabs, edgings, and other waste from his mills into the stream, to sink or float, without control or direction on his part; and, though some of that waste undoubtedly passed through said sluice, no effort or claim was ever made to control or use the sluice for this purpose. *Veasey v. Ducinel*, 50 Me. 479.

<sup>4</sup>*Beckley v. Skroh*, 19 Mo. App. 75.

<sup>5</sup>*McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 638, 15 Week. Rep. 801.

<sup>6</sup>*McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656; *McIntyre v. McGavin* [1893] A. C. 268, 1 Reports, 246, 57 J. P. 548; *Clarke v. Somersetshire Drainage Comrs.* 36 Week. Rep. 890, 57 L. J. Mag. Cas. N. S. 96, 59 L. T. N. S. 670; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, 16 L. T. N. S. 438, Affirming L. R. 3 Eq. 296; *Moore v. Webb*, 1 C. B. N. S. 673.

Where a prescriptive right to cast foul water into a stream was based upon a user whereby the foul matter passed into a reservoir and there settled before passing into the stream, so that the water flowing from the reservoir was comparatively clear, no prescriptive right is acquired to cast the refuse into the stream without its passing through the reservoir. *Blair v. Deakin*, 57 L. T. N. S. 522, 52 J. P. 327.

A manufacturing company which has acquired by prescription the right to cast polluted water into the stream, which, by reason of sluggish current and numerous ponds, is largely precipitated before it reaches the lower owner, cannot clean out the channel in such a way as to hasten the flow and cast the polluted water onto the land of the lower owner. *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546, 11 So. 26.

used in its work to that of a more noxious nature, and cast the refuse from it in increased quantities into the stream, thereby increasing the foulness of the water further down the stream than was done during the prescriptive period.<sup>7</sup> But one gaining a prescriptive right to discharge the refuse from his papermills into a stream may change the character of the materials going into the paper manufacture, and thereby the refuse matter discharged into the stream, where no increased burden is imposed, as the easement extends to the nature and purpose of the business, and not the materials used in it.<sup>8</sup> The pollution of a stream during the existence of a statute rendering such pollution unlawful cannot, upon a subsequent repeal of the statute, be considered a user for the purpose of creating a prescriptive right: and the required period of enjoyment does not commence to run until the act is repealed.<sup>9</sup> A prescriptive right once acquired may be abandoned, and the question of abandonment is one of intention, to be decided by the facts of each particular case. A mere suspension of the use of the right is not sufficient to prove an intention to abandon it.<sup>10</sup> The burden of proof is upon one claiming that a prescriptive right to foul a stream has been abandoned.<sup>11</sup> The converse of the proposition that the right to foul the stream may be acquired by prescription is also true, so that the lower owner may gain a prescriptive right to have the water come to him in its natural purity.<sup>12</sup>

**522. Pollution may be enjoined**—A riparian proprietor whose right to the use and enjoyment of the flow of a stream of pure and wholesome water free from corruption and pollution has been actually invaded is without adequate remedy at law, and injunctive relief will be granted where such invasion will be continuing, and the extent of the injurious consequences is contingent and of doubtful pecuniary

<sup>7</sup>*Blair v. Deakin*, 57 L. T. N. S. 522, 52 J. P. 327.

So, persons having a right by prescription to cast the washings and foul water from their factory into a water course cannot change the character of their business and throw the washings into the water course, although it is less foul and injurious than that cast therein by the previous business, under a statute forbidding the pollution of water courses, but excepting from the operation of the statute those having a legal right to cause such foul water or liquid to flow into an existing water course. *Clarke v. Somersetshire Drainage Comrs.* 57 L. J. Mag. Cas. N. S. 96, 36 Week. Rep. 890, 59 L. T. N. S. 670.

<sup>8</sup>*Bazendale v. McMurray*, L. R. 2 Ch. 790, 16 Week. Rep. 32.

<sup>9</sup>*Trail v. M'Allister*, Ir. L. R. 25 Eq. 524.

<sup>10</sup>*Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, 16 L. T. N. S. 438.

Where dye works which caused the fouling of a stream were entirely dismantled and gradually removed, no work of a similar kind being carried on for more than twenty years, the prescriptive right to foul the stream was lost. *Ibid.*

<sup>11</sup>*Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, 16 L. T. N. S. 438.

<sup>12</sup>*Wood v. Sutcliffe*, 16 Jur. 75, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366.

estimation.<sup>1</sup> And equity may also take jurisdiction where it can give a more complete and perfect remedy than is available at law, and prevent a multiplicity of suits.<sup>2</sup> Under this rule the pollution of the stream by sewage may be enjoined.<sup>3</sup> And also pollution by the conduct of certain kinds of business, as, the manufacture of dynamite,<sup>4</sup> or leather,<sup>5</sup> or starch.<sup>6</sup> And the conducting of dyeing establishments,<sup>7</sup> or a slaughterhouse,<sup>8</sup> or the use of the water for the dissolution of rock salt so as to render it unfit for use lower down the stream.<sup>9</sup> The injunction will not be refused although it will stop defendant's business and throw a large number of workmen out of employment.<sup>10</sup> The court will not award damages in lieu of the injunction.<sup>11</sup> But to justify the issuance of an injunction the appropriateness and necessity of the relief must be shown.<sup>12</sup> The court, in determining whether it will restrain the pollution of a stream instead of leaving the plaintiff to his remedy at law, will take into consideration the serious mischief that will be inflicted upon the defendant by so doing, where the probabilities of the injunction benefiting the plaintiff are doubtful; as, where, by the increase of population along the banks of a stream, there will be an inevitable deterioration of the water irrespective of the defendant's pollution.<sup>13</sup> The injunction will not

<sup>1</sup>*Indianapolis Water Co. v. American* 773, L. R. 5 Ch. Div. 769, 25 Week. Rep. Strauchboard Co. 53 Fed. 970; *Holsman* 874.

<sup>2</sup>*Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142; *Davis v. Lambertson*, 56 Barb. 480.

<sup>3</sup>*Anderson v. Lehigh Coal & Nav. Co.* 9 Pa. Dist. R. 278; *Jessup & M. Paper Co. v. Ford*, 6 Del. Ch. 52, 33 Atl. 618; *Harris v. Mackintosh*, 133 Mass. 228.

<sup>4</sup>*Mason v. Mattoon*, 95 Ill. App. 525; *Atty. Gen. v. Luton*, 2 Jur. N. S. 180; *West Arlington Improv. Co. v. Mt. Hope Retreat*, 97 Md. 191, 54 Atl. 982.

<sup>5</sup>*Rarick v. Smith*, 5 Pa. Dist. R. 530.

<sup>6</sup>*Jessup & M. Paper Co. v. Ford*, 6 Del. Ch. 52, 33 Atl. 618.

<sup>7</sup>*Middlestadt v. Waupaca Starch & Potato Co.* 93 Wis. 1, 66 N. W. 713.

<sup>8</sup>*Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611.

<sup>9</sup>*Woodycar v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419.

<sup>10</sup>*Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, Reversing 24 App. Div. 626, 40 N. Y. Supp. 1144.

<sup>11</sup>*Pennington v. Brinsop Hall Coal Co.* 37 L. T. N. S. 149, 46 L. J. Ch. N. S.

773, L. R. 5 Ch. Div. 769, 25 Week. Rep. 874.

<sup>12</sup>*Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769, 37 L. T. N. S. 149, 46 L. J. Ch. N. S. 773, 25 Week. Rep. 874.

<sup>13</sup>*Messersmidt v. People*, 46 Mich. 437, 9 N. W. 485.

<sup>14</sup>*Wood v. Sutcliffe*, 8 Eng. L. & Eq. Rep. 217, 2 Sim. N. S. 166, 21 L. J. Ch. N. S. 253, 16 Jur. 75; *Atty. Gen. v. Gee*, L. R. 10 Eq. 131, 23 L. T. N. S. 299.

The court will not interfere by injunction to restrain the casting of sewage into a river if the injury to the plaintiff is slight, and that to the defendant will be great from the injunction. *Lillywhite v. Trimmer*, 16 L. T. N. S. 318, 15 Week. Rep. 763, 36 L. J. Ch. N. S. 525.

An injunction will not be issued where it appears that the effect to defendant will be to stop his works, while the plaintiff is not seriously injured by the pollution of the stream. *Elmhirst v. Spencer*, 2 Macn. & G. 45.

In determining whether a permanent injunction will be granted restraining the pollution of a stream, the court should consider, not only the extent and nature of the impurities projected into the stream, but the location of the plain-

be granted if it is not shown that the pollution has occurred,<sup>14</sup> or if the injury has been stopped.<sup>15</sup> Nor will the injunction be issued if there is an adequate remedy at law.<sup>16</sup> And a use to which complainant has agreed will not be enjoined.<sup>17</sup> And if, because of changed conditions, the injunction will not restore the stream to its former condition, while it will destroy defendant's business, it will not be issued.<sup>18</sup> An injunction *quia timet* in nature will not be granted restraining the future pollution of a stream, where the danger is not imminent, although such pollution will, in the course of time, result from a mass of refuse from the defendant's works placed upon land near the river, and from which, in the course of time, a noxious liquid will flow in sufficient quantities to render the water unfit for use unless proper precautions are taken by the defendant to prevent it, which precautions the defendant states will be taken; where, even if the precautions are not taken, or some method discovered of rendering the refuse innoxious, the plaintiff will have sufficient warning to enable him to bring an action at that time to restrain the pollution.<sup>19</sup> For the purpose of showing that there may be an adequate remedy at law, an offer of compromise cannot be shown.<sup>20</sup> No greater relief will be granted than is necessary to restore complainant's rights.<sup>21</sup>

**523. Other remedies.**—An action may be maintained at law to re-

tiff's land, the use to which it was devoted, the effect upon it of any impurities in the stream, and the extent to which the pollution of the waters may be attributable to other sources than those charged in the complaint. *Townsend v. Bell*, 167 N. Y. 482, 60 N. E. 757.

<sup>14</sup>*New Boston Coal & Min. Co. v. Pottsville Water Co.* 54 Pa. 164.

<sup>15</sup>*Benscoter v. Huntington Valley Camp Meeting Asso.* 10 Kulp. 355; *Bennett v. National Starch Mfg. Co.* 103 Iowa, 207, 72 N. W. 507.

An interlocutory injunction will not be granted against a soap manufacturer for pollution of waters, when he has not participated in the creation of the nuisance for more than one year, any increase in the nuisance being due to other manufacturers. *Swan v. Adams*, 23 Grant Ch. (U. C.) 220.

<sup>16</sup>*Wood v. Sutcliffe*, 8 Eng. L. & Eq. Rep. 217, 2 Sim. N. S. 166, 21 L. J. Ch. N. S. 253, 16 Jur. 75; *Ingraham v. Dunwell*, 5 Met. 118.

<sup>17</sup>An injunction will not be granted at the suit of persons through whose land a natural water course runs, to prevent a use thereof by others for drainage and

sewer purposes similar to that to which, by the common consent of all interested, the stream has already been put, where the proposed drainage will not appreciably injure the water for the intended use. *Kemper v. Widows' Home*, 6 Ohio Dec. Reprint, 1049.

<sup>18</sup>*Wood v. Sutcliffe*, 2 Sim. N. S. 166, 21 L. J. Ch. N. S. 253, 16 Jur. 75, 8 Eng. L. & Eq. Rep. 217.

<sup>19</sup>*Fletcher v. Bealey*, L. R. 28 Ch. Div. 688, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745.

<sup>20</sup>*Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

<sup>21</sup>An injunction will not be granted to restrain an upper proprietor from the lawful use of a stream for running off the refuse of a distillery, but only to restrain him from so using it to the extent of polluting the stream and rendering its use unfit for stock. *Schumacher v. Shauchan*, 93 Mo. App. 573, 67 S. W. 717.

An upper riparian proprietor will not be enjoined from maintaining a dam across a stream merely because he permits hogs to have access to the pond in such a way as to pollute the water.

cover damages for injuries which have been caused by the pollution of a stream.<sup>1</sup> And if the pollution is such as to constitute a public nuisance, or if the act is prohibited by statute, the responsible person may be indicted for its maintenance.<sup>2</sup> Indictment will not lie, however, if no public right is invaded.<sup>3</sup> The provision of criminal punishment will not exclude a civil remedy in favor of an owner of riparian property who is injured by an act.<sup>4</sup> The statute may provide a summary proceeding to remove the nuisance.<sup>5</sup> A statute prohibiting the pollution of a stream under penalty must be strictly construed; and therefore a prohibition of pollution by any dead animal, or putrid, nauseous, or offensive substance, will not apply to sawdust; and, if the statute is limited to streams used for domestic purposes, no punishment can be had for the pollution of other streams.<sup>6</sup>

**524. Procedure.**—To be entitled to maintain an action for the pollution of a stream the plaintiff must show that his interests are affected by the pollution.<sup>1</sup> If several persons are similarly affected, they

*Spence v. McDonough*, 77 Iowa, 460, 42 N. W. 371.

<sup>1</sup>An action for injury to land from the contamination of a stream by the mixture of deleterious substances therein which are deposited on such land through an irrigation ditch is an action for creating a nuisance, and not for trespass. *Durfee v. Granite Mount Min. Co.* 13 Mont. 181, 33 Pac. 3.

<sup>2</sup>*Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 363, 26 Am. St. Rep. 749, 15 S. W. 1105.

The pollution of the waters of a stream, caused by allowing offal matter from cattle pens to accumulate and flow therein, is not a nuisance *per se* so as to render a general conclusion "to the common nuisance of all good citizens" in an indictment therefor sufficient; but such indictment must either conclude with an allegation that such pollution is a common nuisance to all persons there residing or there passing and repassing or having a right to pass and repass, or else should show that human habitations or public highways were near and that such pollution caused real and sensible damages. *Com. v. T. J. McGibben Co.* 101 Ky. 195, 40 S. W. 694, 1093.

<sup>3</sup>*Re Yost*, 14 York Legal Record, 25.

<sup>4</sup>*Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630.

<sup>5</sup>A summary proceeding to obtain an order requiring a person to abstain from polluting a stream is not penal in its na-

ture, although the statute authorizing the proceedings provides that any person making default in complying with the order granted shall be subjected to a penalty. *Derbyshire v. Derby* [1896] 2 Q. B. 297.

<sup>6</sup>*State v. Mitchell*, 47 W. Va. 789, 35 S. E. 845.

Under a statute forbidding the discharge into any stream so as to pollute its waters, of putrid solid matter, and declaring that "solid matter" shall not include particles of matter in suspension in the water, where a riparian owner diverting water from a stream into a reservoir for the purpose of allowing substances discharged into it by upper proprietors to settle, and who, after using the water, returned it from the reservoir into the stream, the water carrying with it the slag deposited by it in the reservoir, it was held that the solid matter where it entered the stream from the reservoir was "in suspension in the water" within the meaning of the statute. *River Ribble Joint Committee v. Halliwell* [1899] 2 Q. B. 385, 68 L. J. Q. B. N. S. 984, 81 L. T. N. S. 38, 48 Week. Rep. 22, 63 J. P. 708, Affirming [1899] 1 Q. B. 27.

<sup>1</sup>*Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149.

One having a watering place for his cattle in a tidal river adjoining his land is sufficiently injured by the discharge of sewage therein to enable him to maintain an injunction, although he has no title to the bed of the stream. *Oldaker*



may join in one action.<sup>2</sup> In a first action for the pollution of a stream, the upper riparian proprietor is liable on a count for the pollution, but not on another count for its continuance.<sup>3</sup> And evidence tending to show the pollution of the stream and the extent of plaintiff's injury is admissible.<sup>4</sup> The action may be brought against the one who is responsible for the creation of the nuisance or who has the power to procure its discontinuance. A corporation is responsible for the acts of its agents.<sup>5</sup> And the managers of a corporation may

v. *Hunt*, 6 De G. M. & G. 376, 1 Jur. N. S. 578, L. R. 3 Eq. 671, 3 Week. Rep. 296, 31 Eng. L. & Eq. 503, Affirming 19 Beav. 485.

The possession and working of a mill over a period of several years without interference from anyone, in the same manner after as before his conveyance of the land, affords prima facie evidence of a personal and direct interest in its operations, the impediment to which, by an unlawful filling of his pond with mud, produces a remediable injury. *Salisbury v. Western North Carolina R. Co.* 91 N. C. 490.

Evidence that a riparian owner has obtained a prescriptive right to divert a stream by a dam on another's land for a beneficial purpose makes out a prima facie case for any damage by reason of its pollution by an upper proprietor. *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

The proprietor of a hotel and saloon on premises through which a stream flows may recover for damages from the construction and continuance of a nuisance by the maintenance and operation of a brewery, stables, and hog yards on upper premises, polluting such stream, whereby the health of himself and family is impaired and loss in his business occasioned. *Greene v. Nunnemacher*, 36 Wis. 50.

It has been held that a riparian proprietor cannot grant any rights to a nonriparian proprietor to use the water of the stream, which will entitle the latter to maintain an action against an upper proprietor for pollution of the water. *Stockport Waterworks Co. v. Potter*, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748.

*Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142; *Williams v. Union Improv. Co.* 1 Pa. Dist. R. 288.

Under the Scotch practice, where an action for polluting a stream is not one to recover damages, but of declarator

and interdict, it is proper to join in one action all riparian proprietors objecting to the pollution, and also, as defendants, all of the several persons causing the pollution. *Cowan v. Buccleuch*, L. R. 2 App. Cas. 344, 5 Macph. Sc. Sess. Cas. 3d Series, 214.

*Schock v. Foreman*, 3 Brewst. (Pa.) 157.

<sup>4</sup> When the evidence tends to show that the impurity of the water in a river was not noticeable before the erection of the glucose factory upon one of its tributaries, although sewage from the city and from several slaughter-houses emptied into the tributary before the erection of the glucose factory, the one who is responsible for the casting of the refuse from the factory into the water is responsible for the nuisance occasioned by the subsequent pollution of the water in the river. *State v. Smith*, 82 Iowa, 423, 48 N. W. 727.

The owner of a brewery situated on a stream below a starch factory is entitled to show, upon the trial of an action for damages for the pollution of the stream by the discharge therein of slops from the starch factory, the difference in the sales of his beer before and after the construction of the starch factory, where there was other proof showing that the flow of such slops into the stream affected the atmosphere at the brewery; and the owner's theory was that the atmosphere so polluted affected the beer and rendered it unsalable, such theory being rebuttable by the defendant by showing that other causes, and what, affected the sale of the beer. *Cunningham v. Stein*, 109 Ill. 375.

<sup>5</sup> Where the yard master in employ of a railroad company causes carcasses of dead cattle to be cast into a bayou near the residence of the plaintiff, thereby polluting the water and atmosphere, etc., the company is responsible for actual damages; but, in the absence of proof of authority or artifice, it is not liable for exemplary damages.

be indicted for the acts of its servants.<sup>6</sup> So, knowledge on the part of the managing officers of a corporation of the damages caused to the lands of a lower proprietor by the discharge into a stream above such lands, of muddy or foul waters from the mill of such corporation, and sanctioning its continuance after such knowledge, render such managing officers personally liable, with the corporation, for such damages.<sup>7</sup> A managing superintendent of a mine is liable to a lower riparian proprietor for damage resulting from his own voluntary acts, not enjoined upon him by his employers or associates, in permitting or causing water charged with coal dirt to flow constantly into the stream.<sup>8</sup> And the owner of the property is liable for acts of the lessee which are authorized by him.<sup>9</sup> But he is not liable for acts of his tenant which are done without his knowledge or consent.<sup>10</sup> A bill in equity may be maintained against several mill owners for the creation of a common nuisance, which was created by their individual acts in throwing refuse from their various woodworking machines into the river to the injury of a lower riparian owner, the liabilities of the respective owners being indeterminable.<sup>11</sup> But ten-

*Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 363, 26 Am. St. Rep. 749, 15 S. W. 1105.

<sup>6</sup>The directors of a gas company are liable to an indictment for the act of their superintendent and engineer in polluting a stream of water by discharging gas into it while acting under a general authority to manage the works. *Rea v. Medley*, 6 Car. & P. 292.

<sup>7</sup>*Nunnally v. Southern Iron Co.* 04 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361.

<sup>8</sup>*Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74.

<sup>9</sup>A landowner leasing cotton mills under a lease stating that the property is to be used for the purpose of "bleaching, dyeing, or printing, and any other operation connected with bleaching, dyeing, and printing," cannot escape liability for the pollution of a stream resulting from the carrying on of such business, on the ground that the tenant might have carried on the business at a profit without engaging in the particular dyeing which poisoned the water. *Hamilton v. Dunn*, 3 Shaw & Maclean, 356.

In a case where a tenant had stipulated that he would not have anything about the premises that should be a nuisance to the property or the public, and the landlord, without giving express permission, subsequently allowed him to erect a farina mill, the refuse from which polluted an adjacent stream, it

was held that, so far as other riparian proprietors were concerned, the landlord was as much liable as if he had directly sanctioned the creation of the nuisance. *Robertson v. Stewart*, 11 Sc. Sess. Cas. Macph. 3d series, 189.

<sup>10</sup>*Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585.

Under this principle it has been held that damages to hides of the owner of an easement in land for the maintenance of a race, by the muddying of the water therein, cannot be recouped in an action against him by the owner of the land for damages from the overflowing thereof, due to his failure to keep the race in proper condition as required by the grant of the easement; where it appears that the muddying of the waters of the race was the result of the cutting of the race without authority of such landowner by a contractor hired to make brick, who had been told to take water therefrom from a creek running through the land. *Sharp v. Parker*, 108 Ga. 805, 34 S. E. 135.

<sup>11</sup>*Lockwood Co. v. Lawrence*, 77 Me 297, 52 Am. Rep. 763.

But a joint action cannot be maintained against the several parties who drain their premises into a water course, each thereby contributing to the pollution of the water, as they are not joint

ants at different times of premises on which are located a brewery, stable, and hog yards which pollute a stream, are not liable for the continuance thereof by each other, or the erection and maintenance thereof by the owner, and cannot be joined with the latter in an action for damages occasioned thereby to a lower riparian proprietor, if their operation thereof and tenancies of the premises are in no way connected.<sup>12</sup> One of several tenants in common of a mill, who does not participate in the throwing of refuse from the mill into the stream to the injury of a lower mill owner, is not liable therefor.<sup>13</sup> One who pollutes the water of a stream can be held liable only for his own acts.<sup>14</sup> If the pollution is effected in one county and the injury is done in another, the action may be brought in either.<sup>15</sup> A bill cannot be maintained in equity to restrain the pollution of a stream, unless the person of the defendant is within the jurisdiction of the court.<sup>16</sup>

**525. Defenses.**—The plaintiff is under no obligation to filter the water or take other steps to effect its purification. He may rest upon his rights, and defendant cannot require him to take active measures to avoid the injury, although he could do so at no great expense. Such steps must be taken, and expense borne, by the one who wishes to pollute the stream.<sup>1</sup> The fact that the plaintiff pollutes the water on his own land is no defense to the action.<sup>2</sup> But if complainant adds to the pollution of the water before it reaches the point where he wishes to use it, he cannot complain of pollution by the upper owner.<sup>3</sup> A riparian owner will not be denied relief against the pollution of a

wrongdoers. *Martinowsky v. Hannibal*, 35 Mo. App. 70.

A single suit to restrain the owners of mines located at various points on a river and its tributaries, and worked independently, from discharging gravel, waste earth, and *débris* into such waters, whereby they are carried down and deposited upon lower lands, may be maintained against all of such mine owners on the ground that a multiplicity of suits is thereby avoided; and the bill is not objectionable for misjoinder or multifariousness. *The Débris Case*, 8 Sawy. 628, 16 Fed. 25.

*Kryes v. Little York Gold Washing & Water Co.* 53 Cal. 724, which held that a joint action by a landowner injured by the washing down of tailings and *débris* from mining claims above cannot be maintained against the owners of such claims to restrain the depositing of such tailings and *débris* so as to be washed down by the river current, where

there is no privity of interest between them and they are acting severally and without any co-operation, is said in *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152, to have been practically overruled in *Hillman v. Newington*, 57 Cal. 56.

<sup>1</sup>*Greene v. Nunnemacher*, 36 Wis. 50.

<sup>2</sup>*Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228.

<sup>3</sup>See post, § 525a.

<sup>4</sup>*State v. Glucose Sugar Ref. Co.* 117 Iowa, 524, 91 N. W. 794; *State v. Smith*, 82 Iowa, 423, 48 N. W. 727.

<sup>5</sup>*Mengel v. Lehigh Coal & Nav. Co.* 24 Pa. Co. Ct. 152.

<sup>6</sup>*Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106, 14 Am. Rep. 658.

<sup>7</sup>*Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co.* 13 R. I. 611.

<sup>8</sup>*Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *Wheeler v. Fisher Oil Co.* 6 Ohio N. P. 309.

stream by an upper proprietor because polluted matter reached the stream from his own land, where he had no knowledge of that fact prior to the suit brought, and indicated an intention to remedy the condition.<sup>4</sup> The acquiescence by the complainant in a former pollution does not prevent his present right of action.<sup>5</sup> The lower proprietor may estop himself from complaining of the acts of the upper proprietor. Estoppel will exist where plaintiff purchases his property from defendant with knowledge that the pollution exists.<sup>6</sup> The mere furnishing of supplies for the use of defendant's mill, and permitting large expenditures to be made in its erection, will not estop plaintiff from objecting to the pollution if he did not know of the intention to make it.<sup>7</sup> The mere permission of the making of large expenditures on the upper mill will not defeat the right of action, for, as said in *Silver Spring Bleaching & Dyeing Co. v. Wanskuck*,<sup>8</sup> it is not to be presumed that one person intends to violate the rights of another until he threatens to do it, and the owners of the lower mill could claim no damages until they were actually injured. The fact that the pollution is made necessary by the lack of a municipal sewer is no defense.<sup>9</sup> The municipal corporation cannot grant the right to pollute the stream to the injury of a lower proprietor.<sup>10</sup> So, the owner of a mill who has acquired the right to the use of the water of a stream for milling purposes has no right, by reason of holding under a grant from the United States, to corrupt or impair the quality of the water to the injury of the rights of those below, as a grantee from the United States of land in a state acquires no greater rights as to the use of water running through it than any other grantee in fee.<sup>11</sup>

<sup>4</sup>*West Arlington Improv. Co. v. Mt. Hope Retreat*, 97 Md. 191, 54 Atl. 982.

<sup>5</sup>The court rejected the contention of defendant's counsel that a man may acquire a right to pollute a stream, in the same sense as the public acquires a right by possession to the use of a line of road, and said that the effect of such use of a stream as was relied on was that the lower proprietor lost his right of complaint by acquiescence. It could not be held that a party who had lost his right to complain against an old abuse which had ceased had lost his right to object to any subsequent abuse of the stream of whatever kind it might be. *Rigby v. Doinnie*, 10 Sc. Sess. Cas. 568.

<sup>6</sup>*Loevenback v. Switzer*, 1 Va. Dec. 141.

<sup>7</sup>*Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719.

Patronizing a cheese factory for three years, and failure to object to the casting of the refuse into a stream when the

subject is spoken of, will not estop a lower owner from maintaining an action to restrain such conduct, although in the meantime a third person has purchased the factory. *Snow v. Williams*, 16 Hun, 468.

<sup>8</sup>13 R. I. 611.

<sup>9</sup>*Com. v. Soulas*, 16 Phila. 525.

<sup>10</sup>A gas company is not relieved from liability for the pollution of the water on adjoining premises, because its works were erected under a contract with, and license from, the city authorities, and are skilfully conducted. A municipal authority has no right thus indirectly to take or injure the property of a private individual without making the party causing the injury responsible therefor. *Terre Haute Gas Co. v. Teel*, 20 Ind. 131.

<sup>11</sup>*Levis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177.

Defendant cannot defeat the action by offering to furnish another water supply.<sup>12</sup> The action may be barred by accord and satisfaction.<sup>13</sup> The statute of limitations may be a bar to the recovery,<sup>14</sup> but the statute does not begin to run until injury is caused.<sup>15</sup> The fact that a new water course is a beneficial one is no defense if it was substituted for a natural one.<sup>16</sup> The fact that the rights of the relative parties were acquired by appropriation and do not depend on riparian ownership will not destroy the right of action.<sup>17</sup>

**525a. Contribution by others to pollution.**—That others have contributed to the pollution of the stream is no defense in favor of one against whom the action is brought.<sup>1</sup> So, the fact that other mill owners have acquired the prescriptive right to foul the waters of a stream is no defense to an action by a lower proprietor against an

<sup>1</sup>*Stevenson v. Ebervale Coal Co.* 201 Pa. 112, 88 Am. St. Rep. 805, 50 Atl. 818.

<sup>2</sup>"A receipt in full for all damages which a person has against another will include a cause of action for placing dead animals in a stream from which the one giving the receipt receives a water supply, and will extinguish such right of action, not only for past injuries, but for future ones which accrued from the same act, where the principal injury was the trespass in entering upon the land, and the placing of the dead animals in the water was merely consequential. *Vedder v. Vedder*, 1 Denio, 257.

<sup>3</sup>*Lents v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219.

<sup>4</sup>*Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

<sup>5</sup>*Magor v. Chadwick*, 11 Ad. & El. 571, 3 Perry & D. 367, 4 Jur. 482, 9 L. J. Q. B. N. S. 159.

<sup>6</sup>In *Hill v. Smith*, 27 Cal. 480, the right was claimed to dig in the bed of the stream above the head of plaintiff's ditch, and the result was that the water flowing in the ditch was fouled with sediment. The court says that the charge of the trial court, which was favorable to defendant, was based on the notion, which had become quite prevalent, that the rules of the common law touching water rights had been materially modified in the state upon the theory that they were inapplicable to the conditions found to exist there. But the court further says: "This notion is without any substantial foundation. Neither the miner nor the riparian proprietor can use the water as to prejudice or in-

jure the prior right to a like use by another. The question between miners is the same as between riparian proprietors,—Is the plaintiff's use and enjoyment of the water for the purpose for which he claims it impaired by the acts of defendant?" And that doctrine was adhered to upon a subsequent appeal in the same case. 32 Cal. 166.

<sup>7</sup>*West Arlington Improv. Co. v. Mt. Hope Retreat*, 97 Md. 191, 54 Atl. 982; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142; *Wood v. Waud*, 3 Exch. 743, 18 L. J. Exch. N. S. 305, 13 Jur. 472; *Blackburne v. Somers, Jr.* L. R. 5 Eq. 1; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 15 Week. Rep. 801, 16 L. T. N. S. 438, Affirming L. R. 3 Eq. 296; *Blair v. Deakin*, 57 L. T. N. S. 522, 52 J. P. 327; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106, 14 Am. Rep. 658; *Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *Townsend v. Bell*, 62 Hun, 306, 17 N. Y. Supp. 210; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Wheeler v. Fisher Oil Co.* 6 Ohio N. P. 309.

When a large number of persons are mining on the same stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use, each cannot defend successfully an action for the damage on the ground that his act alone did not materially affect the water. *Hill v. Smith*, 32 Cal. 166.

upper mill owner for damages for the pollution thereof, where he himself has not acquired such a right.<sup>2</sup> To maintain the action against one of those polluting the stream, it must be shown, however, that he materially increased the pollution.<sup>3</sup> And he can be held liable only for his own act. If others have contributed to the tort complained of, his deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly.<sup>4</sup> Therefore, proof of the corruption by others is competent and of vital importance as tending to show the extent of defendant's liability.<sup>5</sup> If the act of defendant did not increase the injury to plaintiff there is no liability.<sup>6</sup> Under this rule it has been held that the owner of a business will not be restrained from the use of soft coal on a complaint that the soot and cinders therefrom are deposited in a nearby pond, thus rendering ice cut therefrom unfit for use, when it appears that other causes contribute to injure the quality of the ice, and that an injunction restraining such use would inflict great injury on the defendant.<sup>7</sup> But that decision does not properly apply the rule. As has been seen, the mere fact that the water is polluted from other sources does not prevent the injured person from proceeding against one offender to re-establish his rights. It is only where the act was not to be continued and cannot have caused injury that freedom from liability exists. The true rule is stated in *Wood v. Waud*,<sup>8</sup> as follows: It is no defense in an action against one for polluting a stream that, at the time of the wrongful acts of the defendants, others were so polluting the stream that the defendants, in polluting it, did not add to the plaintiff's actual damage, as the defend-

<sup>2</sup>*Gladfelter v. Walker*, 40 Md. 1.

<sup>3</sup>*Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286, Affirmed 55 N. J. Eq. 824, 41 Atl. 1117.

<sup>4</sup>*Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Chipman v. Palmer*, 77 N. Y. 51, Affirming 9 Hun, 517, 33 Am. Rep. 566.

<sup>5</sup>*Burch v. State*, 7 Ohio N. P. 379; *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167.

After an appeal to the House of Lords from the decisions of the court of sessions holding that the defendants unlawfully polluted a stream of water by depositing refuse from their distillery into it, the case was remitted by the House of Lords to the court of sessions to inquire as to the extent to which the stream was liable to the service of a common sewer and to receive the scour-

ings of houses in other trades, and also to determine as to how far the actual use made of it by the distillery could, in view of such use of the stream by others, be impeached as a nuisance. *Jamieson v. Russel*, 3 Paton, 403.

<sup>6</sup>A riparian owner cannot recover for damage to his ice pond caused by negligence of a railroad company in opening the valve of a wrecked tank car, when the oil which escaped through a hole in the tank without negligence on the part of the railroad company before the opening of the valve flowed to the pond and was more than sufficient to cause the damage. *Commercial Ice Co. v. Philadelphia & R. R. Co.* 197 Pa. 238, 47 Atl. 205.

<sup>7</sup>*Downing v. Elliott*, 182 Mass. 28, 64 N. E. 201.

<sup>8</sup>13 Jur. 472, 3 Exch. 748, 18 L. J. Exch. N. S. 305.

ants, by continuing such pollution for twenty years, might acquire the right so to do. So, in *Bradley v. Warner*,<sup>9</sup> it was held that in a suit for an injunction by the owner of an ice pond against an owner of land near the pond, to restrain the pollution of the water, it is no defense that the water is unfit for ice-making purposes, because the water of the pond, as well as the water of the creek which flows into the pond, is polluted by others than the defendant.

**526. Contract rights.**—One who grants the use of a stream of water cannot pollute it so as to render the grant ineffectual.<sup>1</sup> A stipulation in a grant of a water privilege for a tanyard, that surplus water shall be returned to the stream, does not refer to water partly consumed and of a deleterious and poisonous nature from use in the course of manufacture.<sup>2</sup> The right to pollute the water may also be acquired by contract.<sup>3</sup> But contract cannot confer a right to create a public nuisance.<sup>4</sup> A mortgagee's rights in the mortgaged property will not prevent the granting of an injunction restraining his casting waste from a sawmill on his own land into a stream flowing through the mortgaged property, in such a way as to be deposited on the mortgaged land and destroy its value.<sup>5</sup>

**527. Damages.**—The pollution of the stream being a wrongful act, no permanent right to continue it can be acquired; and therefore the damages to be awarded must be merely for the temporary injuries which have occurred to the time of trial or to the time of bringing the action, if, under the local practice, that is the time fixed for the computation of damages to be recovered in the action.<sup>1</sup> The foundation for the recovery of damages must be the diminished rental value of the property because of the pollution of the stream.<sup>2</sup> In addition to this value, a recovery may be had for any special injury which may

<sup>9</sup> 21 R. I. 36, 41 Atl. 564.

<sup>1</sup> *Wheatley v. Chrisman*, 24 Pa. 208, 64 Am. Dec. 657.

<sup>2</sup> *Howell v. McCoy*, 3 Rawle, 256.

<sup>3</sup> An easement to foul a stream is not reserved by implication on the conveyance of land bounding on a stream, by the fact that at the time of such grant the grantor was carrying on dye works on the opposite side of the stream, and was and had been engaged in fouling the water, as the law will not reserve anything out of a grant in favor of the grantor except in case of necessity. *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 438, 15 Week. Rep. 801.

<sup>4</sup> *Weston Paper Co. v. Comstock* (Ind.) 58 N. E. 79.

<sup>5</sup> *Morse v. Whitcher*, 64 N. H. 590, 15 Atl. 217.

<sup>1</sup> *Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875; *Whitmore v. Bischoff*, 5 Hun, 176.

The pollution of a stream by an upper riparian owner, a manufacturer in most cases, is a continuing wrong to time of trial, damages for which to that time may be assessed under the Pennsylvania statute; and when the lower owner's right is determined at the first trial, the subject should be considered *res adjudicata*. *Hileman v. Hileman*, 172 Pa. 323, 33 Atl. 575.

<sup>2</sup> *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210.

That a plaintiff in an action for polluting a stream flowing near his prop-

have been caused by the wrongful act.<sup>3</sup> This may include compensation for inconvenience and discomfort caused to the family by the emanation of noxious odors from the polluted water.<sup>4</sup> If the pollution causes injury to mill property, and the cost of restoring the property to its normal condition is less than the decreased value of the estate, such cost will be the measure of damages.<sup>5</sup> The court, in determining an action brought by a tenant for life to restrain the pollution of a stream passing through the estate by the discharge of sewage, will take into consideration not only the discomfort and inconvenience resulting to the tenant from the nuisance, but will consider the effect of its continuance upon the value of the estate and upon the prospect of dealing with it to advantage.<sup>6</sup> Inability of a paper-mill proprietor to wash rags in a stream, thus preventing him from making white paper, by reason of the washing of earth into the stream and the consequent filling up of his dam, constitute special damages, recovery for which cannot be had under a general allegation merely of interference by such pollution with the working of his mill, but which must be alleged to entitle him to recover therefor.<sup>7</sup> The plaintiff is entitled to recover to the extent of the loss sustained by the wrongful act of defendant.<sup>8</sup> The proper measure of damages for befouling the water in an irrigating canal and rendering it useless for irrigation purposes is the market value of the water for irrigation.<sup>9</sup> The recovery can include only the period allowed by the statute of limitations.<sup>10</sup> Where plaintiffs on the trial make an un-

erty does not rent his property will not exclude evidence of the depreciation of the rental value thereby occasioned by the wrongful act. *Michel v. Monroe County*, 39 Hun, 47.

The measure of damages to the mill property of a lower riparian owner because of bark from an upper tannery is the difference between the annual value or use of his mill unaffected by the deposit and as affected by it; and any special contracts may be considered in determining the value. *Horton v. Hall*, 1 Pennyp. 159.

The measure of damages in an action by a lessee of a boardinghouse for injuries caused by the pollution of a stream of water flowing through the premises is the difference in rental value of the premises free from, and subject to, the nuisance. *Chipman v. Palmer*, 9 Hun, 517.

<sup>3</sup>*Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875; *Waterman v. Buck*, 58 Vt. 519, 3 Atl. 505.

<sup>4</sup>*Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; *Threatt v. Brewer Min. Co.* 49 S. C. 95, 26 S. E. 970; *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; *Gulf, C. & S. F. R. Co. v. Reed*, 80 Tex. 363, 26 Am. St. Rep. 749, 15 S. W. 1105; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

<sup>5</sup>*Secly v. Alden*, 61 Pa. 302, 100 Am. Dec. 642.

<sup>6</sup>*Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Ch. 349, 35 L. J. Ch. N. S. 382, 12 Jur. N. S. 203, 14 L. T. N. S. 154, 14 Week. Rep. 562, Affirming L. R. 1 Eq. 161, 13 L. T. N. S. 352, 14 Week. Rep. 92.

<sup>7</sup>*Ellicott v. Lamborne*, 2 Md. 131.

<sup>8</sup>*Cunningham v. Stein*, 109 Ill. 375.

<sup>9</sup>*North Point Consol. Irrig. Co. v. Utah & S. I. Canal Co.* 23 Utah, 199, 63 Pac. 812.

<sup>10</sup>*Lentz v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219.



conscionable demand as to the amount of damages sustained, which is thereupon necessarily resisted by litigation, they should be allowed damages for detention only in an amount not to exceed legal interest.<sup>11</sup>

### VIII. RIGHTS OF OPPOSITE PROPRIETORS.

**528. Extent of rights in water.**—Whether the title of the riparian owner extends to the shore or to the thread of the stream, he has no title to the water as such, or right to use a particular portion of it to the exclusion of the opposite owner. The stream as it flows is an entity, and each owner is entitled to make such use as he can of the entire bulk. Each is entitled *per my et per tout* to his portion of the whole bulk of the stream, undivided and indivisible, except as the power developed from it may be apportioned at the dam.<sup>1</sup> The result of this is that neither can divert what he claims as his share of water above the common dam, but must permit it to remain in the stream to contribute its share towards the natural flow and power of the water.<sup>2</sup> If one does not desire to use the water the other may utilize the whole power created by the stream.<sup>3</sup> But the fact that he is not making use of the water does not prevent his objecting to the opposite proprietor's diverting the flow from the stream.<sup>4</sup> The opposite owners are entitled to share equally in the advantage of the flowing water.<sup>5</sup> Neither has a right to use the water to the prejudice

<sup>1</sup>*Stevenson v. Ebervale Coal Co.* 203 Pa. 316, 52 Atl. 201.

<sup>2</sup>*Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Plumleigh v. Dawson*, 6 Ill. 550, 41 Am. Dec. 199; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Chatfield v. Wilson*, 31 Vt. 358.

<sup>3</sup>*Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

Even the grant of an undivided moiety of a stream does not authorize the grantee to appropriate or use the stream to the injury of others jointly interested in it. *Vandenburgh v. Van Bergen*, 13 Johns. 212.

<sup>4</sup>*Howe Scale Co. v. Terry*, 47 Vt. 109, 123.

One of two opposite riparian owners maintaining a dam across the stream may use whatever portion of the share of the other proprietor the latter is willing shall go to waste. *Warren v. Westbrook Mfg. Co.* 88 Me. 58, 35 L. R. A. 388, 51 Am. St. Rep. 372, 33 Atl. 665.

<sup>5</sup>*Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329; *Adams v. Barney*, 25 Vt. 225.

<sup>6</sup>*Arthur v. Case*, 1 Paige, 447; *Pratt v. Lamson*, 2 Allen, 275; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Illinois & M. Canal Trustees v. Haven*, 11 Ill. 554; *Adams v. Barney*, 25 Vt. 225; *Wetmore v. White*, 2 Cai. Cas. 87, 2 Am. Dec. 323.

The owner of land to the middle of a stream has a right to the use of only one half of the water of such stream, and must use it as it is accustomed to flow down the channel; and the erection by such owner of a dam across the stream, by means of which the head of water is increased and the value of the site and improvements enhanced, is unauthorized, and in such case the owner thereof is entitled to only such damages for a diversion of the water of the stream above as he would sustain by a deprivation of the use of one half the water naturally flowing along the channel, without taking such dam into consideration. *Illinois & M. Canal Trustees v. Haven*, 11 Ill. 554.

of the other.<sup>6</sup> The rule is well stated in *Pinney v. Luce*,<sup>7</sup> as follows: Each riparian proprietor is entitled to the use of the stream so far as it is reasonable and conformable to the uses and wants of the community, having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by other proprietors. To uphold a claim to a larger use than a moiety of the stream, the right to it must be clearly established.<sup>8</sup> If one owner makes an unlawful use of the water of the stream the opposite owner may maintain an action for his injury.<sup>9</sup> There may be an action on the case,<sup>10</sup> or equity may take jurisdiction to restrict the wrongdoer within the limits of his rights.<sup>11</sup> If one of the owners increases the flow of water in the stream by his own exertions, he is entitled to the entire benefit of it.<sup>12</sup> One of two opposite proprietors on a stream may, for the purpose of facilitating the obtaining of water for his house and barn, sink a tub near the margin of the stream, which is kept filled by percolation from the stream.<sup>13</sup> In establishing one owner in the use of his share of the water the court should not permit the owner of the opposite shore wantonly to open a passage in the dam which would permit the water to run to waste and destroy the power at the dam.<sup>14</sup>

**529. Effect of island in stream.**—If the stream is divided by an island the owners of the opposite shores are entitled to the amount of water which would naturally flow on their respective sides of the island, and to no more.<sup>1</sup> The owner of one channel cannot construct a dam across the other channel at the head of the island to turn more water down his channel, because less than one half naturally flows there, nor because the dam on the other channel is not tight so that it permits water to waste and more goes down that channel than is needed by the owner of the dam.<sup>2</sup> And where there are two or more channels in a river the owners upon one channel cannot lawfully, by

<sup>6</sup>*Wright v. Howard*, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Revised Rep. 169.  
<sup>7</sup> 44 Minn. 367, 46 N. W. 561.  
<sup>8</sup>*Dyer v. Cranston Print Works Co.* 22 R. I. 506, 48 Atl. 791.  
<sup>9</sup>*Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 538, Fed. Cas. No. 13,446.  
<sup>10</sup> Co. Litt. 200 b; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.  
<sup>11</sup>*Dyer v. Cranston Print Works*, 17 R. I. 774, 24 Atl. 827; *Arthur v. Case*, 1 Paige, 447.  
<sup>12</sup>A dispute as to the respective water rights of opposite riparian proprietors is properly brought in equity, and the court should ascertain, define, and settle the respective rights of the litigants.  
<sup>13</sup>*Hannah v. Clarke*, 1 Va. Dec. 338.  
<sup>14</sup>*Whittier v. Cochecho Mfg. Co.* 9 N. H. 454, 32 Am. Dec. 382.  
<sup>1</sup>*Chatfield v. Wilson*, 31 Vt. 358.  
<sup>2</sup>*Dyer v. Cranston Print Works*, 22 R. I. 506, 48 Atl. 791.  
<sup>3</sup>*Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927; *Blanchard v. Baker*, 8 Me. 266, 23 Am. Dec. 504.  
<sup>4</sup>*Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927.

widening or deepening their channels, or by other means, cause a greater proportion of water to flow through it than otherwise would; but if the flow through one channel is checked by dams so that the flow in the other is increased, the owners upon the latter may lawfully make use of the extra flow.<sup>3</sup> The owner of one channel may remove all dams from it without liability to the owner of the other channel.<sup>4</sup> If the island is owned by one not the owner of the shore, the island must be regarded as the opposite shore, and the rights of the shore owner will then be merely his proper share of the water flowing in the channel between the island and his shore.<sup>5</sup> If the channels are unequal the rights in either channel are governed by the water naturally flowing in it, and cannot be determined by the flow of the whole stream.<sup>6</sup> If the owner of one bank owns the island, he is entitled to all of the water flowing between his shore and the island, and to one half of that flowing between the island and the opposite shore.<sup>7</sup>

**530. Changing current.**—The action of running water is such as to wear away the banks against which the current is directed, and therefore one riparian owner has no right to change the flow of the current so as to direct it against the land of the opposite owner. In the important case of *Bickett v. Morris*,<sup>1</sup> the court held that a riparian proprietor has no right to erect a building in the *alveus* of a stream without the consent of the opposite proprietor, and the opposite proprietor may compel him to suspend such operation without proving that any damages were actually sustained by him by the erection, unless the encroachment is so slight and trivial as not to involve any risk of future injury. The extent and limitation of this doctrine were fixed in *Belfast Rope Works Co. v. Boyd*,<sup>2</sup> where it was held that the construction of a weir in a stream so as to interfere with the flow of the water was actionable. The court adopted the language of Lord

<sup>3</sup>*Skouhegan Water Power Co. v. Weston*, 94 Me. 235, 47 Atl. 515.

<sup>4</sup>*Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927.

<sup>5</sup>*Stolp v. Hoyt*, 44 Ill. 223; *Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927.

The owner of an island entitled to one-half the water of a channel because the upper end of his island extends above the point where another's dam abuts on the mainland does not lose his right thereto by cutting away the upper end of his island, making it lower down than the point where such dam abuts, in the course of the construction of dams and breakwaters which stand in the place of the removed portion, for the purpose of

utilizing his water power, where the owners of the dam on the mainland acquiesced therein by building a cross dam to connect all such works, and have neither changed their use of the power nor made expenditures for that purpose in consequence of such cutting away. *West v. Fox River Paper Co.* 82 Wis. 647, 52 N. W. 803.

<sup>6</sup>*Warren v. Westbrook Mfg. Co.* 86 Me. 32, 26 L. R. A. 284, 29 Atl. 927.

<sup>7</sup>*West v. Fox River Paper Co.* 82 Wis. 647, 52 N. W. 803; *Ludwig v. Overly*, 3 Ohio Dec. 554.

<sup>1</sup>L. R. 1 H. L. Sc. App. Cas. 47, 12 Jur. N. S. 803, 14 L. T. N. S. 835.

<sup>2</sup>Ir. L. R. 21 Eq. 560.

Blackburn in *Ewing v. Colquhoun*,<sup>3</sup> in which he explained *Bickett v. Morris* as holding that where an erection is a present, sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed, on the ground that there is a present injury to the right of property if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. In discussing the *Bickett Case*, FitzGibbon, L. J., said that the plaintiff in the *Belfast Case* seemed to press the decision in the *Bickett Case* beyond the point which, in *Ewing v. Colquhoun*, it was explained as intended to go, the plaintiff having contended that in the *Bickett Case* all he had to show was an erection in the *alveus* of the stream, and that, at the moment he showed that, the burden of proof was thrown upon the defendants, and the erection and continuance of the weir became illegal unless the defendants could prove, not only the absence, but the impossibility, of injury to the plaintiffs. To this, FitzGibbon, L. J., said that such was not the law, as it would be impossible for the owners of a weir to sustain such a burden of proof, and scarcely a weir erected in the United Kingdom could have originally escaped condemnation as an unlawful structure if this was the law. Every erection in *alveus fluminis* must to some extent interfere with the flow of the stream, and every mill weir is in fact erected for the purpose, and has the effect, of altering and delaying the natural flow; and he did not think the *Bickett Case* was intended so to decide,—at least in any other case than that of *ex adverso* or immediately adjacent property. But the court held in the case under consideration—that is, the *Belfast Case*—that the erection of the weir did actually injure the plaintiff.<sup>4</sup> The rule that a riparian proprietor cannot erect a structure which would disturb the course of a stream without the consent of the opposite proprietor applies to a tidal river as well as a nontidal one, although no material injury is inflicted on the opposite proprietor; and this is not affected by the rule that proprietors on the seashore may treat the sea as a common enemy, and construct embankments for their protection, as such rule

<sup>3</sup> L. R. 2 App. Cas. 839.

<sup>4</sup> It is not necessary that riparian proprietors who are maintaining works in a stream for preventing floods, and are using the stream for sewerage and pondage purposes, shall show actual damage before being entitled to restrain one of the proprietors from erecting structures in the bed of the stream, as such acts, if acquiesced in, will, in

course of time, become a right. *Jardine v. Simon*, N. B. Eq. Cas. 1.

The fact that one building a structure in the *alveus* of a stream is not the owner of any part of the *alveus* does not prevent, but rather strengthens, the application of the doctrine of *Bickett v. Morris*, so as to entitle a riparian proprietor who may possibly be injured by the structure, to restrain its construc-

is limited to the seashore and does not apply to a tidal river.<sup>5</sup> The rule as thus developed prevents the erection of embankments, levees, piers, or other structures, the effect of which will be to force the water over onto land of the opposite proprietor.<sup>6</sup> But if one riparian owner divert the water by a structure on his own bank, and drive it into the field of his neighbor on the opposite side, so as to force the latter to erect a wall to stop the water-break, the former cannot maintain an action for damages if the latter will cause the water to "eddy," or, in time of freshets, to overflow another part of his land.<sup>7</sup> The question now arises as to how far one owner may place structures on his shore which will interfere with the flood water of the river, although the effect is to increase its depth upon the opposite property. As will be seen in a subsequent chapter,<sup>8</sup> some of the courts treat flood

tion. *Palmer v. Persse*, Ir. Rep. 11 Eq. 616.

<sup>5</sup>*Att'y. Gen. v. Lonsdale*, L. R. 7 Eq. 377, 38 L. J. Ch. N. S. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219.

<sup>6</sup>A proprietor of land on the bank of a river may restrain the construction of a mound by the opposite proprietor which would, if completed, in times of ordinary flood throw the waters of the river onto his grounds so as to overflow and injure them. *Menzies v. Breadalbane*, 3 Bligh N. R. 414.

A railroad company which constructs and maintains dikes so as to change the natural channel of a stream from the side on which they are constructed to the opposite side, and force the current directly against opposite lands, is liable to one in possession thereof under the homestead laws, and who has obtained a receipt from the receiver of the land office, for damages occasioned by the washing away of a portion thereof. *Gulf, C. & S. F. R. Co. v. Clark*, 2 Ind. Terr. 319, 51 S. W. 962.

One who narrows a stream by driving piles and filling out to them, in order to protect his abutting land, is liable for injury thereby caused by flooding in time of freshet, to land on the opposite side of the stream. *Hartshorn v. Chad-dock*, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997. Affirming 40 N. Y. S. R. 953, 16 N. Y. Supp. 714.

Where a highway has been located across two towns the boundary between which is on an island in a stream, the one town will be liable if it carries its portion of the road to the island on a dump instead of bridging a portion of the stream which is a torrent at times,

thereby causing an unnatural flow through the other channel, which, in time of freshet, washes out the bridge erected by the other town. *Topsam v. Lisbon*, 65 Me. 449.

The Delaware and Raritan Canal Company, though authorized to make and maintain a public canal and improve navigation on the Raritan river, for public benefit, but private profit, is yet a private corporation; hence, not exempt from damages, even if remote and consequential, such as the washing of land on the opposite shore by the narrowing of the channel, due to the obstruction and interference with the natural flow of the river, to the injury of a riparian owner. *Ten Eyck v. Delaware & R. Canal Co.* 18 N. J. L. 200, 37 Am. Dec. 233.

A city is liable for an injury from a permanent improvement made by it on the bank of a water course in such a way as to narrow the channel and wash and injure private property on the opposite bank; but, the improvement being permanent in character, only one action can be maintained therefor, the right to which accrues on the completion of the structure and is barred at the end of two years, under Kan. Civ. Code, § 18, subd. 3. *Parker v. Atchison*, 58 Kan. 29, 48 Pac. 631.

<sup>7</sup>*Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590.

<sup>8</sup>See post, chapter XXIX.

<sup>9</sup>*Barnes v. Marshall*, 68 Cal. 569, 10 Pac. 115; *Farquharson v. Farquharson*, cited in 3 Bligh N. R. 421.

A riparian owner may construct the necessary embankments, dikes, or other structures to maintain his bank of the stream in its original condition, or to

water as surface water and apply to it the common enemy rule, under which everyone may fight it, regardless of the injury to his neighbor. This is not, however, the rule of right and justice, and has no rightful application to the settlement of the question of the right to deal with flood water. On the other hand, the application of the rule that there can be no interference with the flow of the water of the stream would prevent many needed improvements and be a serious detriment to the development of the country. Moreover, such rule is not necessary, because, while the effect of the flood water is serious at times, and casting it upon another's property in increased quantities may be a trespass, yet its effect is not so serious as the turning of the current of the stream directly against the opposite banks. In the former case the water flows over the surface and has much less effect than the latter. Approaching the examination of the decisions which have dealt with the question under discussion there are some principles which are not disputed. The owner of one bank may erect structures to protect his bank in its original condition.<sup>9</sup> But he cannot erect embankments in the stream for the purpose of reclaiming land, the effect of which is to destroy the opposite bank.<sup>10</sup> Nor can he erect structures for the protection of his own banks in such a way as to change the natural flow of the water and cast it upon his neighbor's land.<sup>11</sup> It has been held that one owner might raise his bank so as to confine the water to the channel in times of flood.<sup>12</sup> But in such cases the limitation is made that in so doing he must not cause injury to the lands or property of other persons. The limitation goes a long distance towards destroying the rule. A basin of a given size is necessary to hold the

restore it to that condition and bring the stream back to its natural course; and, if he does no more, riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury his action causes them. *Gulf, O. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678.

The riparian proprietors upon a stream the channel of which is gradually changing may protect themselves against anticipated encroachments upon their land by rubbing, or the securing of the bank in any way that shall keep the channel in its present location, if the land of the proprietor above or on the opposite bank is not thereby injured or flowed. *Gerrish v. Clough*, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561.

The doctrine of reasonable use, as applied to water courses, has reference merely to the use of the water, and is not applicable to a case where one erects

a breakwater to protect his land from being washed away by the gradual changing of the channel of a river, thereby raising the water therein so that it encroaches upon the land of a proprietor on the opposite bank. *Ibid.*

So, one interested in the navigation of a stream may repair a break in its banks with the consent of the owner of the land where the break occurs, although the effect is to cast the water against the banks of other riparian owners to their injury. *Slater v. Fox*, 5 Hun, 544.

<sup>9</sup>*De Baker v. Southern California R. Co.* 106 Cal. 257, 39 Pac. 610.

<sup>10</sup>*Wallace v. Drew*, 59 Barb. 413; *Ordway v. Canisteo*, 86 Hun, 569, 21 N. Y. Supp. 844.

<sup>11</sup>*Trafford v. King*, 2 Crompt. & J. 265, 1 Moore & S. 401; *Parker v. Atchison*, 58 Kan. 29, 48 Pac. 631.

<sup>12</sup>

water which naturally belongs to a water course, and if it is cut off on one side it must be enlarged on the other; so that the raising of one of the banks, preventing the water from occupying the flood channel on that side, necessitates its occupying proportionately more space on the opposite side, and the increase of the water there must, of necessity, cause injury to the landowner; and the act is a direct violation of the maxim *Sic utere tuo ut alienum non lædas*, in that, for the purpose of relieving his own property of a burden, the owner merely transfers it to his neighbor. Some of the cases have made the question of liability depend upon whether or not the current of the stream was changed by raising the banks on one side, holding that there was liability in case it was.<sup>13</sup> But the broader rule that the owner of one bank cannot turn the water onto his opposite neighbor is very ancient. Vattel<sup>14</sup> states that no embankment can be raised the tendency of which is to throw the water upon the opposite bank. And that is the rule which has been adhered to, more or less strictly, by the current of authority.<sup>15</sup> It is also the rule of justice and right. If, for the

<sup>13</sup>*Menzies v. Breadalbane*, 3 Wils & S. 124, 56 Am. Rep. 24; *Burke v. Sanitary Dist.* 152 Ill. 125, 38 N. E. 670.  
<sup>235</sup>; *Trafford v. King*, 2 Crompt. & J. 265, 1 Moore & S. 401.

In *Menzies v. Breadalbane*, 3 Bligh N. R. 421, the chancellor, in distinguishing *Farquharson v. Farquharson*, cited in 3 Bligh N. R. 421, where it was held that the proprietor on one side of the river might erect a mound, said that the river in that case had been changing its course and the mound was constructed to prevent a further change. The mound erected, therefore, was not to have the effect of altering the old course of the river as in the *Menzies Case*, but to prevent the old course of the river from being altered, and that, independent of this distinction, there was evidence to show that a considerable part of the mound was built on old foundations. There was further evidence that, according to the custom of that part of the country, proprietors on opposite sides of the rivers had embanked against each other, and that the proprietor on the opposite bank in this particular case had himself embanked for the purpose of preventing the overflow of water on his side; and that the damage inflicted on the opposite proprietor was a trifling damage, while the land on the side where the bank was constructed would have been destroyed without it.

<sup>14</sup>Book 1, chap. 22.

<sup>15</sup>*Burrell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; *Farris v. Dudley*, 78 Ala.

One who has conveyed to a railroad company a right of way across his land has no right to construct a levee parallel to the bank of the river upon his land and along the right of way, in such manner as to hold flood water so that it will endanger the bridge and embankments of the railway, and, by flooding the lands of the opposite shore, subject the railway company to suits for damages. *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 527, 62 Fed. 129.

The danger to the land of a riparian owner on a creek, which curves sharply into his land along an abrupt bank of loose soil, from the maintenance of a breakwater on the opposite side of the stream, the effect of which will be greatly to increase the natural tendency of the stream to wash from his bank on the outside of the curve during sudden freshets, to which the stream is subject,—is probable and imminent, entitling him to maintain an action for a mandatory injunction to abate the breakwater as a nuisance. *Nicholson v. Getchell*, 96 Cal. 394, 31 Pac. 265.

But a preliminary injunction against the alleged unlawful erection of a retaining wall along a river bank in such a way as to fill the channel and deflect the stream against the opposite shore will not be continued when the rights of the complaining riparian proprietor are

protection of property and the development of the country, it is necessary to confine the waters to the channel of the stream, it can easily be done under the governmental power to make needed improvements, by raising banks on both sides of the stream alike; and one owner should not be permitted to take the matter into his own hands, and thereby injure or destroy the property of his neighbor. This rule prevents the construction of a solid embankment along the stream by a railroad company the effect of which is to cast the water in greater quantities onto the opposite shore.<sup>16</sup> The New York court of appeals in *Moyer v. New York C. & H. R. R. Co.*<sup>17</sup> seems, at first sight, to be out of harmony with the cases upon the subject elsewhere. In it, the court, after holding that the finding of the referee that the bed of the stream had been infringed upon was not supported by the evidence, held that the railroad company was authorized by law to construct its road upon its own land; and, if it constructed it in a skilful and proper manner, it could not be made responsible to persons receiving incidental or consequential damages. The court said there was no allegation or proof that it was not necessary and proper for the company to raise the bed of its road, nor that it was unskilfully or improperly done. On the contrary, it was expressly found that the embankment was built in a workmanlike and skilful manner. The court then concluded that, since the railroad company had authority from the legislature to construct the work, it was not liable for consequential damages inflicted by it. The decision is thus seen to be placed, not on the general rule that there is no liability for injury to opposite owners by the construction of embankments, but on the ground that the act of the railroad company having been authorized by the legislature the company was protected from liability by such legislative authority. That support for the decision has been removed by subsequent decisions in that state, so that the *Moyer Case*

not defined, and it is not apparent that his property will be injured. *Patterson's Appeal*, 129 Pa. 109, 18 Atl. 563.

<sup>16</sup>*Freeland v. Pennsylvania R. Co.* 197 Pa. 529, 58 L. R. A. 206, 80 Am. St. Rep. 850, 47 Atl. 745; *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. Rep. 246, 13 S. E. 489.

A railroad company is not protected against liability for damages occasioned by the overflowing of lands on the opposite side of a river during freshets, by a statute authorizing the owners of land on water courses to ditch and embank their lands for the protection thereof

from freshets and overflows, provided such ditching and embanking does not divert the water from its natural channel, where its embankment causing the overflow of such lands was not constructed for the protection of its land, but for the purpose of laying its road thereon, and did divert the water from its natural channel. *O'Connell v. East Tennessee, V. & G. R. Co.* 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. Rep. 246, 13 S. E. 489.

<sup>17</sup>88 N. Y. 356.

The same principle had been applied in *Bellinger v. New York C. R. Co.* 23 N. Y. 42.



can no longer be regarded as authority. In *Mundy v. New York, L. E. & W. R. Co.*<sup>18</sup> which involved the question of the alteration of the flow of flood water, the court examined very fully the weight which should be given to the *Moyer Case*, and it was held that the New York court of appeals had adopted the rule that the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury; and that, where the terms of a statute giving authority to a railroad corporation are not imperative, but permissive, this does not confer license to commit nuisance, although what was contemplated by the statute cannot be done without doing so. The rule as established by the foregoing decisions does not prevent the riparian owner from making any improvement upon his own land. The limits of his right are governed by the rule of reasonableness, and are well stated in *Crawford v. Rambo*,<sup>19</sup> as follows: A riparian proprietor who constructs an embankment on a stream for the benefit of his own land will not be held liable for its unforeseen results to another proprietor, if, at the time of its construction, he exercised the care and skill of an ordinarily skilful and intelligent man; but, after the occurrence of an ordinary flood has shown the tendency of the embankment to occasion injury to another proprietor, and that its effect will be to continue to do so at each recurring flood, his liability from such time will be the same as if he could have foreseen the result in the first instance. In that case it was held that the owners of land on the interior bank of a bend in a river, who construct an embankment running back from the stream for the purpose of preventing its water at flood times from flowing upon their property, which embankment acts necessarily as a partial dam to the flood water, the natural and probable consequence of which, at such flood times, is to cause the water to overflow and damage the lands on the opposite bank, are liable to the owners thereof for the damages sustained thereby. The construction of mounds and fenders by landowners adjoining a stream, for the purpose of confining flood water, thereby raising the height of the stream to the injury of an aqueduct crossing it at a lower point is not unlawful where the aqueduct and embankment have penned back the water onto the lands above, thereby justifying the landowner in constructing the mounds.<sup>20</sup> A riparian proprietor

<sup>18</sup> 75 Hun, 479, 27 N. Y. Supp. 469.

<sup>19</sup> 44 Ohio St. 279, 7 N. E. 429.

See discussion of the effect of a legislative grant of authority in § 904 *post*.

<sup>20</sup> *Trafford v. King*, 2 Cramp. & J. 265, 1 Moore & S. 401.

whose lands have been injured by the construction of an embankment on the land of another proprietor may enjoin the maintenance thereof or cause it to be abated as a nuisance, if he has no adequate remedy at law.<sup>21</sup> The right of a riparian owner to make a new bank for a navigable river which forms the boundary between states, or turn the waters upon lands upon the opposite side of the river, is not a local question, but one dependent on the general principles of law, in respect to which the decisions of the state courts are not controlling upon the Federal courts.<sup>22</sup> Neither riparian owner has any right to alter the flow of the water within the channel to the injury of the other.<sup>23</sup>

**531. Construction of dam.**—Where the common law prevails, the owner of one shore cannot construct a dam beyond the center of the stream onto the land of the opposite owner without his consent.<sup>1</sup> This rule has been held to have been changed by the Federal statute, which made the opposite owners tenants in common of the bed of the stream, so that each owner may, under that statute, erect dams across the stream provided he does not thereby injure his cotenant.<sup>2</sup> The owner of one shore may erect a wing-dam to utilize the power on his side of the stream, and the opposite owner cannot object thereto nor to the manner in which he utilizes the water. The opposite proprietor has no interest in such a dam, nor right to its use.<sup>3</sup> In order to legalize the construction of a dam across the stream the consent of both owners is necessary, unless one has obtained the right by adverse

<sup>21</sup>*Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429.

But an injunction will not be granted at the suit of a riparian owner to restrain the maintenance of an embankment by an opposite owner to prevent the flooding of his own land in times of high water, on the ground of the threatened overflow of the former's land by reason thereof, where it does not appear how often in the past the stream has overflowed its bank nor how much of the plaintiff's land had been, or is liable to be, overflowed at such times in consequence of the embankment made or threatened to be made. *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609.

<sup>22</sup>*Cairo V. & O. R. Co. v. Brevoort*, 25 L. R. A. 527, 62 Fed. 129.

<sup>23</sup>*Chatfield v. Wilson*, 31 Vt. 358.

<sup>1</sup>*Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219.

It appears that, under the early laws of Virginia, to entitle one owning lands on one side of any water course to construct a dam therein it was necessary

that the bed of the water course should be shown to belong to the applicant or to the commonwealth. *Richards v. Hoome*, 2 Wash. (Va.) 36.

But where the person applying owned land on both sides of the stream it is said by Carrington, J., in *Wros v. Harris*, 2 Wash. (Va.) 126, that the presumption is that the bed of it belongs to him and therefore it is unnecessary for him to set it forth in his application to the court.

<sup>2</sup>*Moffett v. Brewer*, 1 G. Greene, 348.

<sup>3</sup>An opposite riparian owner cannot compel his neighbor, who has constructed a wing-dam on his own side of the stream, to take the water at the point where the dam abuts on the shore, if it can be more advantageously taken some distance higher up the stream, where he has no interest in the dam, and the flow of the water in the stream is not affected injuriously to his right. *Pinney v. Luce*, 44 Minn. 367, 46 N. W. 561; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

use.<sup>4</sup> The extent to which such rights can be acquired is treated in a subsequent section.<sup>5</sup> The grant by the owner of land on one side of a stream to the owner of land on the opposite side, of a right to connect a dam across the stream with the grantor's land, confers a perpetual easement therein and involves the right to use and occupy the grantor's land for the purpose of a dam so long as the same is kept up.<sup>6</sup> When an easement to abut a dam on another's land has once been acquired it cannot be extinguished contrary to the wish of the owner of the dominant estate, except by an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years.<sup>7</sup> And the right, when acquired, is a valuable right which cannot be taken away from the owner's devisee without compensation.<sup>8</sup> The agreement under which the dam is constructed may provide for the quantity of water which each owner shall be entitled to use.<sup>9</sup> Mere neglect to contribute to the maintenance of a dam, as stipulated in the covenant between two opposite riparian owners, will not cause a forfeiture of the privilege or easement vested by the deed,—especially when both parties are equally negligent, as either could repair, and sue for contribution.<sup>10</sup> If a dam is thrown across the stream without authority the one upon whose property it is wrongfully located may remove so much of it as is upon his property.<sup>11</sup> And notice need not be given of intention to do so.<sup>12</sup> The one removing the dam will not be liable for injuries resulting to the property of the wrongdoer unless they were inflicted wantonly,—especially if the dam was injuring his property.<sup>13</sup> The South Carolina court held that one who is about

<sup>4</sup>*Odiorn v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Bliss v. Rice*, 17 Pick. 23.

Where one of two opposite riparian proprietors, without title either by grant or prescription to the farther shore or the water privilege, each owning to the centre of the stream, has for many years maintained a dam extending from his own to his neighbor's bank, and diverted water through a ditch to his mill, he has no cause of action against the other for destroying half of the dam from the latter's side, notwithstanding the defendant had never appropriated the water to any special use and although the act deprived plaintiff's mill of all running power. *Adams v. Barney*, 25 Vt. 225.

A corporation which having agreed to submit to arbitration the amount to be awarded a landowner for the right to abut a dam on his property will, in case it revokes the arbitration before the award, be liable to the landowner for all damages he has sustained in consequence of

such refusal, such as expenses of counsel, witnesses, etc. *Miller v. Junction Canal Co.* 53 Barb. 590.

<sup>5</sup> See post, § 532.

<sup>6</sup>*Sanitary Dist. v. Adam*, 179 Ill. 406. 53 N. E. 743.

<sup>7</sup>*Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219.

<sup>8</sup>*Sanitary Dist. v. Adam*, 179 Ill. 406. 53 N. E. 743.

<sup>9</sup>*Sanitary Dist. v. Adam*, 179 Ill. 406. 53 N. E. 743.

The question of the utilization of the power created by a dam is discussed in § 471, ante.

<sup>10</sup>*Lindeman v. Lindsey*, 69 Pa. 93, 8 Am. Rep. 219.

<sup>11</sup>*Richardson v. Emerson*, 3 Wis. 319, 62 Am. Dec. 694.

<sup>12</sup>*Brown v. Spalding*, 1 Pittsb. 361.

<sup>13</sup>*Marsh v. Brooks*, 2 Hill L. 427.

Where one erects a dam partly upon his own land and partly upon adjoining land, the adjoining owner may tear

to remove a dam which has been constructed across a stream and is flooding his land need not give notice to the owner of the dam for the purpose of enabling him to protect his property, where he had previously sued such owner for the injury resulting from the dam, thereby practically notifying him of his objection to its continuance.<sup>14</sup> That decision appears to place a limitation upon the general rule. But that result occurred merely because the court was applying the rule to the facts of the case. Notice is not necessary in any case unless the one upon whose land the dam is placed has acquiesced in the trespass, so that it will result in a hardship for him to revoke the implied license without giving notice. When one is lawfully engaged in pulling down the part of a dam resting on his land, and those who are assisting him go on the dam and raise the gates, letting out the water, although this latter act is unlawful, he will not be liable, when the act was not done by his direction or with his assent, although done with a view to aid in the work.<sup>15</sup> To entitle a riparian owner to an injunction restraining the defendant from rebuilding a dam which had connected with the plaintiff's land, it is incumbent on the plaintiff to show that the defendant had no right to construct the dam at the time of the institution of the suit; and, where this is shown, the plaintiff is entitled to have the injunction perpetuated and to recover costs, although the defendant, after the institution of the suit, connected the dam with the land of another person.<sup>16</sup> For the purpose of determining the right to the water power obtained by several dams, one of which extends from one shore of the river to an island, and another from such island to another island, while the third reaches from the island to the further shore,—such dams constitute a single hydraulic work, where the use of either is impracticable without the others.<sup>17</sup>

**532. Change of natural rights.**—The natural rights of the owners of land on the opposite sides of the stream may be changed in various ways. The right to abut a dam on the opposite shore may become the subject of grant, but the right to maintain it there permanently, necessitates a transfer of an interest in the land, and as such it cannot pass by parol, but requires a deed,—a parol agreement for such right being void within the statute of frauds.<sup>1</sup> If the dam is erected on

down in a proper manner that part of the dam constructed on his land, although as a result the entire dam falls down. *Wigford v. Gill*, Cro. Eliz. pt. 1, p. 269.

<sup>14</sup>*Marah v. Brooks*, 2 Hill L. 427.

<sup>15</sup>*Richardson v. Emerson*, 3 Wis. 319, 62 Am. Dec. 604.

<sup>16</sup>*Thomas v. Junction City Irrig. Co.* 80 Tex. 550, 16 S. W. 324.

<sup>17</sup>*Dexter v. Jefferson Paper Co.* 22 Misc. 389, 50 N. Y. Supp. 557.

<sup>1</sup>*Moulton v. Faught*, 41 Me. 298; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60.

the land of the opposite owner merely by his consent, without the grant of a right, it is personal property.<sup>2</sup> A grant of a right to abut a dam on land of the grantor is not void in favor of subsequent purchasers of the grantor's estate merely because no consideration is mentioned in the deed.<sup>3</sup> All the parties to an agreement by which the owners of mills on one side of a river are given a right to connect their dam with the opposite bank are necessary parties to a bill to enforce the agreement.<sup>4</sup> Since the right may be conferred by grant, it may also be acquired by prescription, which presumes a grant. But in order to perfect title in that manner the actual possession must be continued for the prescriptive period.<sup>5</sup> The acquisition of a prescriptive right to abut a dam upon property, however, confers no title in the land. Only an easement for the support of the dam is acquired.<sup>6</sup> Not only natural rights with respect to the abutting of a dam on the property of the opposite owner may be changed, but the rights with respect to the use of the water in the stream may also be changed. This may be effected by contract,<sup>7</sup> by estoppel,<sup>8</sup> or by prescription.<sup>9</sup> But a prescriptive right to abut dams upon an island in a river does not carry with or give any right to use the water pertaining to either shore of the island; such right can be acquired only by prescription, by use of the waters under claim of right in hostility to the rights of the riparian owner, and cannot be based upon nonuser

<sup>2</sup>*Southard v. Hill*, 44 Me. 92, 69 Am. Dec. 85.

<sup>3</sup>*Boynton v. Rees*, 8 Pick. 329, 19 Am. Dec. 326.

<sup>4</sup>*Burnham v. Kempton*, 37 N. H. 485.

<sup>5</sup>*Beidelman v. Foulk*, 5 Watts, 308.

A prescriptive right to maintain a dam across a navigable river is established as against the owner of land used for one end thereof, by the continuous, adverse possession and use of such land for that purpose for nearly forty years under color of title. *Pioneer Wood Pulp Co. v. Chandos*, 78 Wis. 526, 47 N. W. 661.

The owner of one end of a dam may acquire a prescriptive right in the continued maintenance of the other end. *Warren v. Westbrook Mfg. Co.* 88 Me. 58, 35 L. R. A. 388, 51 Am. St. Rep. 372, 33 Atl. 665. But see *Warren v. Westbrook Mfg. Co.* 88 Me. 69, 33 Atl. 668.

<sup>6</sup>The owner of a dam can acquire no title to land by reason of one end thereof abutting on another's land for the prescriptive period,—he only acquires an easement therein. *Trask v. Ford*, 39 Me. 437.

<sup>7</sup>The owner of a mill on one side of

a river, who acquires by deed a parcel of land on the other side and a right to draw a certain quantity of water from a dam, has not, on that account, the privilege of using his share of the water from either end of the dam so that he may change back and forth at his pleasure. *Burnham v. Kempton*, 44 N. H. 78.

But one who has a right to all the water when there is not sufficient to run the mills on both sides cannot erect a barrier in the stream to divert the water to his side. *Curtis v. Jackson*, 13 Mass. 507.

<sup>8</sup>The owner of one bank of a stream is not estopped from objecting to the diversion of the stream by omitting to object when seeing the opposite owner constructing a factory on his land, and a race which will return the water to the stream below the land. *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822, 14 N. E. 269.

<sup>9</sup>*Bliss v. Rice*, 17 Pick. 23.

The owner of one shore of the stream can gain no prescriptive right to use the entire water power by structures wholly on his own side of the stream, so long

by the owner, no matter how long continued.<sup>10</sup> The right of a mill owner to abut or connect a dam with the land of an opposite riparian proprietor must be presumed when evidence establishes its existence substantially in the same condition for fifty years.<sup>11</sup> Where one in possession of mills on one side of a river has acquired water rights by adverse user, the grantee under a conveyance of land on the other side of the river, with an appurtenant mill privilege, will not acquire any water rights which will be inconsistent with his.<sup>12</sup> The right will be limited by the extent of the user.<sup>13</sup> The peculiar use by the owner of one bank of the stream of the water power raised by a dam will not create an easement on the opposite lands already subject to mortgage, as against a purchaser on foreclosure.<sup>14</sup> That one who, with his predecessors in title, has maintained a dam and diverted water for over sixty years under a claim of right, stated that he owned only to the center of the stream and asked if the person addressed would sell the title to the other bank, who replied that he would not, but would not interfere with the dam,—does not disprove adverse possession on the ground of the acceptance of a license.<sup>15</sup> Where suit is brought to enforce prescriptive rights to a certain amount of water power created by a dam owned in part by defendant, plaintiffs must show ground for equitable relief by alleging ownership or interest or riparian rights impaired by defendant, or equity will not interfere.<sup>16</sup> The rights of the parties may be fixed by a judgment of court which in some manner changes the natural rights of the parties.<sup>17</sup>

as the opposite proprietor neither uses nor seeks to use, nor makes any preparation nor has any occasion for the use, of the part of the stream to which he is entitled. *Pratt v. Lamson*, 2 Allen, 275.

<sup>10</sup>*Dexter v. Jefferson Paper Co.* 22 Misc. 389, 50 N. Y. Supp. 557.

<sup>11</sup>*Yeasie v. Duinck*, 50 Me. 479.

Where an owner of land on one side of a stream, upon which he has long maintained a dam built to the opposite bank, takes from the owner of the opposite bank a lease of the land there situated, "together with the benefit and use of all falls and water thereupon, running through, or adjoining the premises," he is precluded from thereafter claiming an adverse, exclusive user of the water along the premises as against the lessor. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 101, Affirming 39 Barb. 311, 34 Barb. 485.

<sup>12</sup>*Whittier v. Cocheeo Mfg. Co.* 9 N. H. 454, 32 Am. Dec. 382.

<sup>13</sup>Where one has acquired a prescriptive right to abut a dam across a river

to the opposite shore, and to use the water raised for certain mills only, he cannot claim the right to use all the water held by the dam so as to deprive the owners on the opposite shore of their water rights. *Burnham v. Kempton*, 44 N. H. 78.

In that case Sargent, J., said that the same proof of user which establishes a prescriptive right to maintain a dam across a river and to use therefrom a certain quantity of water is equally conclusive for the benefit of the party against whom the right is attempted to be set up, to establish the limitations of that right.

<sup>14</sup>*Dyer v. Cranston Print Works Co.* 22 R. I. 506, 48 Atl. 791.

<sup>15</sup>*Re Clark*, 21 N. Y. S. R. 711, 4 N. Y. Supp. 250.

<sup>16</sup>*Warren v. Westbrook Mfg. Co.* 88 Me. 69, 33 Atl. 668.

<sup>17</sup>Where a suit is instituted by the owner of a dam against a riparian proprietor, in which the proprietor sets up damages caused by water thrown upon

**533. Remedy for injury.**—The same remedies are available between opposite proprietors as between those who adjoin on the course of the stream. The injured person may maintain an action at law to recover his damages, and, if that remedy is inadequate, he may bring a suit in equity to enjoin the wrongful act of the opposite owner. The facts that plaintiff has never improved his own property nor attempted to use his water power will not prevent his maintaining an action for interference with his substantial rights.<sup>1</sup> Before an action can be maintained by one riparian proprietor against another for an infringement of his rights as such proprietor, he must show that he has been substantially damaged by acts of the latter which exceed the common right of all the proprietors in and over the waters of the stream.<sup>2</sup> The owner of a mill on one side of the river, whose wheel is interfered with, and rights injured, by the raising of the dam by the owner of the other side, is not deprived of his right to recover for the consequent injuries by the fact that he is only entitled, in times of scarcity of water in the river, to the use of the water one-fourth of the time.<sup>3</sup> When one of two owners of the banks of an eddy enters on the land of the other to seize and remove floating timber brought down by the stream, which each has an equal right to take upon his own shore, he is liable both for trespass on his neighbor's freehold and also for invading the latter's exclusive right to capture and convert such driftwood from his own beach; and, in the last case, the measure of damage is not the worth of the appropriated wood, but the value of the chance lost to take and enjoy it, gauged by the likelihood of its reclamation by up-stream owners, its escape altogether from the pool, or its carriage to the trespasser's shore and lawful seizure by him.<sup>4</sup> In an action for removing from the bank of a stream drift wood which in time of floods prevented the washing away of the soil but cast the water in additional quantities onto the land of the opposite owner who caused its removal the injury inflicted on the land is permanent, and prospective damages may be assessed.<sup>5</sup>

his land, and in which judgment is rendered in favor of the plaintiff, refusing damages to the defendant and forever enjoining him from interfering with the dam,—such suit is a bar to a suit subsequently instituted by the riparian owner against the owner of a dam to restrain him from repairing it, on the ground that it will force water upon the lands, and that the owner of the dam was a mere licensee and that the proprietor could revoke the license at his pleasure.

*Thomas v. Junction City Irrig. Co.* 80 Tex. 550, 16 S. W. 324.

<sup>1</sup>*Minnesota Loan & T. Co. v. St. Anthony Falls Water Power Co.* 82 Minn. 505, 85 N. W. 520.

<sup>2</sup>*Crawford v. Rambo.* 44 Ohio St. 279, 7 N. E. 429.

<sup>3</sup>*Burdick v. Glasko.* 18 Conn. 494.

<sup>4</sup>*Rogers v. Judd.* 5 Vt. 223, 26 Am. Dec. 299.

<sup>5</sup>*Walker v. Davis.* 83 Mo. App. 374.

## IX. PRESCRIPTIVE RIGHTS IN WATER COURSE.

**534. Rights acquired by priority of use.**— Before proceeding to consider how far rights in the flow of water may be acquired by prescription, it is necessary to determine how far they may be acquired by mere priority of use. The rule which was finally established is that every owner of land along a stream has an equal right to the use of the water, and that he may begin to enjoy such use whenever he desires to do so, and that his rights are not affected by the fact that others have made a prior use of the stream, unless, in so doing, they have actually interfered with his rights and continued to do so long enough to acquire a prescriptive right. This rule was not clearly perceived in the early cases and some conflicting decisions were made before it was established. At first it seems to have been thought that, in order to give one riparian owner a right to complain of the use of a stream made by another, it was necessary for him to have acquired a prescriptive right to enjoy the flow of the stream in the manner in which he had been using it. In a case in the Year Books it was said that if I have a mill by prescription on my land, and another erects a new mill on his land, and thus takes the stream from my mill, or stops it, or takes more water to run his mill, so that I receive damage to my mill, so that my mill no longer grinds as much as it used to do, I may have an action on the case against him.<sup>1</sup> But in the discussion of that case Newton said that if, of two landowners abutting on the bank of a river, one has had a water mill for all time and the other none, the latter may make a new mill if he does not stop the water to the other mill or deprive it of sufficient water for its purposes. That case established, not only that there can be no interference with prescriptive rights, but that the fact that one proprietor has made use of the water will not prevent another from making use of it if he can do so without interfering with the rights of the former.<sup>2</sup> In accordance with the idea that there could be no interference with an ancient mill, Lord Holt was of opinion that no mill owner had a right of action for interference with the flow of the water unless he had an ancient mill. In *Heblethwait v. Palms*,<sup>3</sup> in which the court affirmed a judgment in favor of plaintiff<sup>4</sup> for diverting a water course, although the record

<sup>1</sup> 1 Rolle Abr. 107, 22 Hen. VI. 14, whom the stream was diverted owns the pl. 23.

<sup>2</sup> *Saunders v. Newman*, 1 Barn. & Ald. 258, 19 Revised Rep. 312.

<sup>3</sup> *Carthew*, 85, 3 Mod. 48.

<sup>4</sup> *Palms v. Heblethwait*, *Skinner*, 65, where it is stated that if the one from that plaintiff in that case not owning



did not allege that plaintiff's mill was ancient, Lord Holt insisted that plaintiff should prove his mill to be ancient or be nonsuited. The rule laid down by the majority of the court, however, was to the contrary, and it is not necessary to show a prescriptive right to enjoy the flow of the water in order to maintain an action for interference with it.<sup>5</sup>

It being thus settled that prescriptive use was not necessary to give a right to the flow of the water, the question arose upon what the right depended, and the courts did not at first perceive that it depended upon the natural right to have the stream retain the form given it by nature, but held that it depended upon the fact that the complainant had made an actual use of the water. If one having a mill have a right to prevent the diversion of water from it without showing that it was ancient, they naturally thought that the right of action must depend upon the fact that the complainant had appropriated and was making a use of the water. Carried to its logical conclusion, this idea made necessary the holding that when one had made such an appropriation it could not be interfered with by another. And the converse was assumed to be true, to wit, that, before one could complain of an interference with the flow, he must have made some actual use of the water. In *Williams v. Morland*,<sup>6</sup> the court held that, although flowing water is originally *publici juris*, as soon as it is appropriated by an individual his right is coextensive with the beneficial use to which he appropriates it. Under this rule the one making the first use of the water had a right to continue his use regardless of its effect upon the other riparian owners along the stream. And this rule was approved by the judges for several years.<sup>7</sup> This doctrine, in

the water course but prescribing to it, he ought to show that the mills were ancient.

<sup>5</sup>*Anonymous*. Cro. Car. 499; *Cox v. Matthews*, 1 Vent. 239.

In *Rutland v. Bowler*, Palmer, 290, it was held that an owner of a mill could sue for diverting the stream from its ancient course, although his mill, in connection with which he used the water, was new.

<sup>6</sup>2 Barn. & C. 913, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579.

<sup>7</sup>*Liggins v. Inge*, 7 Bing. 692, 5 Moore & P. 712, 9 L. J. C. P. 202; *Canham v. Fisk*, 2 Cramp. & J. 126, 2 Tyrw. 155, 1 L. J. Exch. N. S. 61; *Saunders v. Newman*, 1 Barn. & Ald. 258, 19 Revised Rep. 312.

In *Bealey v. Shaw*, 6 East. 208, 2 Smith. 321, 8 Revised Rep. 466, where,

after a lower proprietor had appropriated the surplus of the water left by prior mill owners, the latter undertook to enlarge their works so as to take more of the water to the detriment of the lower proprietor, Le Blanc, J., said: "The true rule is that after the erection of works and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterward takes what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do it afterwards." And at the argument the case of *Prescott v. Phillips* (1798) was cited to the effect that nothing short of twenty years' undisturbed possession of water diverted from the natural channel or raised by a weir

practical application, seems to have been limited to giving the appropriator a standing in court to object to interference with the flow of the stream by another. This is illustrated by *Frankum v. Falmouth*,<sup>8</sup> in which the plaintiff claimed the water right as the owner of the mill. The court said, if water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of land on both sides of it who appropriates it without doing injury to anyone either above or below him acquires such a right by his appropriation that, while he may not have enjoyed his appropriation for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. But in that case it was held that the plaintiff should have claimed the right in respect of the land, and not in respect of his mill. Whatever the extent to which the doctrine was carried may have been, however, it was completely overthrown by subsequent decisions. In *Mason v. Hill*,<sup>9</sup> the court held that the right to flowing water does not belong to the first appropriator to the exclusion of other riparian owners. Defendant contended that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title to it against all the world, including the proprietor of the land below; there is no right of action against him unless such proprietor has already applied the stream to some useful purpose with which the diversion interferes; and in the default of his having done so, the prior user may altogether deprive him of the benefit of the water. The court said that the contention that the first occupant of running water for a beneficial purpose has a good title to it is perfectly true in this sense,—that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. But it is a very different question whether

would give a person an adverse right against those whose land lay lower down the stream and to whom it was injurious.

In *Cross v. Leois*, 2 Barn. & C. 686, 4 Dowl. & R. 234, 2 L. J. K. B. 136, an action for erecting a wall near plaintiff's ancient windows, Holroyd, J., said: "A stream of water is at first the property of the person through whose land it flows; but the water may be appropriated by an individual, and after he has enjoyed it for a certain length of time, that enjoyment cannot be interrupted, although it might at first have been prevented."

Mr. Woolrych adopted this view. He stated that water is in the first instance common to all, but it is in the power of an individual to appropriate a portion of that universal property to himself for his own private benefit, whereby he acquires the title to use the stream independently of, and without molestation from, others. Woolrych, *Waters*, p. 257.

<sup>8</sup> 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B. N. S. 26, 90.

<sup>9</sup> 5 Barn. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118.

he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and deprive him of it altogether by intercepting him in its application to a useful purpose. The Roman law considered running water, not as a *bonum vacans* in which anyone might acquire a property, but as public or common in this sense only—that all might drink it or apply it to the necessary purposes of supporting life, and that no one has any property in the water itself except in that portion which he might have abstracted from the stream, and of which he had the possession: and during the time of such possession only. The court adds: "We think no other interpretation ought to be put upon the passage in Blackstone, and that the *dicta* in which water is said to be *publici juris* are not to be understood in any other sense." And the conclusion is that the plaintiff is entitled to recover in respect of the abstraction of water by the defendant for the use of a mill for which it had been appropriated before it had been put to use by plaintiff.<sup>10</sup> This rule at once found favor with the courts.<sup>11</sup> And in *M'Glone v. Smith*,<sup>12</sup> where it was held that an upper proprietor might maintain an action against a lower one for increasing the height of a weir, the effect of which was to raise the height of water flowing past the plaintiff's land, although no actual damage was done, the court held that *Williams v. Morland* was overthrown in *Mason v. Hill*. The rule that there is no priority between the several riparian owners along the stream applies to its full extent to purchasers of government land through which a stream flows, so that the first proprietor on the stream has no priority of right to the use of the water over those who subsequently acquire title.<sup>13</sup>

<sup>10</sup> The same result had been reached upon the motion for new trial in the same case. *Mason v. Hill*, 3 Barn. & Ad. 304, 1 L. J. K. B. N. S. 107.

<sup>11</sup> *Embrey v. Owen*, 6 Exch. 355, 20 L. J. Exch. N. S. 212, 15 Jur. 633; *Chasemore v. Richards*, 2 Hurlst. & N. 168; *Rampson v. Hoddinott*, 1 C. B. N. S. 611, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 230.

In *Wood v. Waud*, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472, the court says that the principles which regulate the law as to natural streams were placed on their right footing in *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118.

In *Chasemore v. Richards*, 7 H. L. Cas. 387, it is said by Lord Wensleydale that "we may consider that this proposition is indisputable, that the right of the pro-

prietor to the enjoyment of a water course on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. And the expressions used by Mr. Justice Bayley in *Williams v. Morland*, 2 Barn. & C. 910, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579, and by Lord Chief Justice Tindal in *Liggins v. Inge*, 7 Bing. 682, 5 Moore & P. 712, 9 L. J. C. P. 202, that water flowing in a stream is *publici juris*, and the property of the first occupier, are founded on a mistake between the property in the water itself and the right to have its continual flow."

<sup>12</sup> 1r. L. R. 22 C. L. 559.

<sup>13</sup> The United States, as the owner of land on a stream in a state, has only the right to the use of the waters thereof in common with all the owners of the adjacent land; and a purchaser from the

**534a. Effect of *Williams v. Morland* in America.**—Some of the courts in this country were inclined to follow the rule announced by the English court in *Williams v. Morland*, and to hold that the one who first made an appropriation of the use of the water had a right to control its flow. And there are expressions in some of the earlier cases that such was the rule.<sup>1</sup> The Nebraska court even went to the extent of holding that the law concerning the erection of mills favors diligence, and gives priority to the person who in good faith first commences the erection of a mill or dam.<sup>2</sup> And the Delaware court held that a prior occupant of a lawfully established mill site on a stream has a right to flowage in the stream below his mill for the purpose of venting the waters of his mill pond according to the natural descent and course of the waters.<sup>3</sup> These decisions are, however, not only opposed to the later English rule, but to the principle upon which the doctrine of riparian right is founded. There is no ownership of the water on the part of any riparian owner.<sup>4</sup> And none can

United States gets only such right, and is not entitled to priority in the use of such waters by reason of the priority of his purchase. *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

<sup>1</sup>*Strickler v. Todd*, 10 Serg. & R. 63, 13 Am. Dec. 649.

A later case, however, stated that the right of prior appropriation has regard to the *quantum* of water withdrawn from the stream common to all parties, and not to the *quantum* of fall. *McAlmont v. Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102. And the doctrine was afterwards wholly abandoned, as will appear by decisions subsequently cited.

In *Tye v. Catching*, 78 Ky. 463, it seems to be decided without any discussion of the question that the right to use a stream for mill purposes can be acquired by occupancy, and that when once acquired a subsequent locator of a mill must take the stream as he finds it. For this doctrine, Angell, *Watercourses*, §§ 130 and 360 are cited; but § 360 treats of special grants and reservations, and § 130 states the old doctrine of the common law, while the author goes on in the subsequent sections to state the doctrine of the later English and American cases to the contrary.

In New Jersey the court held that a prior occupancy of the stream is considered an appropriation of it. And if such appropriation be made,—as, for instance a mill or an artificial work be erected on a stream of water not before occupied,—the person so making the ap-

propriation may acquire rights to it as against the riparian proprietor. When there has been an enjoyment of a stream of water in a particular mode for a long period of time, without interruption on the part of other proprietors, their natural rights may be seriously impaired and even entirely lost. They may lose the natural right of using the water in common. Their enjoyment must be subject to the right of the prior appropriator. *Shreve v. Voorhees*, 3 N. J. Eq. 25.

<sup>2</sup>*Nosser v. Seeley*, 10 Neb. 460, 6 N. W. 755.

<sup>3</sup>*Delaney v. Boston*, 2 Harr. (Del.) 489.

<sup>4</sup>2 Bl. Com. 18; *Hudson River R. Co. v. Loeb*, 7 Robt. 418.

Hosmer, Ch. J., in *Mitchell v. Warner*, 5 Conn. 497, citing *Brown v. Best*, 1 Wils. 174, 1 Inst. 46, and *Sury v. Pigot*, Popham, 166, uses the following language: "Water is neither land nor tenement, nor susceptible of absolute ownership. It is a movable, wandering thing; and must, of necessity, continue common by the law of nature. It admits only of a transient, usufructuary property; and if it escapes for a moment, the right to it is gone forever; the qualified owner having no legal power of reclamation."

No riparian proprietor has any property in the water, for, like the air, it cannot be appropriated as the exclusive property of anyone; but each of them may simply use it as it passes along. *Rhodes v. Whitehead*, 27 Tex. 310, 84

be acquired except so far as the water is removed from the stream and stored so that it cannot escape. Moreover, the rights of the various owners along the stream are equal, and the right to use is limited to the land of the one seeking to make use of the water. Each may use the water as he finds it upon his property, and the use which a proprietor above or below him has made of it is wholly immaterial. Therefore the fact that the upper or lower owner may have made an appropriation of the water as it flows through his land does not prevent a riparian owner from utilizing the water upon his own property when he chooses to do so. And this is the rule that has been adopted by the almost unanimous weight of authority. Therefore, one owner by erecting a mill cannot control the flow of the water upon the property above him any further than he may insist that the upper owner shall not make an unreasonable use of his common right.<sup>5</sup> And as against the lower owner an appropriation will not justify a diversion or unreasonable detention of it.<sup>6</sup> Nor can an appropriation give a right to interfere with a mill site on the upper property.<sup>7</sup> And generally such appropriation does not affect the rights of any other proprietor on the stream.<sup>8</sup> As said in *Barkley v. Wilcox*,<sup>9</sup> the multiplied uses to which, in civilized society, the waters of rivers and streams are applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by an individual of the water in a stream or any unreasonable narrowing of the flow. The only effect which the fact of

Am. Dec. 631; *Fleming v. Davis*, 37 Tex. 173.

<sup>5</sup>*Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 606; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Omelvany v. Jaggers*, 2 Hill, L. 634, 27 Am. Dec. 417; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Hartzall v. Sill*, 12 Pa. 248; *Whaler v. Ahl*, 29 Pa. 98; *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Merritt v. Brinkerhoff*, 17 Johns. 319, 8 Am. Dec. 404; *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270; *Thomas v. Brackney*, 17 Barb. 654.

<sup>6</sup>*Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 107; *Van Hoesen v. Coventry*, 10 Barb. 518.

Prior user of the waters of a stream by a riparian proprietor to furnish power for mill purposes does not give him a paramount right to its use to the injury of a lower riparian proprietor subsequently establishing a mill and us-

ing the waters of the stream to supply power thereto. *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

<sup>7</sup>*Stout v. McAdams*, 3 Ill. 67, 33 Am. Dec. 441; *Hendrick v. Cook*, 4 Ga. 241; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914.

Mere priority in the construction of a mill and dam across a stream will not confer upon one exclusive rights of flowage so as to enable him to enlarge his dam and thereby throw water back on another's mill, built subsequently. *Gilman v. Tilton*, 5 N. H. 231.

<sup>8</sup>*King v. Tiffany*, 9 Conn. 162; *Gilman v. Tilton*, 5 N. H. 231; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Cowles v. Kidder*, 24 N. H. 378, 57 Am. Dec. 287; *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Tyler v. Wilkinson*, 4 Masson, 397, Fed. Cas. No. 14,312; *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 55; *Bliss v. Kennedy*, 43 Ill. 67.

<sup>9</sup>86 N. Y. 140, 40 Am. Rep. 519.

appropriation and use by the riparian owner can be given, therefore, is to determine the measure of damages for interference with the flow of the stream. If there has been no use of the water the riparian owner cannot claim substantial damages for alleged injury to his right, whereas, if he has made such appropriation and use, he may recover for the injury caused by being deprived of the use which he has made, if he has not exceeded his rights in that regard.<sup>10</sup> So, in *Wood v. Waud*,<sup>11</sup> the court held that where the plaintiff at the time of the construction of a mill was the owner of the soil adjoining the water course and had a right to the unobstructed flow of the water after appropriating it to the use of the mill, he may maintain an action against one obstructing the water after its appropriation to the use of his mill, and recover for the injury to the mill, though the mill had not been erected for a period of twenty years. The result is that mere appropriation of the water to a particular use will not give the appropriator a right to have the stream flow in a particular way; nor will it deprive other owners of the right to begin to use the flow at their pleasure.<sup>12</sup> The only way in which the right to monopolize the stream can be acquired without the express assent of other owners is by adverse use for the prescriptive period.<sup>13</sup> The limits of such right will be examined in succeeding sections.

**534b. Rule in Massachusetts and Maine.**—The Massachusetts court seems at first to have adopted the rule of prior appropriation to its full extent. It held that the owner of a mill site who first occupies

<sup>10</sup>*Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50; *Holker v. Porritt*, L. R. 10 Exch. 59, 44 L. J. Exch. N. S. 52, 33 L. T. N. S. 125, 23 Week. Rep. 400, Affirming L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, 21 Week. Rep. 414.

<sup>11</sup>The court in deciding this distinguished it from the case of *Frankum v. Palmouth*, 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B. N. S. 26, 90, on the ground that the claim in the *Frankum Case* was not to have the flow of the river in its natural course for the supply of the mill, but to an easement to dam back in *alieno solo*; and as the mill was not twenty years old that claim could not be established.

<sup>12</sup>*Kecney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576; *Parker v. Hotchkiss*, 25 Conn. 321.

No priority of occupation or use of water by a mill owner, upon a stream within the limits of his own estate, affects the right of the riparian proprietor above to erect and operate a mill in

a suitable and reasonable manner upon his own land, or to cultivate or make improvements thereon, using or diverting the waters of the stream for that purpose, unless he thereby sensibly affects the rights of such mill owner and works an injury to his mill. *Norway Plains Co. v. Bradley*, 52 N. H. 86.

<sup>13</sup>No riparian proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has acquired the right to use the water in some particular manner and differently from what he would be entitled to do as a mere riparian owner, which he may do by an uninterrupted enjoyment for such a length of time as would afford a conclusive presumption of a grant. *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Williams v. Wadsworth*, 51 Conn. 277; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Ingraham v. Hutchinson*, 2 Conn. 592.

it by erecting a dam and mill will have a right to water sufficient to work his wheels if the privilege will afford it, notwithstanding he may, by his occupation, render useless the privilege of anyone above or below him upon the same stream.<sup>1</sup> This doctrine was stated in the case of *Hatch v. Dwight* as a general proposition of law, and there is no hint that the ruling was required by the mill acts. But the key of the decision is furnished by *Storm v. Manchaug Co.*<sup>2</sup> where the court, in considering the right of an upper proprietor to dig a ditch on his own land to prevent the flooding of it by a dam of a lower proprietor in process of erection, said the priority of right secured by a priority of occupation has always been determined by the express language of the statute. Before the Revised Statutes, if an upper proprietor was building a mill, he was held to have so far appropriated the water privilege that the lower proprietors could not erect a new dam or raise an old one to his injury.<sup>3</sup> By a slight, and, perhaps, unintentional, change of phraseology introduced into those statutes, it was held that the law was changed, and nothing but an existing mill could prevent a lower proprietor from putting a milldam upon his own land, although the effect of it might be to destroy an upper privilege which its owner had previously begun to occupy.<sup>4</sup> This was altered and the old rule restored in 1841. The limits of the rule are stated in *Gould v. Boston Duck Co.*<sup>5</sup> as follows: When one proprietor upon the banks of a river has in fact appropriated the water, the proprietor below is so far restricted in his right to appropriate that he cannot erect a mill on his own land to flow back the water to the destruction of the mill already erected by authority of law. This priority of possession necessarily arises from the nature of the appropriation. When two men have equal right to appropriate, and where the actual appropriation of one necessarily excludes all others, the first in time is the first in right. But the mere erection of a

<sup>1</sup>*Hatch v. Dwight*, 17 Mass. 296, 9 Am. Dec. 145; *Cary v. Daniels*, 8 Met. 476, 41 Am. Dec. 532; *Whitney v. Eames*, 11 Met. 519; *Fuller v. Chicopee Mfg. Co.* 16 Gray, 44; *Pratt v. Lamson*, 2 Allen, 288; *Lowell v. Boston*, 111 Mass. 465, 15 Am. Rep. 39.

So, there is no right to use water for irrigation as against the right of the lower owner to the water for a mill which has stood for forty years. *Cook v. Hull*, 3 Pick. 269, 15 Am. Dec. 208.

<sup>2</sup>13 Allen, 10.

<sup>3</sup>Citing *Bigelow v. Newell*, 10 Pick. 348.

<sup>4</sup>*Baird v. Wells*, 22 Pick. 312.

In the absence of the statute, no right

will be acquired by the erection of a dam. *Rearse v. Perry*, 117 Mass. 211.

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it appeared that the upper proprietor on a stream was making such use of the stream as to foul the water and make it corrode plaintiff's machinery when he attempted to use it in his mill. The court said: "We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused as against a riparian owner of land on the same stream below."

<sup>5</sup>13 Gray, 442.

mill will not prevent other persons from erecting their mills above on the stream and running them in the natural way, although the result will be that the water does not come down the stream in its ancient manner and cannot be so successfully utilized by the lower owner as it was before. An appropriation of the water of a stream to mill purposes gives the proprietor a prior and exclusive right to such use only so far as it is actual. If he has appropriated only to a certain extent, and there is a surplus remaining, the proprietor below may have the benefit of that surplus. If the latter appropriates that surplus, he is, as to that part of the stream, the first occupant and makes the first appropriation. As to that, his right is prior and exclusive.<sup>6</sup> The upper proprietor cannot, after a lower proprietor has made an appropriation of the water power on his land, lower a dam or change the bed of the channel of the stream so as to interfere with the rights of the lower owners.<sup>7</sup> The court of Maine has, upon most questions, followed the decisions in Massachusetts. But upon this question it does not seem to have done so. The court very early held that running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it.<sup>8</sup> An exclusive right to a mill privilege is not sustained by occupancy alone for a period short of twenty years, as against those holding above or below him on the stream.<sup>9</sup> And that rule was followed for a time.<sup>10</sup> But finally a statute provided that no mill should be erected to the injury of any mill lawfully existing above or below it on the same stream.<sup>11</sup> And under the influence of this statute it is held that, where there are two mills on the same privilege, the owner of the last-erected and upper mill will be liable for the loss sustained by the older and lower mill because of decreased flowage, it being shown that the improved machinery of the newer mill required less water to carry it than the older mill required.<sup>12</sup> And the dam which is first in time is first in right.<sup>13</sup> But an omission by a riparian owner to

<sup>6</sup>*Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532.

<sup>7</sup>*Gleason v. Assabet Mfg. Co.* 101 Mass. 72.

<sup>8</sup>*Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

<sup>9</sup>*Butman v. Hussey*, 12 Me. 407.

But by appropriating the water of a stream to the use of a mill by constructing a milldam the owner may acquire a right to be protected, although the water is not actually used for that purpose but merely held for that use when it suits the owner's convenience to so apply it. *Ibid.*

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<sup>10</sup>*Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

The prior erection of a mill by one of two joint owners of a mill privilege will not deprive the other of his right to his share. *Bailey v. Rust*, 15 Me. 440.

<sup>11</sup>*Thomas v. Hill*, 31 Me. 252; *Wentworth v. Poor*, 38 Me. 243; *Lincoln v. Chadbourne*, 56 Me. 197.

<sup>12</sup>*Wentworth v. Poor*, 38 Me. 243.

<sup>13</sup>*Lincoln v. Chadbourne*, 56 Me. 197. While a mill owner may be deprived of the use of a reservoir dam erected by his grantor under a parol license subsequently revoked by the owner of the



make use of his right to the flow of the water does not impair his title or confer any right thereto upon another.<sup>14</sup> The rule adopted in Maine cannot be of universal application in states where private property cannot be taken for private use or for public use without compensation. As will be seen in a subsequent chapter,<sup>15</sup> there has been some tendency to hold that the erection and maintenance of a mill was a public use for which the power of eminent domain might be exercised. But, even conceding that it is such, it cannot be maintained to the injury of private property without compensating the owner for the injury thereby caused. And it has already been seen that the right of a riparian owner to the entire flow on his property from the higher to the lower point of the stream was property; and, being such, it cannot be interfered with by another private individual without subjecting him to an action for tort; and the legislature cannot authorize one private individual to make use of property of another against his will, even though compensation is made for the privilege.

**535. Right may be acquired by prescription.**— Having now seen that every riparian owner has an equal right to use the water as it flows past his property, and that no right is gained by an appropriation or prior use which will deprive the adjoining proprietor of any of his natural rights, we are ready to determine how far rights in the flow of water can be acquired by prescription. The courts are agreed that the right to use the water of a stream in a particular manner is one which can be acquired by prescription.<sup>1</sup> But, in order to acquire the right, all the conditions must be met which are necessary to acquire

soil, if he is the junior occupant of the privilege he is entitled to the natural flow of the stream as against the licensor of the reservoir who may later erect mills on the same privilege. *Pitnam v. Poor*, 38 Me. 237.

<sup>14</sup>*Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

<sup>15</sup>See post, chapter XXIII.

<sup>1</sup>*Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Blanchard v. Baker*, 8 Me. 266, 23 Am. Dec. 504; *Williams v. Wadsworth*, 51 Conn. 277; *Smith v. Adams*, 6 Paige, 433; *Finch v. Resbridger*, 2 Vern. 390; *Terry v. Smith*, 47 Hun. 333; *Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. No. 6,281; *Horn v. Miller*, 142 Pa. 557, 21 Atl. 994; *Baker v. Brown*, 55 Tex. 377; *Belknap v. Trimble*, 3 Paige, 577; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Mitchell v. Parks*, 26 Ind. 363; *Lutz v. McDonald*, 9 Hun. 23; *Shields v. Arndt*, 4 N. J. Eq. 234; *Hoyt v. Carter*, 16 Barb. 219; *Randall v. Silverthorn*, 4

Pa. 173; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

An easement is created by the adverse, uninterrupted use for the requisite time of water of an artificial ditch supplied by a non-navigable stream for milling purposes, with the knowledge and acquiescence of the owners of adjoining land over which the water flowed, although there is no evidence of permission or license; and a subsequent purchaser of the adjoining land over which the water flows takes subject to the easement, and has only a qualified right, and must so use the water as not to deprive the prior appropriator of a sufficient quantity to operate his mill. *Trambley v. Luteran*, 6 N. M. 15, 27 Pac. 312.

A private right to the exclusive use of the waters could be acquired under the Mexican law by prescription or by compliance with the established conditions. *Lutz v. Hoggins*, 69 Cal. 255, 10 Pac. 674.

rights in other classes of property by such title. The courts have, in some cases, stated the doctrine more broadly than the law warrants. For instance, in *Re Water Comrs.*,<sup>2</sup> the court said: "The use of water in a stream in a particular way for a period of forty years is evidence of the right to continue such use perpetually, unless it can be shown that such right in its creation related only to temporary use or was to endure but for a limited time." If the use which was made of the water was one which the proprietor had a right to make, and it did no injury to the other person, it would not make the slightest difference how long it had continued. It was not until the use of the water became wrongful as to another or injured his rights that it became adverse so that its continuance would give a good title. Therefore, to determine to what extent an adverse right can be acquired, it is necessary to consider the elements which must enter into the acquisition of such right. And in general it may be stated that to acquire such rights the user must be continuous and uninterrupted, actual, open, notorious, and exclusive.<sup>3</sup> The prescriptive right may include not only the manner of using the water, but also the regulation of its flow along its course so that an upper owner may acquire a prescriptive right to send the water down in unusual quantities when his needs require him to do so.<sup>4</sup>

**536. No adverse right to receive flow of stream.**—The riparian owner receives the water as it flows to him by natural right, and in so doing he does not interfere with the rights of any other owner on the stream; and he can gain no prescriptive right to have the flow continue by the fact that he has received it without interruption by the upper owner for the prescriptive period. It may be that the upper owner has had no use for the water, but the mere fact that he had none, and did not attempt to make any use of it, cannot deprive him of any of his rights or entitle the lower owner to insist that the flow

<sup>2</sup> 4 Edw. Ch. 545.

<sup>3</sup> Adverse possession of the right to use the water of a spring is not constituted by the construction of a fence around the spring, when it does not appear whether the fence was built in assertion of such right or as a protection to the spring; and also when it was not so constructed as to exclude others from using the water. *Hunter v. Emerson* (Vt.) 53 Atl. 1070.

The use of the whole of the water of a ditch on every alternate day by the predecessor in title of the owner of lands through which the ditch runs, under a lease of one half the water thereof every alternate day, cannot be relied

upon to establish a prescriptive right to half of such water, where the circumstances and practical construction put thereon by the parties show that it was intended the lessee should have half of the water, to be arrived at by the use of the whole for half the time. *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743.

<sup>4</sup> A municipal corporation may acquire by prescription the right to open locks in times of anticipated floods for the protection of its lands against overflow. *Simpson v. Godmanchester* [1897] A. C. 696, 77 L. T. N. S. 409, 66 L. J. Ch. N. S. 770. Affirming [1896] 1 Ch. 214, 65 L. J. Ch. N. S. 151, 73 L. T. N. S. 423.

shall continue uninterrupted, in case the upper owner finds use for the water.<sup>1</sup> Even when the upper owner is making a certain use of the water, the lower one can gain no prescriptive right to have the water flow to him as the upper owner has permitted it to flow.<sup>2</sup> In order to establish a right to the use of water for the purposes of a mill, exclusive of a riparian owner above, founded upon the presumption of a grant from lapse of time, there must have been an actual occupation of the flow of water upon the land above for a sufficient length of time.<sup>3</sup> Mere knowledge by an upper riparian proprietor of the use of water by lower riparian proprietors under a claim of right to use it does not constitute matter of estoppel, in the absence of anything to show that the upper proprietor did or said anything to mislead them into making a diversion of such water, or that any money was expended on representations by him that he would not claim any rights as against them, or had abandoned his rights to them, or had acquiesced in their taking the water to the exclusion of his rights.<sup>4</sup> Some early cases in Connecticut failed to recognize this rule, and held that where one has had the uninterrupted use of the water of a stream as it flowed in its natural and unobstructed course, for a period sufficient to raise the presumption of a grant, he and his grantees may maintain such right as against a proprietor above who interferes with the flow of the stream.<sup>5</sup> It is needless to say that there is no principle upon which these decisions can be sustained.

**537. Use must be adverse.**— Mere use of the water of a stream in a particular manner will not ripen into a prescriptive right. The rights of the riparian owners being equal, each has a right to make all the use of the water he can without infringing the rights of others; and, therefore, in order to destroy the latter's rights, the use made by

<sup>1</sup>*Crawford Co. v. Hathaway* (Neb.) 60 L. R. A. 889, 93 N. W. 781, Overruling 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303; *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282; *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Hinckley v. Nickerson*, 117 Mass. 213; *Gould v. Boston Duck Co.* 13 Gray, 442; *Thurber v. Martin*, 2 Gray, 394, 61 Am. Dec. 468; *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; *Pollitt v. Long*, 58 Barb. 20; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442; *Lord Wensleydale in Chasemore v. Richards*, 7 H. L. Cas. 387.

Such use does not entitle one to maintain an action against an upper proprietor for polluting the stream. *Stockport Waterworks v. Potter*, 3 Hurlst. & C.

300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748, Affirmed in 7 Hurlst. & N. 160, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880.

<sup>2</sup>*Vliet v. Sherwood*, 35 Wis. 229. The court says that the claim that, if a person constructing a reservoir upon a stream for his own convenience and use maintains it for the prescriptive period, he is bound to maintain it forever for the benefit of lower property owners, cannot be sustained. The upper owner may abandon the reservoir should it become onerous for him to maintain it, or should it cease to be beneficial to him.

<sup>3</sup>*Hartzall v. Sill*, 12 Pa. 248.

<sup>4</sup>*Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442.

<sup>5</sup>*Tucker v. Jewett*, 11 Conn. 311; *Ingraham v. Hutchinson*, 2 Conn. 592.

claimant must be such as to deny their existence. To show this, mere use of the water is not sufficient,<sup>1</sup> nor is use under permission of the claimant of the conflicting rights.<sup>2</sup> But the burden of showing that the use of a water privilege was under license is upon the one disputing a claim to it by adverse user.<sup>3</sup> In order to ripen into a prescriptive right the use must be under claim of right,<sup>4</sup> and adverse.<sup>5</sup> And must be such as to give the one against whom the right is claimed a right of action.<sup>6</sup> The question as to how far the use must be actually injurious to the one against whom the right is claimed is not free from difficulty. There are some uses which must, of necessity, be presumed to be injurious, such as the diversion of the water from the stream. On the other hand, there are uses which may or may not be injurious according to the use which the other proprietor is attempting to make of the water. In *Manier v. Myers*,<sup>7</sup> it is said that an easement for the use of water privileges may grow into a prescriptive right by adverse, uninterrupted enjoyment by one and a nonuser by another for twenty years; and a disseisin is not indispensable to make such enjoyment

<sup>1</sup>*Delhi v. Youmans*, 50 Barb. 316, affirmed in 45 N. Y. 362, 6 Am. Rep. 100; *Winter v. Winter*, 8 Nev. 129.

<sup>2</sup>*Hunter v. Emerson* (Vt.) 53 Atl. 1070; *Hall v. Blackman* (Idaho) 68 Pac. 19; *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 484, 23 Pac. 808, 25 Pac. 378; *Coalter v. Hunter*, 4 Rand. (Va.) 58, 15 Am. Dec. 726; *Polly v. McCall*, 37 Ala. 20.

User for irrigation purposes of the water of a canal running through the waste gate, whenever not needed in the operation of the mill, gives no right to the water for such purpose, interference with which will be restrained by injunction, where it appears to have been so used by permission of the mill owners and without notice to them of any claim of right to take water from the canal for that purpose. *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780.

In *Gray's Case*, 5 Coke, 79, it was said: "that it was adjudged in a Devonshire case that where a man prescribed to have pot water out of the river, etc., and the jury found that he ought to have it, paying 6d. yearly, he had failed of his prescription, for he had prescribed absolutely, and the jury had found it conditionally or *sub neodo*, and that if he did not pay the money he ought not to take water; and the terre-tenant in such case might disturb him, which is all the remedy the terre-tenant had.

<sup>3</sup>*Lair v. McDonald*, 9 Hun. 23.

<sup>4</sup>*Postlethwaite v. Payne*, 8 Ind. 104; *Cox v. Clough*, 70 Cal. 345, 11 Pac. 732; *Heintzen v. Binninger*, 70 Cal. 5, 21 Pac. 377.

The use by squatters of part of the waters of a stream appurtenant to a tract of land, upon a portion of such tract occupied by them, without any claim of right to divert or use it elsewhere, is not adverse to the right of the owners of such tract; nor does the temporary segregation by such trespass of the actual occupancy of such portion which lies inland, without segregation of the title, make it nonriparian, to which such waters are not appurtenant, so as to change the rule. *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645.

<sup>5</sup>*Manning v. Smith*, 6 Conn. 289; *Egan v. Estrade* (Ariz.) 56 Pac. 721; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743; *Stokes v. Upper Appomattox Co.* 3 Leigh, 318.

In *Parker v. Footc*, 19 Wend. 309, Bronson J., says he cannot subscribe to the doctrine that there may be cases relating to the use of water, which form exceptions to the rule that the enjoyment must be adverse to authorize the presumption of a grant.

<sup>6</sup>*Carson v. Hayes*, 39 Or. 97, 65 Pac. 814; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Hall v. Blackman* (Idaho) 68 Pac. 19.

<sup>7</sup>4 B. Mon. 514.

adverse. If there is sufficient claim of right to notify the one against whom the right is claimed that the use claimed is rightful and that the latter has no right in the water, the conduct of the adverse claimant may be sufficient to require the opposing owner to vindicate his rights or defend them. It has also been held that there is no adverse use until it actually becomes injurious to the opposing owner.<sup>8</sup> And in *Buddington v. Bradley*<sup>9</sup> it is said that the mode in which the lower owner has been making use of the stream will be immaterial in case he wishes to make a new use of it with which the use by the upper proprietor will conflict. Under this rule it has been held that, if the flow of water was at all times sufficient for the use of both owners, the one exceeding his rights cannot be regarded as making an adverse use.<sup>10</sup> It would seem that a rule would better subserve the rights of the riparian owner which holds that so long as the use by one owner is not plainly in contravention of the rights of the other owners on the stream, and he does not deny their rights in such a way as to put them on notice that he intends to claim a prescriptive right, the mere fact that he is making an excessive use of the stream should not ripen into an adverse title. But if he is making a use of the water which he has no right to make, or denies the rights of other riparian owners, then his use becomes adverse and will ripen into title. Therefore, an owner of a dam built subsequently to a dam lower down the stream, who diverts the water above his dam and empties it below the lower dam, acquires a title by prescription to the use of the water where such use is not interfered with for more than twenty years, although the diversion of the water had not injuriously affected the lower owner for the full period of the prescription, the stream formerly furnishing sufficient power for both.<sup>11</sup> Conversely, a riparian proprietor's rights in a water course are not lost by an interruption in the flow of the water in the channel for a period extending over several years, as the interruption may have been caused by excessive dryness of seasons or from some other cause over which

<sup>8</sup>*Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Parker v. Hotchkiss*, 25 Conn. 321; *Meng v. Coffey* (Neb.) 60 L. R. A. 910, 93 N. W. 713.

The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public, and one complaining of the breach of such a right must show that he is prevented from having water

which he has acquired the right to use for some beneficial purpose. *Williams v. Morland*, 2 Barn. & C. 910, 4 Dowl. & R. 583, 2 L. J. K. B. 191, 26 Revised Rep. 579.

<sup>9</sup>10 Conn. 213, 26 Am. Dec. 386.

<sup>10</sup>*Anaheim Water Co. v. Semi-Tropic Water Co.* 64 Cal. 185, 30 Pac. 623; *Ruell v. Read*, 5 U. C. Q. B. 546.

<sup>11</sup>*Cape v. Thompson*, 21 Tex. Civ. App. 681, 53 S. W. 368.

the proprietor had no control.<sup>12</sup> The rule which would permit an excessive use to ripen into adverse title whether an injury was actually done to a lower owner or not, unnecessarily deprives the riparian owner of advantages which he might enjoy in the stream were it not for the necessity thus imposed upon the other owners to protect their rights. On the other hand, if a particular owner is permitted to go forward under the belief that he is making a rightful use of the water, and makes large expenditures in the erection of works to utilize the water, it may be a hardship upon him to deny that his use has not been adverse. The one erecting such structures, however, acts with his eyes open, and is charged with notice that in erecting them he is exceeding his rights and may be required to abate his structures when they become a nuisance to other owners. The present advantage which he may gain from the excessive use of the water may make it desirable to take this risk and he may be willing to do so. The rule which will best subserve all interests, therefore, would seem to be that each riparian owner should be allowed to make as much use of the water as he desires to make, and should assume the risk of having his use cut down when its excess is found to injure other riparian owners. And they should not be required to resort to proceedings to vindicate or defend their rights unless they are plainly notified that the owner enjoying the use of the stream claims that he is not exceeding his rights, and that, in case no steps are taken by them to establish their rights, his claim may ripen into an adverse title.

**538. Use must be notorious.**—In order that the user by one owner shall ripen into an adverse title, it must be notorious and with the knowledge of the one against whom the right is claimed, or it must be of such a character that his knowledge of it must be presumed.<sup>1</sup> But notoriety with reference to the one against whom the right is claimed is all that is necessary, so that, in case he has notice of the fact that the claim is adverse and that the use is being made, it is sufficient to bring the case within the rule that an adverse possession may be acquired.<sup>2</sup>

**539. Use must be continuous.**—To ripen into a prescriptive title

<sup>12</sup>*Hall v. Swift*, 6 Scott, 167, 4 Bing. Affirming 10 Pa. Super. Ct. 132, Affirming 7 Del. Co. Rep. 15. N. C. 391, 1 Arnold, 157, 7 L. J. C. P. N. S. 200.

<sup>1</sup>*Bell v. San Salito Land & Ferry Co.* (Cal.) 33 Pac. 449; *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Irvine v. Media*, 194 Pa. 648, 45 Atl. 482, Cal. 46, 61 Pac. 570, that the use of water may be adverse without being open or notorious, as all that is necessary to make a use adverse is a claim of right in the party using it, and knowledge of the claim in the adverse party.

the use must have been continuous for the whole prescriptive period.<sup>1</sup> And the use must not be materially varied during the time the prescriptive period is running, although the water need not be used in precisely the same manner during all the time, if the effect upon the rights of the one against whom the adverse right is claimed is not materially different under the new, than it was under the old, use.<sup>2</sup> The user must be peaceable;<sup>3</sup> that is, it must not have been disputed or against the claimed rights of the other party. But ineffectual protests by a riparian proprietor against the diversion of the water of a stream can have no effect in preventing the presumption of a grant from adverse use, but rather tend to strengthen the character of the use as adverse.<sup>4</sup> In England, while an interruption in the enjoyment of a water course during a prescriptive period must be acquiesced in for a full year before it breaks the period, yet interruptions acquiesced in for less than a year may be shown as evidence on the question whether there ever was a commencement of the enjoy-

<sup>1</sup>*Hunt v. Heapeior*, 6 U. C. C. P. 269; *McKechnie v. McKeyes*, 9 U. C. Q. B. 563; *American Co. v. Bradford*, 27 Cal. 360.

No title to water is acquired by adverse user, where, during several years, the possession of none of the claimants was continuous or of such a nature as to constitute adverse possession against the others, and the owner thereof asserted his right thereto as long as he lived. *Faulk v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 602.

<sup>2</sup>*Stein v. Burden*, 24 A.L.J. 130, 60 Am. Dec. 453.

<sup>3</sup>*Cave v. Crafts*, 53 Cal. 135.

Interruption, at least once every year, of the adverse user of water by the turning thereof from the ditch through which such use is made, by the one against whom the right is asserted, prevents the acquirement of title by prescription, since any interruption of adverse user, however slight, is sufficient to prevent the acquirement thereof. *Bree v. Wheeler*, 129 Cal. 145, 61 Pac. 782.

Adverse user of water for irrigation purposes is not established where it appears that during the last fifteen years when the water was low in the river the claimant has habitually removed the dams of defendant so as to let water run down to his own ditch, but that, in all cases, such dams were immediately replaced, and that such acts were without notice from him to defendant; also, as to the preceding period, it appearing

that claimant's ditches were constructed by his predecessor in title under a license from the then owner of defendant's land, his original entry was, therefore, not adverse. *Patterson v. Mills* (Cal.) 68 Pac. 1034.

No prescriptive right to water is acquired by the diversion thereof by an appropriator into the lower channel of a slough, and thence through a cut to its ditch, by incursions upon the lands of riparian proprietors, for the purpose of obstructing the natural flow of the water in the upper channel and causing such diversion to the lower channel, no matter how long continued or how often repeated, where such owners not only never assented thereto, but undid the work as often as discovered. *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 323.

The bringing of an action of ejectment before the expiration of the statute of limitation, to recover possession of a portion of a riparian tract occupied by squatters, is an interruption of the user thereon of part of the waters of a stream appurtenant to the whole tract which will prevent the acquirement of a prescriptive right thereto, where no right to such waters was ever asserted independent of, or segregated from, the land. *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645.

<sup>4</sup>*Jordan v. Lang*, 22 S. C. 159.

The mere denial of a right to the diversion of water, not acceded to and followed by no interruption of the diver-

ment of right.<sup>5</sup> And interruptions, in order to defeat the acquisition of the prescriptive title, must be such as tend to show that the claimed right had no existence.<sup>6</sup> In order to tack together adverse uses by different persons they must have been in the same right.<sup>7</sup> The fact that the user has not continued for the prescriptive period will not prevent evidence of its existence being given to the jury, because such user for less than the prescriptive period, even if interrupted, may be evidence of a right, to be used with other evidence by the jury.<sup>8</sup>

**540. What acts are adverse.**—As was indicated in a preceding section<sup>1</sup> there are certain acts with reference to a water course which, from their very nature, must be considered as adverse, because they exceed any use which the riparian owner may rightfully make of the stream. The most important of these is the diversion of water from the channel of the stream. Such a use is of itself notice that it is adverse and in opposition to the rights of other riparian owners, and if continued will ripen into title.<sup>2</sup> So, the jury may, in the absence of any evidence as to whether a user was permissive or otherwise, infer that it was adverse and as of right, where one land holder by a ditch and levee on his own land diverts water and throws it on the

sion, is not sufficient to constitute a break in the continuity of a user which will prevent the acquisition of a right by prescription. *Oregon Constr. Co. v. Allen Ditch Co.* 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

<sup>1</sup>*Eaton v. Sicansea Waterworks Co.* 17 Q. B. 267, 20 L. J. Q. B. N. S. 482, 15 Jur. 675.

<sup>2</sup>A prescriptive right to divert the water of a stream is not defeated by the fact that the right was exercised subject to the right of the owner of the land through which the canal was cut to turn the water down the natural channel during six weeks of each year to facilitate the use of his land. *Bolivar Mfg. Co. v. Neponset Mfg. Co.* 16 Pick. 241.

The presumption of plaintiff's right to the use of the water of a creek arising from user, so as to prevent defendant from closing it up, is not repelled by a contract entered into during such user, by which defendant was permitted to erect a dam and flood gates so as to hold back the water during the times plaintiff did not need it. *Jennings v. Sherwood*, 8 Conn. 122.

<sup>3</sup>Where, after the death of a person using a water right adversely to defendant, his administrator conveyed the land on which the same was situated to the

defendant, and he reconveyed the same to the plaintiff who continued to use the water adversely, the two periods of adverse user cannot be tacked together. *Manning v. Smith*, 6 Conn. 280.

The grantee of a mill and privilege cannot establish a prescriptive right of erecting booms and storing logs in the mill pond on grantor's land by showing that he had enjoyed such a privilege for the preceding sixteen years, and that his grantor had done the same for more than four years next preceding the date of the grant, as a landowner cannot have an easement in his own land. *Mansur v. Black*, 62 Me. 38.

<sup>4</sup>The use of water in a particular manner for a less period than twenty years, and even an interrupted use, may be evidence of a right, to be weighed with other evidence by a jury. *Gilman v. Tilton*, 5 N. H. 231.

<sup>5</sup>See *ante*, § 537.

<sup>6</sup>*Matheson v. Ward*, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520; *French Hook v. Hugo*, L. R. 10 App. Cas. 336, 54 L. J. P. C. N. S. 17, 54 L. T. N. S. 92, 34 Week. Rep. 18; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

The diversion and use of the waters of a stream to a certain extent for irrigation purposes, continuously and uninterruptedly during the irrigation sea-



lands of another to his injury, and such injury continues without increase for ten years.<sup>3</sup> Therefore, where an upper proprietor diverts the water for a period of twenty years, continuously and uninterruptedly, he acquires, as against a lower proprietor, the right to continue the diversion; and in such a case it is immaterial whether or not such lower proprietor had any need of the water during that period.<sup>4</sup> But, since an upper riparian owner has a right to make a reasonable diversion of water from the stream for use on his property, the Oregon court has held that even the diversion of water cannot become adverse so as to give a right thereto by continuance thereof for the statutory period, so long as the rights of those against whom it is asserted are not infringed.<sup>5</sup> If no more than the legal right of the upper owner is exercised, he has no occasion to claim a prescriptive right; but if he has exceeded his legal right, then his use infringes that of the lower owner, and is of necessity adverse. Therefore, the Oregon decision adds nothing of value to the general discussion upon the subject. No prescriptive right to a certain amount of water from a stream can be acquired against a riparian owner by diverting water below his land, for such diversion does not interfere with the natural flow over his land and is not an invasion of his rights which he is bound to notice.<sup>6</sup> In an action to determine water rights, after defendant has successfully denied that he diverted all the water of a creek, he cannot recover waters he has not diverted on the ground of adverse user, or that plaintiff stood by and allowed him to divert all the water without objection.<sup>7</sup> Where lessees of a mine take water from a stream on the leased premises, and convey it to adjoining lands to be used by them in the working of a mine, their right to divert the water will cease with the expiration of the lease, and no prescriptive right to continue it will have been acquired, since it will be presumed that they acted under an assumption on the part of lessors and lessees that the diversion of the water was authorized by the lease.<sup>8</sup> A prescriptive right may be acquired to interrupt the

son, under claim of right adverse and hostile to one claiming such waters and with the latter's knowledge, for more than five years before the commencement of an action for damages and to restrain the same,—defeats the right of such claimant to that extent. *Evans v. Ross* (Cal.) 8 Pac. 88.

<sup>3</sup>*Polly v. McCall*, 37 Ala. 20.

<sup>4</sup>*Olinch v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

<sup>5</sup>*Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642.

<sup>6</sup>*Cave v. Tyler*, 133 Cal. 566, 65 Pac. 1089.

<sup>7</sup>*Hayes v. Silver Creek & P. Land & Water Co.* 136 Cal. 238, 68 Pac. 704.

<sup>8</sup>*Chamber Colliery Co. v. Hopwood*, 55 L. J. Ch. N. S. 859, L. R. 32 Ch. Div. 549, 55 L. T. N. S. 449, 51 J. P. 164.

But the fact that a stream of water as turned along an artificial course is used by parties who take possession of a mine under a custom by which they can work it adversely to the rights of the true owner by paying him a royalty

flow of a stream. Therefore, the owner of a mill situated on a small stream may acquire a prescriptive right by erecting a reservoir dam further up the stream and exercising a control over the flow therefrom under a claim of right for the prescriptive period, which cannot be interfered with by owners of land between the reservoir and mill.<sup>9</sup> But a person who gains the right to regulate the flow of the stream does not gain a right to the exclusive use of the water so as to forbid another riparian owner to make use of it as it flows past his property.<sup>10</sup> Intermediate owners on the stream, however, do not gain a prescriptive right to control the flow of the water by using it as it flows past them from the storage dam, which will enable them to compel the owner of the reservoir to maintain it for their benefit.<sup>11</sup> A prescriptive right may be acquired to stop the flow of water from the stream in an artificial course.<sup>12</sup> And a prescriptive right may be acquired to have land remain free from the flow of water which has been diverted therefrom.<sup>13</sup> Or to have the water flow in a given

will not prevent the presumption of a grant in favor of the owner when he again becomes possessed of the land through which it runs. *Ivincy v. Stocker*, 35 L. J. Ch. N. S. 467, L. R. 1 Ch. 306, 12 Jur. N. S. 419, 14 L. T. N. S. 427, 14 Week. Rep. 743.

<sup>9</sup>*Brace v. Yale*, 10 Allen, 441.

A prescriptive right to regulate the flow of water from a reservoir dam to a mill is not lost in favor of intermediate owners by the building of a new mill and changing the use to which the water is put, although the effect is to make the water flow in a way to injure the intermediate owners, who have made use of the water as it flowed for more than twenty years. If there has been a wrongful injury to the rights of the intermediate owners, they have an action therefor; but this will not affect the prescriptive right of the mill owner. *Brace v. Yale*, 97 Mass. 18.

<sup>10</sup>*Dyer v. Cranston Print Works Co.* 22 R. I. 506, 48 Atl. 791.

<sup>11</sup>A prescriptive right to control the flow of water from a storage reservoir cannot be acquired by a lower owner, where the upper proprietor exercises the sole control and management of the outlet and the use of the liberated water is equally beneficial to both parties. *Weare v. Chase*, 93 Me. 264, 44 Atl. 900.

The owner of an intermediate dam will be enjoined from maintaining it, as

against a mill owner below who owns a reservoir above and has acquired a prescriptive right to control the flow of the stream, in such a manner that his pond must be filled every day by withholding the flow of the water from the lower owner during the time of filling, and then letting it leak out when the lower mill is not in use. *Yale v. Brace*, 99 Mass. 488.

<sup>12</sup>Where a mill owner closed up the communication between the stream and a ditch through which water was diverted from the stream, and has kept it closed, without interruption, for more than twenty years, he is entitled to keep it closed; and the owner of land adjoining the ditch cannot object to it, although the ditch may have been an ancient water course, where he has not had a modern use of the water. *Drewett v. Sheard*, 7 Car. & P. 465.

<sup>13</sup>A riparian proprietor acquires a prescriptive right of exemption from having his land overflowed by the waters of a stream being restored to their natural course, where the change which resulted in protecting his land from overflow was made in the flow by artificial means, and the riparian owners affected thereby acquiesced in the new state of the stream for over forty years. *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep. 304, 2 N. E. 309, 3 N. E. 826.

course which it has taken.<sup>14</sup> A right to a waste way may also be acquired.<sup>15</sup>

**541. What time is necessary to give right.**—The prescriptive right to control the flow of water is an incorporeal hereditament, and, in the absence of express statutory declaration to the contrary, the time necessary to gain the right is the same as is necessary to acquire rights in real property.<sup>1</sup> If there is no statutory designation of the time, the use must be continued long enough to presume a grant.<sup>2</sup> Where the prescriptive period for acquiring rights in real estate is twenty years, that is the period which will govern the acquisition of water rights.<sup>3</sup> So, in jurisdictions where the period is fifteen years, that period will govern.<sup>4</sup> In case the statute has prescribed a period, that will govern.<sup>5</sup> Defendant need not be in possession of

<sup>14</sup>*Gring v. Sinking Spring Water Co.* 7 Pa. Super. Ct. 63.

If a stream of water has followed a defined ditch or channel on upper lands, thence across a highway and onto another's land, for a period of twenty-one years and upwards, the owner of the lower land has a right to have the water discharged at that point. *Adam v. Moll*, 6 Pa. Super. Ct. 380.

But no right to a stream of water is acquired by one upon whose land it is unlawfully turned, before the expiration of twenty years. *Shields v. Arndt*, 4 N. J. Eq. 234.

<sup>15</sup>The peaceful and uninterrupted use for twenty years by the owner of a mill of the water from a dam for the purpose of working such mill, with the flow of water from its wheels unobstructed by the water of a dam below, under claim of right so to use it, and which use was known to the owner of the dam below, creates a presumption of right to the use and flow of the water to that extent so as to render the owner of the dam below liable for any damages caused by raising the height of his dam so as to obstruct that flow and cause a backing up of the water upon the wheels more than had been done at any time during such twenty years, although such height may not be greater than that of the dam as originally built or as it might have been built under the grant establishing it. *Manier v. Myers*, 4 B. Mon. 514.

<sup>1</sup>*Oregon Constr. Co. v. Allen Ditch Co.* 41 Or. 209, 93 Am. St. Rep. 701, 60 Pac. 455; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 768; *Sherwood v. Burr*, 4 Day, 244, 4 Am. Dec. 211.

<sup>2</sup>*Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Bealey v. Shaw*, 6 East, 214, 2 Smith, 321, 8 Revised Rep. 406, Cited in *Sherwood v. Burr*, 4 Day, 250, 4 Am. Dec. 211; *Ellis v. Clemens*, 21 Ont. Rep. 227, Affirmed in 22 Ont. Rep. 216; *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 538, Fed. Cas. No. 13,446; *Prescott v. Phillips*, Cited in 6 East, 213; *Mason v. Hill*, 2 Nev. & M. 747, 5 Barn. & Ad. 1, 2 L. J. K. B. N. S. 118; *Strickler v. Todd*, 10 Serg. & R. 63, 13 Am. Dec. 649.

Twenty years' adverse possession of a diverted water course are indispensably necessary, unless there are other circumstances from which a grant may be presumed in a less time, to defeat the right of the proprietor of the ancient channel to have the water flow in it. *Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400.

<sup>3</sup>*Haight v. Price*, 21 N. Y. 241.

<sup>4</sup>*Rogers v. Page*, Brayton (Vt.) 169, 201.

<sup>5</sup>Under the law of Texas, the right of a riparian proprietor to use the water of the stream for natural and domestic purposes may be lost by the adverse possession of another for the period of ten years, by analogy to the statute of limitations which bars the right of entry on lands after the lapse of such period. *Baker v. Broton*, 55 Tex. 377.

Under the statute of limitations of Arizona (Comp. Laws, p. 331, § 3) uninterrupted adverse possession of a water right for five years under a claim of right gives a valid title. *Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. 540; *Dalton v. Rentaria* (Ariz.) 15 Pac. 41.

The diversion of a certain amount of

the land against which the right is claimed during the whole period.<sup>6</sup> The right begins to run when the possession first becomes adverse, and it will continue to do so regardless of the changes of possession of the property against which the right is claimed; and one acquiring possession of the property must take notice of the fact of the adverse user and of the time during which it has been enjoyed, and will only be entitled to take steps to abate the nuisance during the unexpired portion of the prescriptive period. The right to have water flow as it has been accustomed to do for more than twenty years is not lost by reason of the fact that there was some interruption before the twenty years began, and the stream did not flow again in its former course till within nineteen years of the diversion complained of.<sup>7</sup>

**541a. When time begins to run.**—Since adverse user is necessary to perfect a prescriptive right to interfere with a water course the time will not begin to run until the one against whom the right is claimed can be charged with notice of the adverse claim.<sup>1</sup> So, where the upper owner is using the water for a purpose for which he has a right to use it, so long as he does not exceed the quantity to which he is entitled he cannot claim an adverse use while there is water enough to supply the needs of all persons along the stream.<sup>2</sup> But where the upper owner is making a wrongful use of the water, time will begin to run when the use commences, regardless of the effect on the lower owner.<sup>3</sup> It will begin to run at the instant the unlawful use is made of the water, and not at the time works are begun which are intended to utilize it.<sup>4</sup> But a diversion of water, followed by actual and ex-

water from a stream and the use thereof for the irrigation of lands situate near the same, for six years following the appropriation thereof, with the full knowledge of riparian proprietors, continuous, uninterrupted, peaceable, open, and notorious, under claim of right adverse and in hostility to such proprietors and their successors in interest, gives a prescriptive right to the diversion and use thereof. *Spargur v. Heard*, 90 Cal. 221, 27 Pac. 198.

<sup>1</sup>*Jordan v. Lang*, 22 S. C. 159.

<sup>2</sup>*Hall v. Swift*, 4 Bing. N. C. 381, 6 Scott, 167, 1 Arnold, 157, 7 L. J. C. P. N. S. 209.

<sup>3</sup>*Hughesville Water Co. v. Person*, 182 Pa. 450, 38 Atl. 584; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546.

<sup>4</sup>*Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395; *Egan v. Estrada* (Ariz.) 56 Pac. 721; *North Powder Mill Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223.

<sup>5</sup>Where two dams were constructed in

a stream, one above the other, the lower dam being constructed first, and the water at the upper dam was diverted from the stream in a race which emptied below the lower dam, and at the time of the construction of the upper dam there was enough water for both owners, but subsequently, from some unknown cause, the quantity of water became insufficient for the use of both, the right of action of the lower owner against the upper owner accrued when the upper dam was constructed, and the statute of limitations commenced to run from that time, and not from the time when the quantity of water was diminished. *Cape v. Thompson*, 21 Tex. Civ. App. 681, 53 S. W. 368.

<sup>6</sup>An appropriator of water from a stream is not estopped from maintaining an action to enjoin an unlawful interference therewith, because the building of the flume by means of which the water was diverted was begun more

clusive possession and control, such as will constitute an invasion of prior acquired rights, with the intent and purpose of applying the water to some need or useful purpose, followed by actual application within a reasonable time, such as will serve to complete a valid prior appropriation,—constitutes such a user as will set the statute of limitations in motion, and, if continued for the statutory period, will confer a valid title to the easement.<sup>5</sup> The statute of limitations will not run against a right to compel the restoration of a stream to its former channel, where the change causes the casting of stone and sand upon private property in such a way as to constitute a private nuisance, the injury from which is continuous.<sup>6</sup> The fact that it does not begin to run until the one against whom the right is claimed can be charged with notice is illustrated by the rule that no adverse title can be acquired against a grantee of government land until he has acquired possession of the property.<sup>7</sup> But the period during which squatters on public land maintained ditches for irrigation purposes, which continued under homestead entries prior to obtaining patents, may be counted in making out the statutory period of prescriptive right as against lower riparian proprietors who acquired

than five years before, where water was actually diverted thereby to his detriment only a short time before the action was instituted. *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12, 19 Pac. 836.

The use of a ditch on one's own lands for the period necessary to confer a prescriptive right gives no such right to overflow the lands of another thereby, if the overflowing has not existed for such period, as prescription runs, not from the time of the construction of the ditch, but from the beginning of the overflow. *Polly v. McCall*, 37 Ala. 20.

A right by prescription of a railroad company to maintain a bridge across a stream in such a manner as to wash away land of another in times of freshets begins to run, not from the date of completion of the bridge, but from the time of the first damage to the land so occasioned by it. *Ellis v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479.

*Oregon Constr. Co. v. Allen Ditch Co.* 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

*Wright v. Syracuse, B. & N. Y. R. Co.* 49 Hun, 445, 3 N. Y. Supp. 480. Affirmed in 124 N. Y. 668, 27 N. E. 854.

*Mathews v. Ferrea*, 45 Cal. 51.

To defeat by diversion the riparian rights of a patentee from the United

States of public lands through which a stream flows, there must have been an adverse user for the statutory period after the land was patented to him, since the presumption arising from an adverse user is not a grant against any particular person, but against the title under which he holds; and a patentee from the government acquires thereby a new title against which prior adverse user during the government's ownership is not available. *Vansickle v. Haines*, 7 Nev. 249.

But the diversion and adverse user of the water of a stream for more than the statutory period after the survey and location of the line of railroad to which lands through which it runs were granted by Congress gives title thereto as against a subsequent purchaser of land from the railroad company, although such diversion and user were for less than the statutory period after the issuance of a patent to the railroad company, since by the acts of Congress there was a grant *in presenti* which passed the legal title thereto on the survey and location of the line, so as to subject it to the running of the statute of limitations, which was not interrupted or defeated by the subsequent issuance of the patent. *Jatwin v. Smith*, 95 Cal. 154, 30 Pac. 200.

their rights from the government after the upper ditches were constructed.<sup>8</sup> In analogy to the rule which has sometimes been applied in case of the damming back of water in a stream<sup>9</sup> the New York court of appeals held, in *Colrick v. Swinburn*,<sup>10</sup> that an action for wrongfully diverting the water of a stream is not barred by the lapse of six years from the time of the first diversion, since the wrong is a continuing injury and is not referable exclusively to the day when it was first committed. It may be that the right of the lower owner to object to the diversion of the stream is not barred in six years after the first diversion of the water; but, if such is the fact, the reason for it is that the action is not governed by the six year limitation period, but by the longer one necessary to acquire an interest in real estate; and not for the reason, as suggested by the court, that it does not begin to run when the injury is first committed. If an upper proprietor makes such a change in the condition of the stream on his property that he effects a diversion of the water therefrom, and this condition is permanent, the wrong is done at that time; and the mere fact that the consequences of it are continuous does not make the wrong a continuing one so as to extend indefinitely the period during which the action can be brought to correct the wrong. There are few injuries to real estate which are not continuing ones, and yet the rule is almost universal that the right of action arises at the time the structure which causes the injury is completed, and, if the action is not brought within the statutory period thereafter, it is barred. And there is no ground for making an exception to this rule in favor of one who is injured by the diversion of water from a stream. The hardship which the New York court felt was the result of applying the statute which limits actions for the recovery of damages to the case of the attempted acquisition of an incorporeal hereditament, which could not be acquired in less time than that necessary to acquire an interest in real estate. And, while the decision was correct, the court should have held, not that the injury was a continuing one, but that the right to maintain the diversion could not be acquired in less than ten, fifteen, or twenty years, as might be necessary to acquire real estate by adverse possession.

**542. Extent of right acquired.**— The right which is acquired by the adverse use of the water of a stream is measured by the extent to which the claim was asserted and maintained. The claimant cannot, on the one hand, gain a right which is in excess of his claim.<sup>1</sup> On

<sup>8</sup>*Meng v. Coffey* (Neb.) 60 L. R. A.

910, 93 N. W. 713.

<sup>9</sup>See post, §§ 559 et seq.

<sup>10</sup>105 N. Y. 503, 12 N. E. 427.

<sup>1</sup>The owner of a water mill on a stream, who, by a continuous use and

the other hand, he will gain a right to all he claims, although he does not make use of it to the full extent.<sup>2</sup> In analogy to the rule that time will not begin to run until the one against whom the right is claimed is charged with notice, it has been held that a presumptive grant by a lower proprietor to an upper proprietor of the right to divert water affects only the premises owned at the time by the lower proprietor, and does not affect another parcel of riparian lands subsequently purchased by him.<sup>3</sup> The right to use the water is limited to a use which will not affect the rights of the one against whom the right is claimed, any more than his rights were affected during the time the right was being acquired.<sup>4</sup> The extent of the privilege acquired is determined by the actual user while the right was being acquired.<sup>5</sup> But he is entitled to exercise the prescriptive right to its full extent, although some right had been acquired by grant before the adverse use was made.<sup>6</sup> And, so long as he keeps within the limits of the right which he has acquired, he may make such changes in the manner of using his right as he desires.<sup>7</sup> But the adverse use of the water in a stream by means of a mill and dam constructed in a particular place, for a period of twenty years, will not confer upon one the right to change the location of his dam, or erect one which would cause a different flowage from that maintained during the period of adverse user.<sup>8</sup> And it has been held that if the natural

occupancy of said mill and water pit, acquired title thereto by actual adverse possession, also acquired title thereby to a race in the stream through which the waters flowed to and over the wheel, and to so much of the bed of the stream to its thread above the wheel pit as would insure a free and unobstructed flow of waters into such race for the use of the mill. *Cooper v. Great Falls Cotton Mills Co.* 94 Tenn. 588, 30 S. W. 353.

<sup>2</sup>The right acquired by adverse use of a water power is measured by the height and capacity of the dam, and not by the partial use of the water power created by it. *Bliss v. Rice*, 17 Pick. 23.

<sup>3</sup>*Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371.

<sup>4</sup>*Robinson v. Byron*, 1 Bro. Ch. 588; *Prentice v. Geiger*, 9 Hun, 350.

When a grant of a right to change the course and flow of a stream is presumed, the grant presumed is for the precise right which has been enjoyed; and long enjoyment of one ditch can raise no presumption of a grant of a right to a ditch differing in any appre-

ciable degree from that enjoyed, in locality or dimensions. *Porter v. Durham*, 74 N. C. 767.

<sup>5</sup>*Shrewsbury v. Brown*, 25 Vt. 197; *Whittier v. Cocheco Mfg. Co.* 9 N. H. 454, 32 Am. Dec. 382.

<sup>6</sup>*Whetley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

<sup>7</sup>One gaining by prescription the right to the water of a stream for the operation of a fulling mill may destroy the mill and erect a grist mill, as the mill constitutes the substance of the prescriptive right, and the change is only in the quality or name of the mill and works no prejudice to the rights of others in the water course. *Luttrell's Case*, 4 Coke, 86.

A mill owner who has acquired a prescriptive right to a certain flow of water by the use of a particular mill will lose none of such right by altering or changing his mill or raising his dam. *Blanchard v. Baker*, 8 Me. 266, 23 Am. Dec. 504.

<sup>8</sup>*Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Buckingham v. Smith*, 10 Ohio, 288.

flow of the water of a stream would be of no use to the owner of land between a mill and a reservoir dam, he will not be entitled to relief in equity against the mill owner to restrain his raising the dam and placing different machinery in the mill from what was in use during the time he was acquiring his prescriptive right to control the flow of the stream.<sup>9</sup> One who has acquired by prescription a right to maintain a dam for the purpose of diverting water to his barns and house for domestic use will not be required to remove the dam because he has used it to divert water for irrigation purposes to the damage of a lower proprietor, but will be restricted to its maintenance for domestic uses.<sup>10</sup>

**543. Rights in artificial channel.**—If an artificial channel has been substituted for a natural one, the same rights may be acquired with respect to it as though it was a natural one. No adverse right can be acquired where the one against whom it is claimed is, at the expiration of the time and long before, incapacitated from making a grant because of infancy. No right can be presumed to have been granted by his guardian. The fact that the one claiming the right made the necessary repairs on the conduit will not serve to show that they were made by right conferred by grant. But the right to the use of the water upon condition of making the repairs may be presumed. A mere negotiation to purchase the right when the owner of the conduit threatens to shut off the water will not destroy an adverse right which has actually been acquired; but an application to purchase before the expiration of the limitation period, if unexplained, will amount to an admission that the use was not adverse. One who has an adverse right may permit others to share in its use. A conveyance of the undivided interest of one tenant in common against whom no adverse use exists because of infancy, to take water from an artificial aqueduct laid in the common land, will not destroy the right he had to controvert the title of one claiming a prescriptive right to the use of such aqueduct; and such right may be exercised as well by his grantee.<sup>1</sup>

**544. Protection of right.**—One who has acquired an adverse title to the use of water may be protected in its enjoyment by the court, the same as though it was a natural right.<sup>1</sup> The burden of proving

<sup>9</sup>*Yale v. Brace*, 99 Mass. 488

<sup>10</sup>*Mastenbrook v. Alger*, 110 Mich. 414, 68 N. W. 213.

<sup>1</sup>*Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

For further discussion of this subject, see chapter xxv.

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<sup>1</sup>One who has acquired a prescriptive right to divert a portion of the water of a stream onto his farm, where it supplies a watering trough, the overflow from the trough diffusing itself over the surface, is entitled to have such flow continue, using it for any purpose he



uninterrupted user of the water with the knowledge of the owner is on the one claiming the right in case he asserts title to it and attempts to enforce his title before the courts.<sup>2</sup>

**545. Abandonment of right.**—After an adverse right has been acquired to use the water of a stream in a particular manner, it will not be lost by a mere nonuser for a period short of the time necessary to extinguish it by prescription.<sup>1</sup> A prescriptive right is in all respects equal to a natural one, and the rules with reference to abandonment are the same with regard to both; and therefore the decisions dealing with the question of abandonment of both classes of rights may be considered together. In order to extinguish a right in water, even by a lapse of twenty years, an adverse claim must have been made against it; for a mere nonuser of a right will not destroy it, regardless of the time which elapses.<sup>2</sup> But if the nonuser is of such a character that the use by the other riparian owners must of necessity be adverse to it, the right will be lost by nonuser for the prescriptive period. Thus, where a mill owner, after acquiring the right to a high head of water by using a breast-shot wheel which requires a high head, discontinues its use for twenty years, during such time using a ground-shot wheel, he thereby loses his right to the higher head of water.<sup>3</sup> The prescriptive right is not lost by a mere change of use.<sup>4</sup> But the prescriptive right may not be sufficient to support

may desire; and, where he subsequently conducts the surplus from a trough to a mill owned by him, he or a purchaser of the mill and water rights may maintain an action against one obstructing the flow of the stream. *Holker v. Porritt*, L. R. 10 Exch. 59, 44 L. J. Exch. N. S. 52, 33 L. T. N. S. 125, 23 Week. Rep. 400. Affirming L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, 21 Week. Rep. 414.

<sup>1</sup>*Boll v. Kehl*, 95 Cal. 606, 30 Pac. 780.

<sup>2</sup>*Dyer v. Depui*, 5 Whart. 584.

Parties who, for over twenty years, diverted through an aqueduct the waters of springs which would otherwise have flowed into the plaintiff's mill pond will not be enjoined from reconstructing their aqueduct and continuing to divert such waters, although for three years the aqueduct has been temporarily disused, without intent to abandon it, during which time the water has taken its natural course to the plaintiff's pond. *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, Fed. Cas. No. 5,902.

<sup>3</sup>*Townsend v. McDonald*, 12 N. Y. 381, Reversing 14 Barb. 460.

A servient mill does not escape its servitude by mere nonuser for fifteen years, without intent to abandon, of the dominant privilege, if that was created by grant. *Mason v. Horton*, 67 Vt. 266, 48 Am. St. Rep. 817, 31 Atl. 291.

The right to have the stream flow in its natural course is not acquired by prescription by a servient mill, as against the dominant one having a right arising by grant to divert water above and return it below, notwithstanding the dominant right has not been used for fifteen years (there being no intent to abandon it), nor that the grant is an implied one arising out of distribution to the heirs of the original owner who created the easement. *Ibid*.

<sup>4</sup>*Dreckett v. Sheard*, 7 Car. & P. 465.

<sup>5</sup>*Palmis v. Heblethwaite*, 2 Show. 250.

Where a person having two ancient fulling mills, to which was annexed by prescription a right to a water course, pulled them down and erected two mills to grind corn, the prescriptive right to the water course was not thereby destroyed but extended to the grist mills. *Luttrell's Case*, 4 Coke, 86.

the new use, and therefore, in a sense, the right may be lost by the attempted change. That is, the claimant will have no right to enjoy his new use, and, if he insists on doing so, all his right will be gone, although he might lawfully revert to his old use did he desire to do so.<sup>5</sup> The right may be abandoned by dealing with the water in such a way as to estop the owner of the right to use it from asserting his rights against the one to whom the right to use has been transferred.<sup>6</sup> A sale of a mill privilege for its value or an offer to sell, does not constitute an abandonment.<sup>7</sup>

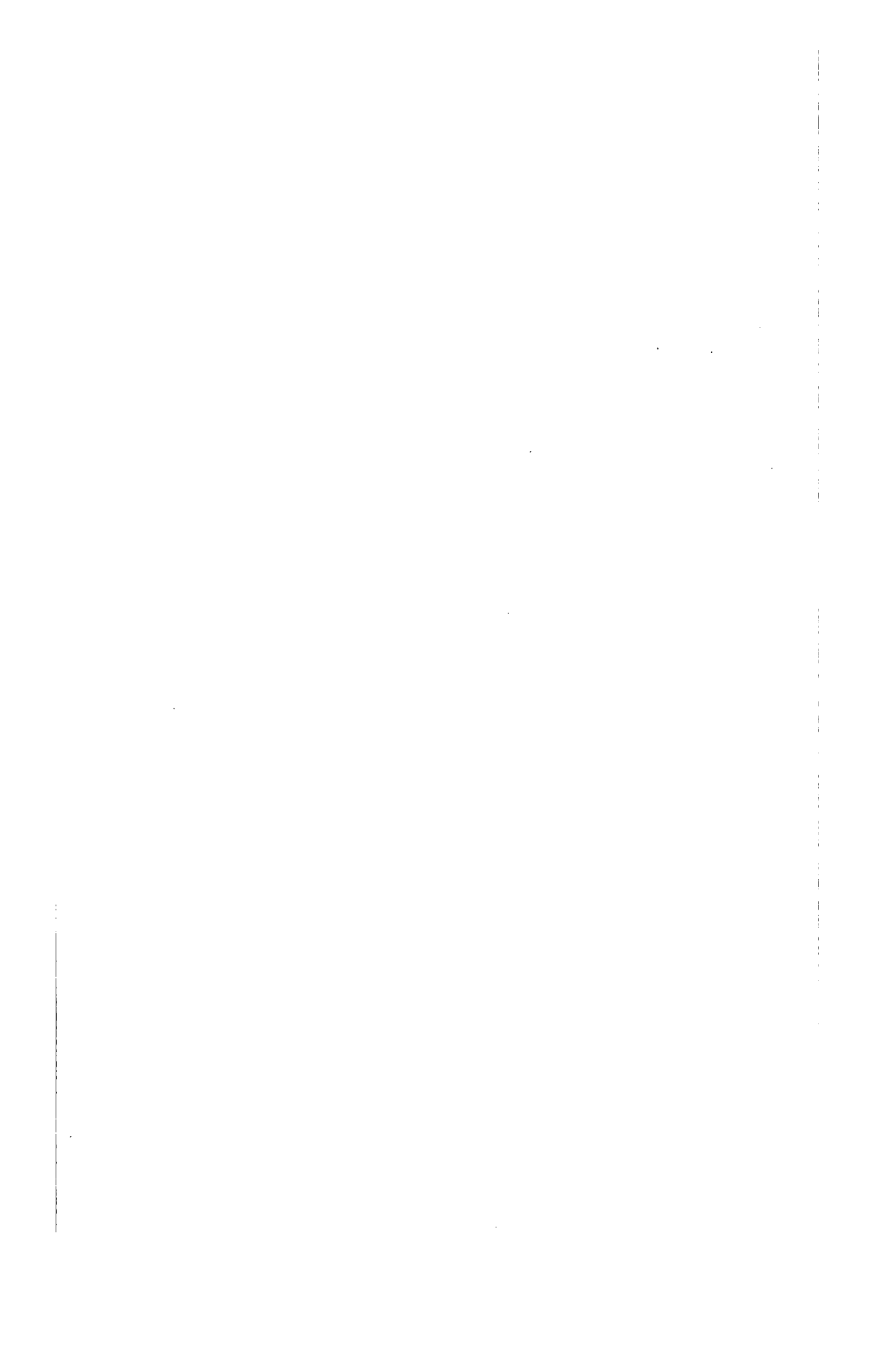
\*The owner of a mill loses his prescriptive right to a water privilege where he rebuilds the mill at a point 10 or 20 feet above its former site, and cuts a new race which takes water from the stream higher up than before. *Pier-son v. Elgar*, 4 Cranch C. C. 454, Fed. Cas. No. 11,157.

*Liggins v. Inge*, 7 Bing. 682, 5 Moore & P. 712, 9 L. J. C. P. 202.

A mill privilege obtained by grant will be held abandoned and lost by lapse of time and nonuser, when the owner of

an undivided interest therein has known that his cotenant and associates were erecting valuable mills and a dam below on the same river, which would impair the value of said privilege; and in the conveyances by which the present claimant asserts title, no title by prior appropriation was referred to as appurtenant to the site, and no use of the site for more than twenty years was shown. *Farrar v. Cooper*, 34 Me. 394.

*Pillsbury v. Moore*, 44 Me. 154, 60 Am. Dec. 91.



## CHAPTER XX.

### DAMMING BACK WATER OF STREAM.

#### I. EXTENT OF RIGHT TO DAM BACK.

- 546. There is no right to change natural condition of stream.
- 547. Water cannot be backed over line.
- 548. Water must not interfere with mill.
- 549. Drainage must not be interfered with.
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  - 552a. Power to permit flowage by regulation of use of stream.
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- 557. License.
- 558. Right to flow land may be acquired by prescription.
- 559. What is necessary to give prescriptive right.
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- 560. Extent of prescriptive right.
- 561. What will prevent acquisition of right.
- 562. Loss or abandonment of right.
- 563. Title to land flowed.

#### II. WHO IS LIABLE FOR DAMMING BACK WATER.

- 564. Whoever causes injury may be sued.
- 565. One who has parted with title.
- 566. Purchaser of property.
  - 566a. Liable if flowage knowingly continued.
  - 566b. Liable for adding to nuisance.
  - 566c. Effect of request to abate.

**III. WHAT MAY CONSTITUTE AN ILLEGAL DAM.**

- 567. Anything which casts the water back is illegal.
- 568. A bridge may be an obstruction.
- 569. Railroad bridge; duty as to construction.
  - 569a. Measure of care required in construction.
  - 569b. Liability for injury.
  - 569c. Satisfaction or release of liability.
  - 569d. Effect of contributory causes.
  - 569e. Recovery of damages.
- 570. Drift and *débris*.
- 571. That obstruction is beneficial does not destroy liability.
- 572. Alteration of obstruction.
- 573. Increasing height of dam.
- 574. Change of location.

**IV. EFFECT OF LOCAL CONDITIONS.**

- 575. Character of stream.
- 576. Effect of high water.
- 577. No liability in case of extraordinary flood.
  - 577a. What is extraordinary flood.
  - 577b. Effect of negligence.
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**V. PROCEDURE FOR SECURING REDRESS.**

- 579. Abatement.
- 580. Statutory action for redress.
- 581. Common-law actions.
- 582. Relief in equity.
  - 582a. Injury must be irreparable.
  - 582b. When right must be established at law.
  - 582c. Effect of laches.
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- 583. Criminal proceeding.
- 584. Joinder of causes of action.
- 585. Notice; pleading; evidence.
- 586. Limitation of actions.
- 587. Jurisdiction.
- 588. Judgment.
- 589. Damages for permanent obstruction.
  - 589a. Temporary structure.
  - 589b. Damages for injury to crops.
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  - 589d. Measure of damages generally.
  - 589e. Rules for estimating damages.
  - 589f. Profits and interest.
  - 589g. Costs and expenses.
- 590. Suits by property owner.
- 591. Suit by one in possession.
  - 591a. Tenant; licensee.
- 592. Suit by grantee.
  - 592a. Necessity of request for removal.
- 593. Survivorship of action.

- 594. Joinder of parties plaintiff.
- 595. Contributory negligence as a defense.
- 596. Estoppel.
- 597. Contributing cause.
- 598. Right and duty of owner of obstruction to minimize injury.

## I. EXTENT OF RIGHT TO DAM BACK.

**546.** There is no right to change natural condition of stream.—The litigation which has arisen out of attempts on the part of a lower owner to place an obstruction in a stream the effect of which was to cause the water to set back over the line of the upper owner has been so extensive that it is necessary to devote a separate chapter to the consideration of the cases upon that subject. As has been seen in the preceding chapter, each owner of land along a water course has the natural right to have the stream maintain the condition which nature gives it throughout the entire extent of his territory. This rule gives him a right to have the water leave his land at its lowest level, as well as the right to have the water come down to him from above. Rights in running water are governed by the maxim, *Aqua currit et debet currere ut currere solebat*.<sup>1</sup> Under this maxim the riparian owner has a right to enjoy the natural flow of the stream to the full extent to which it may be made available within the limits of his boundaries. And for the purpose of determining the possibilities of his fall he is entitled to measure from the point at which the water stands in its natural condition where it flows across his boundary. The owner below him, therefore, can do nothing which will cause the water to stand higher at that place than is natural.<sup>2</sup> The right to have the water thus leave the property of the upper owner is a corporeal right, part and parcel of the premises.<sup>3</sup> Even if the upper proprietor cuts drains into the stream, by which the amount of water flowing therein is increased so as to overflow its banks to the damage of a lower proprietor, the latter will not be permitted to dam it back so as to overflow the land of the upper proprietor.<sup>4</sup> And the same rule applies in case of other wrongful acts of the upper owner.<sup>5</sup> In considering what is the natural condition or ordinary stage

<sup>1</sup>*Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

<sup>2</sup>*Brigham v. Wheeler*, 12 Allen, 89.

<sup>3</sup>*Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675.

<sup>4</sup>*Williams v. Gale*, 3 Harr. & J. 231.

<sup>5</sup>The diversion of the water from its natural channel on the land of the up-

per proprietor for the purpose of straightening the course of the stream will not authorize a lower proprietor to embank against the water after it has been returned to its natural channel. *Missouri P. R. Co. v. Keys*, 55 Kan. 205, 45 Am. St. Rep. 249, 40 Pac. 275.

of the water, one court held that by ordinary stage of water in a river, as the term is used in a decree directing the abatement of a dam so as not to interfere with a prior dam at such stage, is meant the stage of water that ordinarily flows in the spring or other seasons of the year when the stream stands at the highest water mark, and not that which continues for the longest time in ordinary seasons.<sup>6</sup> But that decision plainly cannot be made applicable to all cases, because the riparian owner is entitled to whatever advantage there may be in the change of the seasons; and a better definition, therefore, is that which has been adopted by the Minnesota court, as follows: The natural state of a stream is that condition in which the stream is, under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season every year.<sup>7</sup> The value of a mill site depends upon the fall of water which can be obtained at that point. And if, during certain seasons of the year, the level of the water at the point where it leaves the land of the upper owner is several feet lower than it is in times of high water or freshets, the upper owner is entitled to the full benefit which this condition gives to his water power; and he is entitled to object in case the lower owner sets the water back over his land to such an extent as to interfere with or destroy this low level point. The lower owner has no more right to insist upon using a portion of the land of the upper owner to increase the difference between his highest and lowest water level, than the upper owner has to insist that he may, by dredging or removing obstructions, use the lower property for a waste way, and thereby increase the height of his own fall. Such is the right of the upper owner to be free from water thrown back by the lower one that he may erect a dam across the stream on his own property for the purpose of constructing a fish pond, although the effect is to prevent the flowing back on his land of water by a milldam below.<sup>8</sup> The rule that the upper property is to be free from back water from a lower dam applies with full force to property owned by the government, so that a settler on public land by erecting a mill thereon acquires no right to flow water back on other public land without an express grant of the right from the government.<sup>9</sup>

<sup>6</sup>*Decorah Woolen Mill Co. v. Greer*, 58 Iowa, 86, 12 N. W. 128.

<sup>7</sup>*Wood v. Eides*, 2 Allen, 578.

<sup>8</sup>*Wilcoxon v. McGhee*, 12 Ill. 381, 64

<sup>9</sup>*Dorman v. Ames*, 12 Minn. 451, Gil. 347; *Ames v. Cannon River Mfg. Co.* 27 Minn. 245, 6 N. W. 787.

Am. Dec. 409.

547. **Water cannot be backed over line.**— Although, as will be seen in a subsequent section,<sup>1</sup> there are few cases which apply to the damming back of water the rule that to entitle one riparian owner to complain of acts of another he must show that he has been injured, those decisions are not only against the weight of authority, but also are unsupported by principle. Any swelling of the stream over the line is an invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect, not only for present needs, but for possible future ones. It constitutes a direct trespass upon his property which he may seek the aid of the courts to redress, and he is not bound to show that he is specially injured to maintain the action.<sup>2</sup> The right of the upper owner is strengthened if injury is done to him, as, by the flooding of a building,<sup>3</sup> or of a mining claim,<sup>4</sup> or of a ford.<sup>5</sup> The law which prevents the damming back of the water applies to land within a municipal corporation as well as to that outside of it, so that the owner of a building lot cannot obstruct the flow of a natural stream in his building operations to the injury of his neighbor.<sup>6</sup> Springs cannot be destroyed, nor stagnant ponds created.<sup>7</sup> As stated in *Wilhelm v. Burleyson*,<sup>8</sup> as a general rule, a riparian proprietor is restricted in the management of his property by the maxim, *Sic utere tuo ut alienum non lœdas*, and he cannot take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor, that may lie opposite or above his own premises, either when the water is at its usual height, or in an ordinary freshet;

<sup>1</sup> See post, § 551.

<sup>2</sup> *Jones v. Fisher*, 17 Can. S. C. 515; *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557; *Haas v. Choussard*, 17 Tex. 588; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Baldwin v. Calkins*, 10 Wend. 167; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Omelvany v. Jaggers*, 2 Hill L. 634, 27 Am. Dec. 417; *Hahn v. Thornberry*, 7 Bush, 406; *Good v. Dodge*, 3 Pittsb. 557; *Brown v. Bush*, 45 Pa. 64; *Warring v. Martin*, Wright (Ohio) 380; *McCalmont v. Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102; *Johns v. Stevens*, 3 Vt. 308; *Robertson v. Miller*, 40 Conn. 40; *Stout v. McAdams*, 3 Ill. 67, 33 Am. Dec. 441; *Summy v. Mulford*, 5 Blackf. 202; *Scheible v. Law*, 65 Ind. 332; *Sumner v. Tileston*, 7 Pick. 193; *Hodges v. Hodges*, 5 Met. 205; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Fox v. Fostoria*, 14 Ohio C. C. 471; *Booker v. McBride*, 16 Tex. Civ. App. 348, 40 S. W. 1031.

<sup>3</sup> *Masonic Temple Asso. v. Banks*, 94 Va. 695, 27 S. E. 490.

<sup>4</sup> *Fraser v. Sears Union Water Co.* 12 Cal. 555, 73 Am. Dec. 562.

The locators of a mining claim upon the banks of a creek, using the bed of the stream for the working of their claim, are entitled to recover for damages caused by the subsequent construction of a dam, which turns back the water upon such claim so as to interfere with the operation thereof, preventing the tailings therefrom from being carried off. *Sims v. Smith*, 7 Cal. 149, 68 Am. Dec. 233.

<sup>5</sup> *Harmon v. Carter* (Tenn. Ch. App.) 59 S. W. 656.

<sup>6</sup> *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

<sup>7</sup> *Neal v. Henry*, Meigs. 17, 33 Am. Dec. 125.

<sup>8</sup> 106 N. C. 381, 11 S. E. 590.



or that so obstructs its flow as to prevent the land of the other riparian proprietor from being properly drained.<sup>9</sup> The maxim of the common law that the owner of the soil has absolute dominion over it above and below the surface, and that damage caused to others by his rightful command over his own soil is *damnum absque injuria*, has no application to such case.<sup>10</sup> Throwing the water back on the upper land is a nuisance in and of itself, of which the upper owner may complain whenever he desires to do so, whether it is a direct injury to him or not. He has a right to have his land free from the water and can object to its presence whenever he chooses; and the lower owner has no right in the premises.<sup>11</sup> The flooding of land by water set back by artificial obstructions placed in a running stream is a taking of such land within the meaning of the provision of Wisconsin Constitution requiring compensation to be made where private property is taken for public use.<sup>12</sup> The right of the lower owner to dam back the water of the stream is not strengthened by the fact that the upper owner is casting it upon his property in an illegal manner. The remedy of the lower owner is not to obstruct the entire flow of the stream, but to resort to his legal action to compel the upper owner to desist from his wrongful use. Therefore, the fact that the upper owner has cut ditches for the purpose of draining the water on his land into the stream, in such a way as greatly to increase the flow, does not permit the lower owner to construct dams for the purpose of stopping the flow of the stream.<sup>13</sup> And especially

<sup>9</sup> *Moffett v. Brewer*, 1 G. Greene, 348; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Morris v. Commander*, 25 N. C. (3 Ired. L.) 510; *Miller v. Stowman*, 26 Ind. 143.

A riparian proprietor may restrain the construction of a weir in the *alveus* of a stream, where it affects the flow of the water of the stream past his lands. *Belfast Ropeworks v. Boyd*, Ir. L. R. 21 Eq. 560.

So, an upper proprietor is entitled to maintain an action against a lower one for increasing the height of a weir, where the effect is to raise the water of the river as it flows past the upper proprietor's land, although no actual damage is done. *M'Glone v. Smith*, Ir. L. R. 22 C. L. 550.

<sup>10</sup> *Colony v. Farrow*, 91 Hun, 82, 36 N. Y. Supp. 164.

<sup>11</sup> *Snow v. Cowles*, 22 N. H. 302; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Beech v. Kuder*, 15 Pa. Super. Ct. 89.

2 Rolle Abr. 140, pl. 6, says if a man stops a stream of water which runs through his land by which my land is surrounded, it is a nuisance to me; citing 9 Edw. IV., 35. The question there was as to the right to enter the land and throw down the obstruction, and the question of nuisance was only incidentally passed on.

The erection of a dam by one to whom land is conveyed without any water rights or privileges is a nuisance subject to abatement, where it floods the land of an adjoining riparian owner, and injures his water privileges. *Winchell v. Clark*, 68 Mich. 64, 35 N. W. 907.

<sup>12</sup> *Arimond v. Green Bay & M. Canal Co.* 31 Wis. 316.

<sup>13</sup> *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

See also preceding section.

is this true if, by the obstruction placed in the stream by the lower owner, the property of an innocent person is injured.<sup>14</sup>

**548. Water must not interfere with mill.**—A special injury is inflicted upon the upper owner if the water is set back in the stream across the line in such a way as to interfere with the flow of water from the wheel of a mill on the upper property.<sup>1</sup> Such act is a private nuisance.<sup>2</sup> The mere setting back of the water gives a right of action and entitles the upper owner to at least nominal damages.<sup>3</sup> Where the water power of the upper owner is unlawfully destroyed by the construction of a dam below, the upper owner is entitled to recover his damages irrespective of the question as to whether the construction of the dam was necessary for the protection of defendant's property or that of other riparian owners.<sup>4</sup> The boundary line dividing the upper from the lower property is the point at which the rights of the adjoining owners terminate. The lower owner may set the water back to that point, but not beyond it. An action will lie by a mill owner having a tailrace cut through his land to a stream for the escape of water from his mill wheel, against one who, by erecting a dam, raises the stream above its ordinary natural level, and as a consequence backs the water up the tailrace upon the mill owner, thereby obstructing the working of his mill.<sup>5</sup> The right of the upper owner is absolute and he is entitled to object to any interference with it, and therefore, in an action by a mill owner for obstructions to his machinery from back water from a dam erected by another on a river below, such obstructions need not be continuous to entitle him to a recovery. One hour's obstruction would furnish as complete a cause of action as any longer period of time.<sup>6</sup>

**549. Drainage must not be interfered with.**—That the lower owner is not entitled to set back the water across the boundary line is most strongly demonstrated by the fact that the upper owner has a right to avail himself of the stream flowing through his property for drainage purposes to its fullest extent. The level of water standing in the soil will usually correspond quite closely to that of the water flowing in the stream, so that anything which raises the height of the latter will prevent the water in the soil from finding its way into

<sup>14</sup>*Martin v. Riddle*, 26 Pa. 415, note.

<sup>1</sup>*Boatner v. Henderson*, 5 Mart. N. S. 186; *Hill v. Ward*, 7 Ill. 285; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Hutchinson v. Coleman*, 10 N. J. L. 78.

<sup>2</sup>*Moffett v. Breuer*, 1 G. Greene, 348.

<sup>3</sup>*Little v. Stanback*, 63 N. C. 285.

The mere fact that the injury suffered

by the upper mill owner by the damming back of the water is small will not prevent his recovery. *Thompson v. Crocker*, 9 Pick. 59.

<sup>4</sup>*Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740.

<sup>5</sup>*Watson v. Perine*, 13 U. C. C. P. 229.

<sup>6</sup>*Cory v. Silcox*, 6 Ind. 39.

the stream and will render the land adjoining the stream wet and unfit for cultivation. And any act of the lower owner which will tend to cause such a condition is a wrong to the upper owner and he is entitled to maintain an action to protect his rights.<sup>1</sup> That a right of drainage through an ancient water course has become of no value by reason of the construction of a public sewer system will not defeat an action for injuries caused by obstruction of the water course so as to interfere with the right of drainage through it.<sup>2</sup> So, a right of action for obstructing a water course through which plaintiff has a right of drainage is not affected by the construction at the same time of a new drain, although plaintiff's land is thereby as effectually drained.<sup>3</sup> But the mere construction of a drain gives no right to its maintenance until it has existed for the prescriptive period, so that a lower owner is not liable for raising his dam so as to obstruct a newly constructed drain, if he does not thereby interfere with riparian rights of the owner of the drain.<sup>4</sup> The New Hampshire court has said that the upper proprietor cannot complain that his right of drainage is cut off, if such effect results from merely a reasonable use by the lower owner of his property.<sup>5</sup> But that places the liability upon an entirely wrong principle. The wrong comes in backing the water over the line, and the reasonableness or unreasonableness of the act of the lower owner is wholly immaterial.

**550. Level of lakes and ponds cannot be raised.**—The rule which prevents the setting back of the water of a stream prevents the raising of the level of lakes or ponds to the injury of abutting owners.<sup>1</sup> The fact that the outlet of the lake is not a running stream, but submerges itself and filters through a bed of gravel, is immaterial.<sup>2</sup> The permanent maintenance of the water of a navigable lake at a height

<sup>1</sup>*Murdock v. Stickney*, 8 Cush. 113; *Oliver v. New York Bay Cemetery Co.* 38 N. J. Eq. 109; *Treat v. Bates*, 27 Mich. 390; *Hastings v. Livermore*, 7 Gray, 194; *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50; *Pisley v. Clark*, 35 N. Y. 525, 91 Am. Dec. 72; *Ferris v. Wellborn*, 64 Miss. 29, 8 So. 165; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Smith v. Philadelphia & R. R. Co.* 57 Fed. 903; *Montgomery v. Locke* (Cal.) 11 Pac. 874, Reargument in 72 Cal. 75, 13 Pac. 401; *Booker v. McBride*, 16 Tex. Civ. App. 348, 40 S. W. 1031. In the latter case some cases dealing with surface water were distinguished on the ground that the common-law rule, that when an adjoining proprietor in the ordinary use of his prop-

erty diverts the surface water to and upon the land of his neighbor he is not liable, and the injury which results therefrom is *damnum absque injuria*, has no application to a case where an adjoining proprietor dams up a natural water course, and thereby causes the surface water to overflow the land of his neighbor.

<sup>2</sup>*Hastings v. Livermore*, 7 Gray, 194.

<sup>3</sup>*Hastings v. Livermore*, 15 Gray, 10.

<sup>4</sup>*Cotton v. Pocasset Mfg. Co.* 13 Met. 429.

<sup>5</sup>*Bassett v. Salisbury Mfg. Co.* 43 N. H. 578, 82 Am. Dec. 179.

<sup>1</sup>*Dole v. Clow*, 21 Ill. App. 477.

<sup>2</sup>*Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199.

above high-water mark constitutes a taking of the property of the adjoining owners which entitles them to compensation.<sup>3</sup> One who has been granted an injunction to restrain the cutting of trees and undergrowth on the banks of his pond, and the digging of ditches which would empty surface water therein and fill it in, but has been refused such relief against the cultivation of land already cleared; and who undertakes to prevent such cultivation by raising his dam so as to overflow such cleared portion by back water,—may be ordered by the court to lower the dam to the height at which it stood at the time of the granting of the injunction, and may be attached for contempt for refusal to obey such order.<sup>4</sup> Equity will not restrain the owner of a dam from raising it or deepening the channel so as to change the natural level of the lake forming the reservoir, when the injury done may be compensated for in money damages, and the question of avoiding a multiplicity of suits does not arise, because no action at law had been brought.<sup>5</sup>

**551. No injury need be shown.**—Some of the earlier cases, which were decided upon the ground that priority of use was the basis of rights in a flowing stream, seem to indicate that, in order to give the upper owner a right of action, he must show that he has been injured. But it has become settled that the right to the natural flow of the stream is a natural right, given by nature, and that it depends solely on ownership of the banks of the stream, regardless of whether any use has been made of it or not. The conclusion must necessarily follow that an interference with this right will entitle the riparian owner to redress, whether he can show any actual injury or not. Injury is shown as soon as it appears that the water is backed over the line. The upper proprietor has a right to protect himself from the acquisition of prescriptive rights at least, and that right is not diminished by the fact that he has no present use for his rights to their full extent.<sup>1</sup> When the rights of the upper owner are

<sup>1</sup>*Re Minnetonka Lake Improv. Co.* 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295.

<sup>2</sup>*Baker v. Weaver*, 104 Ga. 228, 30 S. E. 726.

<sup>3</sup>*Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co.* 37 N. H. 254.

<sup>4</sup>*Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 455; *Hill v. Ward*, 7 Ill. 285; *Whipple v. Cumberland Mfg. Co.* 2 Story, 661, Fed. Cas. No. 17,516; *Alexander v. Kerr*, 2 Rawle, 83, 19 Am. Dec. 616; *Cory v. Silcox*, 6 Ind. 39; *Pastorius v. Fisher*, 1 Rawle,

27; *Branch v. Doane*, 18 Conn. 233; *Ellington v. Bennett*, 59 Ga. 286; *Graver v. Sholl*, 42 Pa. 58; *Graham v. Burr*, 4 Grant Ch. (U. C.) 1; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147; *Doud v. Guthrie*, 13 Ill. App. 653.

In an action for damages to one's land caused by the erection of a dam or embankment by another, it is not necessary to a cause of action that such landowner should prove that the obstruction complained of caused the water both to overflow and remain on the land to a greater extent than it would have done if the

invaded the law presumes damage, so that no special injury need be shown.<sup>2</sup> To give a right of action it is sufficient, therefore, that the level of the water is raised in the channel, and it is not necessary that it should overflow its banks.<sup>3</sup> The rule *de minimis* has no application to such cases.<sup>4</sup> An action will lie for penning back water, as soon as it interferes with a use to which the upper proprietor attempts to put his land, although he was not making such use of the land when the dam was built.<sup>5</sup> In order to give the upper owner a right of action the water must be set back over his line, because neither the erection of a dam nor the ponding of the water is a nuisance *per se*.<sup>6</sup> So, it is not the erection of the dam which gives the right of action, but the subsequent use of it in case it throws the water across the line.<sup>7</sup> As stated above, some of the earlier cases held that to entitle the upper owner to relief he must show that he has been injured.<sup>8</sup> It was held that the mere raising of the level of the water within the channel did not show special injury.<sup>9</sup> These decisions do not represent the correct rule upon the subject. Of course, one who seeks to compel a lower riparian owner to lower a dam on his property because it is an injury to land of the upper proprietor

obstruction had not been made. It is sufficient to prove either result. *Doud v. Guthrie*, 11 Ill. App. 194.

<sup>2</sup>*Woodman v. Tufts*, 9 N. H. 88; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

<sup>3</sup>*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Ripka v. Sergeant*, 7 Watts & S. 9, 42 Am. Dec. 214.

If the lower owner throws the water back upon a mill wheel of the upper proprietor the latter may maintain an action to protect his right, although the water is not thrown out of the banks, and no perceptible damage is done. *Hen-drick v. Cook*, 4 Ga. 241.

<sup>4</sup>*Dickson v. Burnham*, 14 Grant Ch. (U. C.) 594.

The slightest flooding back caused by a dam complained of will entitle the upper proprietor to damages, nominal if the injury is very slight, compensatory if substantial. *Kemmerer v. Edelman*, 23 Pa. 143; *Thompson v. Crocker*, 9 Pick. 59.

<sup>5</sup>*McLaren v. Cook*, 3 U. C. Q. B. 299.

Although the water from a dam has been set back over land for several years, less than the period of limitation, the upper proprietor may maintain an action, if, upon attempting to make a new use of his property, he finds that the use is interfered with by the water. *King v. Tiffany*, 9 Conn. 162.

<sup>6</sup>*Rogers v. Barker*, 31 Barb. 447.

So, an upper riparian proprietor cannot maintain an action as a prior appropriator of a stream to prevent the erection of a dam in the stream on the lands of a lower owner when he fails to show that he has suffered, or will necessarily sustain, any injury to his premises by such erection, where, instead of a proposed 8-foot dam, one would be required 70.66 feet high to back the water to his lower line. *Blair v. Boswell*, 37 Or. 169, 61 Pac. 341.

<sup>7</sup>*Sargent v. Stark*, 12 N. H. 332; *State v. Buttle*, 115 N. C. 784, 20 S. E. 725.

An owner of a dam cannot be held liable for the flowing of upper riparian lands when it is evident that the dam, as constructed, could not throw the water back onto the damaged lands. *Lowery v. San Joaquin & K. River Canal & Irrig. Co.* 134 Cal. 186, 66 Pac. 225.

<sup>8</sup>*Garrett v. McKie*, 1 Rich. L. 445. 44 Am. Dec. 263; *Omeltany v. Jagers*, 2 Hill L. 634, 27 Am. Dec. 417; *Cooper v. Barber*, 3 Taunt. 99.

<sup>9</sup>*Chalk v. McAlilly*, 11 Rich. L. 153; *State ex rel. Boise v. Hennepin County Dist. Ct.* 83 Minn. 464, 86 N. W. 455; *Cooper v. Hall*, 5 Ohio, 323; *McElroy v. Goble*, 6 Ohio St. 187.

has the burden of proving the injury.<sup>10</sup> But the upper owner has a right to have the water leave his property at its natural level, and an invasion of that right is an injury to him which gives him a right of action.

**552. Legislature cannot authorize the flooding of land.**—The flooding of lands to create a pond or reservoir is virtually a taking of the land within the meaning of the constitutional provisions that private property shall not be taken for public use without making compensation. Therefore, the legislature cannot authorize such flooding for a public use without making compensation, and it has no power to authorize it for a private use under any circumstances.<sup>1</sup> And therefore the mere grant of authority to erect a dam will not entitle the grantee to set the water back across a boundary line.<sup>2</sup> A legislative act authorizing the building of a dam across a navigable river will protect the one doing the work from liability to an indictment only, and not from the necessity of answering to the upper owner for injury caused by flowing his land.<sup>3</sup> A statute authorizing the maintenance and construction of booms, but making no provisions against the flowing of lands higher up the stream, or for the recovery of damages caused by such flowing, does not show a legislative intent to exempt boom companies from such liability, or authorize them to flow land if necessary to the successful prosecution of their business.<sup>4</sup> Authority conferred by statute upon a railroad corpora-

<sup>10</sup>*Avery v. Empire Woolen Co.* 82 N. Y. 583.

<sup>1</sup>*Colwell v. May's Landing Water Power Co.* 19 N. J. Eq. 245; *Wabash & E. Canal Co. v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Eastman v. St. Anthony Falls Water-Power Co.* 43 Minn. 60, 44 N. W. 882.

<sup>2</sup>*Lee v. Pembroke Iron Co.* 57 Me. 481, 2 Am. Rep. 59; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Sinnickson v. Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Rowan v. Johnson*, 17 N. J. L. 154; *Orittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462.

An act authorizing the owner of a milldam "to raise the dam" to the height of the natural surface of the water at the line of his lands will be construed to authorize the raising of the water in the dam to that height, and not to authorize the raising of the structure of the dam by which the water will be made to flow back upon the lands of the adjoining proprietor. *Colwell v. May's Landing Water Power Co.* 19 N. J. Eq. 245.

An act of the legislature permitting the damming of the outlet of a lake with a dam 7 feet high, but forbidding the raising of the water of the lake above its ordinary level, is inoperative when any dam of appreciable service to the grantee would raise the water of the lake above its ordinary level. *Arimond v. Green Bay & M. Canal Co.* 31 Wis. 316.

A water-power company organized and continued for private profit, empowered by statute to maintain for its own emolument a dam erected by public officers, is not immune from liability for injury to private citizens consequent upon such maintenance; such immunity extends only to acts done under valid legislation in the execution of a public trust for the public benefit, with care and skill, within the scope of authority. *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

<sup>3</sup>*Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201.

<sup>4</sup>*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

tion to construct its road upon its own land does not justify the obstruction by it of a natural water course due to the insufficiency of a culvert, by means of which the water was thrown upon the plaintiff's property to his injury.<sup>5</sup> Since the legislature cannot authorize the erection of the dam without making compensation to the upper owner, the grant of power to erect it does not take away the right of the upper owner to abate it as a nuisance if it interferes with his rights.<sup>6</sup> As said in *Lee v. Pembroke Iron Co.*<sup>7</sup> he who assumes, under color of legislative authority, to overflow an ancient mill, "takes" that mill and privilege from the owner as effectively and directly as though he entered upon the premises and demolished the building. And when the flowing is done under legislative authority the upper owner will be entitled to a common-law remedy if no statutory remedy is found applicable.<sup>8</sup> A railroad company is not relieved from liability for a dam on its right of way which amounts to a nuisance, and which it uses and keeps in repair, by reason of the fact that it was built by county commissioners under an act of the legislature, but with the railroad company's knowledge and consent.<sup>9</sup> When a legislative grant of authority to flow lands contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee, accepting the grant and exercising the power, cannot question the constitutionality of the condition.<sup>10</sup> If the legislature has no authority to permit the flowing of land of any adjoining owner, no such right can be conferred by the subordinate divisions of the state.<sup>11</sup> The question of the rights under the mill acts will be considered in a subsequent chapter.<sup>12</sup> But it may be stated here that the common-law rights of the upper own-

<sup>5</sup>*Mundy v. New York, L. E. & W. R. Co.* 75 Hun, 479, 27 N. Y. Supp. 469.

<sup>6</sup>*State v. Moffett*, 1 G. Greene, 247.

<sup>7</sup>57 Me. 481, 2 Am. Rep. 59.

<sup>8</sup>To constitute a taking of overflowed lands for public use, entitling the owner thereof to compensation under constitutional provisions, it is not necessary that the land should be absolutely appropriated, nor that the owner be permanently deprived of the use of it; the serious and direct interruption of the use of such land by reason of the public improvement is sufficient. *Payne v. Kansas City, St. J. & C. B. R. Co.* 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

<sup>9</sup>*Payne v. Kansas City St. J. & C. B. R. Co.* 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

<sup>10</sup>*Dow v. Electric Co.* 68 N. H. 59, 31 Atl. 22.

<sup>11</sup>It is no defense to an action for a private nuisance by erecting a milldam that the same was erected pursuant to a license from the town. *Nichols v. Paily*, 1 Root, 129.

But if a person, pursuant to a right claimed by him under contract with the police jury, and by its authority, constructs a dam across a non-navigable water course, a neighboring inhabitant, whatever his rights therein, cannot take the law in his own hands and physically oppose its construction or tear it down when built, but must assert his rights by an appropriate action. *Egan v. Russ*, 39 Ia. Ann. 907, 3 So. 85.

<sup>12</sup>See post, chapter XXIII.

er have, in some instances, been changed or destroyed by statutes authorizing the erection of mills.<sup>13</sup>

**552a. Power to permit flowage by regulation of use of stream.**—The recent Vermont case of *Avery v. Vermont Electric Co.*<sup>1</sup> presents a very interesting question. In it the idea was advanced that the stream should be treated as a unit, and that the legislature, in order to utilize the stream to its fullest extent, had the power to regulate the rights of the respective owners in such a way as to permit one to make use of a water power, although he did not own the land upon which the whole of it existed, and make compensation to the upper or lower owner for the use of his share of the power. The court held that the right of the legislature to regulate the rights common to riparian owners does not empower it to permit a lower owner to dam the water back on the upper owner's land when necessary to do so to develop the full power of the stream, and require the upper owner to take his share of the value of the stream in money. So that, in that case, the doctrine did no harm to the upper owner. But the very suggestion of the existence of such a right makes it necessary to examine the question whether it exists or not; for, if a stream is of such a character that the legislature may take possession of it and regulate it for the good of the public, to the injury or destruction of individual rights, the power is fraught with such possibilities of infringement upon private rights that it is necessary to determine what are the limits of such right. It is generally considered that the right to the flow of a stream and the advantages which may arise from its use are private property connected with the land through which the stream flows, and that the public, as such, has no right in, or power of control over, it. In case the stream is not navigable, or, even if it is navigable, in case no rights of navigation are involved, the public has no more interest in the use which the individual makes of that class of property right than of any other right which is purely private, and any suggestion that the state may compel one owner to combine with another, or permit him to make use of the property for his individual benefit against the will of the former, is a departure from all received notions of property rights and has no place in our system of jurisprudence; and the Vermont court, in suggesting that

<sup>13</sup> The English common law of flowage legally occupied their mill site, and a was changed in Massachusetts and site already occupied was not flowed Maine by the ordinance of 1714, which thereby. *Jones v. Skinner*, 61 Me. 25. authorized mill owners to flow the lands  
<sup>1</sup> (Vt.) 59 L. R. A. 517, 54 Atl. 179.



such a right might exist, was misled by certain local rules which are not of general application.

**552b. *Head v. Amoskeag Manufacturing Company*.**—The contention that the legislature may permit a lower owner to dam the water back onto the upper owner's land when necessary to do so to develop the full power of the stream, and compel the upper owner to take his share of the value of the stream in money, under its power to regulate the common rights in the stream, is based directly upon *Head v. Amoskeag Mfg. Co.*<sup>1</sup> In that case, Mr. Justice Gray stated that the New Hampshire mill act was clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good in a more general sense, as well as to the rights of the riparian proprietor, to regulate the use of the water power of running streams, which, without some such regulation, could not be beneficially used. The petitioner in that case sought to establish a dam to create power for the manufacture of cotton, woolen, iron, and other materials. The petition was attacked by demurrer on the ground that the statute permitting the taking of land for such a purpose was unconstitutional and void. The court held that the constitutionality of the statute had been established by *Great Falls Mfg. Co. v. Fernald*,<sup>2</sup> and *Ash v. Cummings*.<sup>3</sup> The provision as to eminent domain, in the New Hampshire Constitution, is that "no part of a man's property shall be taken from him or applied to public uses without his consent, or that of the representative body of the people." That provision affords the individual much less protection than do most of the Constitutions, and it might well be argued that, when the legislature consents to the taking of property, the individual is bound thereby. The court, however, in the *Fernald Case*, states that the right of flowing land cannot be taken without the owner's consent, unless it is for a public use; and it decides that the establishment of power for manufacturing purposes is a public use, holding that to create and improve water power in the streams and waters of a country is a matter of such general public advantage that private property taken for that purpose is taken for a public use. And that ruling was made the basis for the decision in the *Ash Case*. The *Head Case* was taken to the Supreme Court of the United States upon several grounds, but the court said that the single question presented for its decision was whether the landowner had been deprived of his property without due process of law in violation of the 14th

<sup>1</sup> 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441.

<sup>2</sup> 47 N. H. 444.

<sup>3</sup> 50 N. H. 592.

Amendment of the Constitution of the United States. The only ground upon which absence of due process of law was claimed was the unconstitutionality of the statute. This statute had been held constitutional by the supreme court of the state, and the matter was so far one of local policy that the Supreme Court of the United States might well have considered itself bound by that holding. But the court, instead of doing so, proceeds to enter upon a discussion of the question of the constitutionality of the act, refuses to consider whether the flooding of lands for manufacturing purposes is a public use, and upholds the statute on local Massachusetts law, applying the ruling of Chief Justice Shaw in *Bates v. Weymouth Iron Co.*<sup>4</sup> where he says that the right granted by the mill acts "is not a right to take and use the land of the proprietor above against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law for regulating the rights of proprietors on one and the same stream from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." In Massachusetts, the mill acts had their rise in 1714, long before the adoption of the first Constitution; and, when the Constitution was adopted, it provided "that no part of the property of any individual can, with justice, be taken from him or applied to public uses without his own consent, or that of the representative body of the people. . . . Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." There is nothing in that language to forbid the taking for private use, and the landowner is expressly bound by the act of the legislature. When the question of the validity of the mill acts came before the courts, there was no claim that they were unconstitutional. The sole question was whether the common-law remedy had been taken away by them. The court, in *Stowell v. Flagg*,<sup>5</sup> says the statute goes far "to establish a right in the owners of mills to flow the adjoining lands if necessary to the working of their mills," treating the question as merely one of local regulation within the power of the legislature. And it decides that there can be no doubt of the intention of the legislature to take away the common-law action, which might be renewed for every new injury, and so burden the owner of a mill with continual law suits and expenses, stating that the legislature has a right to substitute one process for another. The judge writing the opinion says: I cannot.

<sup>4</sup> 8 Cush. 548.

<sup>5</sup> 11 Mass. 366.

help thinking that the statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the scarcity of them, bore a much greater value compared to the land used for the purposes of agriculture than at present. But with this we have nothing to do. As the law is, so we must declare it. That language is utterly inapplicable in every state where the Constitution prevents the taking of private property for private use expressly, and also in those where it is held to do so by implication. In those states the question must recur, whether or not taking for mill purposes is for a public use. In *Lowell v. Boston*,<sup>6</sup> Judge Wells, in distinguishing the mill acts from an act authorizing the issuance of bonds for the rebuilding of a city, said the mill acts are not founded upon the power of eminent domain, and do not authorize its exercise. No private property or right in the nature of property is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the right of another proprietor. This right of flowage is sometimes inaccurately called an easement. But it is not so. It confers no right in the land upon the mill owner, and it takes none from the landowner. This regulation of the rights of riparian proprietors above in respect to the stream and to their adjacent lands liable to be affected by its use involves no other governmental power than that "to make, ordain, or establish all manner of wholesome, reasonable orders, laws, statutes, and ordinances" as the legislature shall judge to be for the good and welfare of the commonwealth, and for the government and ordering thereof, and of the subjects of the same. The distinction between permanently covering land with water, and with dirt or other *débris* from a public improvement, is not clear; and it would certainly be difficult to convince anyone that a railroad company, which, in making an excavation for its right of way, placed the excavated material on adjoining property to remain there permanently, had not effected a taking within the meaning of the constitutional provision requiring compensation to be made therefor. In fact, the Supreme Court of the United States, in *Pumpelly v. Green Bay & M. Canal Co.*<sup>7</sup> held that the backing of waters so as to overflow the land of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land for the public benefit, is such a taking as, by the constitutional provision, demands compensation. And that decision represents the general rule. The doc-

<sup>6</sup> 111 Mass. 464, 15 Am. Rep. 39.

<sup>7</sup> 13 Wall. 166, 20 L. ed. 557.

trine that the rule is not so appears to be local to Massachusetts; and *Head v. Amoskeag Mfg. Co.*, being founded upon it, cannot be held to be of general application. The reasoning in that case is based upon the analogy between owners upon water courses and tenants in common generally; but that reasoning is conclusively answered by the observation in *Avery v. Vermont Electric Co.* that it seems "to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights in the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams." The question how far the legislature may permit the water to be ponded upon the land of the upper owner under the power of eminent domain will be examined when we come to consider mill rights.<sup>8</sup> But in any state where the rights of private property are protected by constitutional provisions the legislature certainly has no power to permit such ponding to be done under any theory that it has a power of regulation over the stream which is superior to individual rights of property therein.

**553. Grants of right to dam back water.**—The right to set back the water of a stream upon land of the upper owner may be acquired by contract with him.<sup>1</sup> The right involves such an interest in land, however, that to be permanent it must be created by the same kind of transaction as is necessary to pass an interest in real estate,—that is, by grant.<sup>2</sup> And the instrument by which the grant is made must be

<sup>8</sup> See *post*, chapter XXIII.

<sup>1</sup> A grant of land subject to be covered by the waters of a mill pond due to a dam at a particular point 6 feet high from low-water mark on a stream flowing through the grantor's farm conveys a right in perpetuity to flood such lands by means of a dam at the designated place, 2 yards above the bed of the stream as it was when the deed was made. *Mouer v. Hutchinson*, 9 Vt. 242.

<sup>2</sup> *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *French v. Owen*, 2 Wis. 250; *Harris v. Miller*, 1 Meigs, 158, 33 Am. Dec. 138; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

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is an interest in land requiring a written instrument to pass title thereto, and acceptance by the owner of an oral award of damages made on an oral submission to arbitration does not create such easement. *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083.

An early Maine case is out of harmony with the decisions elsewhere in holding that the right of flowage is not an interest in lands within the meaning of the statute of frauds, but is rather in the nature of a license to do certain things in, or upon, the land of another, of which parol proof is always admissible. *Olement v. Durgin*, 5 Me. 9.

a deed under seal,<sup>3</sup> and is subject to the operation of the recording acts.<sup>4</sup> The interest however is an incorporeal hereditament, and does not constitute a freehold.<sup>5</sup> Therefore, a mere parol grant, or grant by a written instrument unacknowledged and unsealed, is a mere license and may be revoked at any time; and, in case the dam is washed away, it cannot be replaced without the consent of the grantor.<sup>6</sup> And even a license to flood the land must be so precise and definite that there can be no dispute as to the interests which were intended to be conveyed by it. Therefore, in an action for overflowing land, a letter stating that land would be sold to the defendant for the purpose of erecting a sawmill will not be construed as a license to overflow the grantor's lands to any extent necessary for working the mill, unless it appears that the probable effect of building the mill and putting up the dam was known to, and contemplated by, the parties at the time.<sup>7</sup> To make valid a grant of a right to flood the land, it must be made by one representing the title. Therefore, it cannot be made by one tenant in common.<sup>8</sup> But permission by tenants in common for the erection of a dam which will flow the common estate will bar an action by either individually for injuries to his separate property, where the grantors are not described as tenants in common, nor is it stated that the land on which it is to operate is held in common.<sup>9</sup> A grant of the right cannot be made by a

<sup>3</sup>*Cagle v. Parker*, 97 N. C. 271, 2 S. E. 76.

<sup>4</sup>An instrument granting, for a valuable consideration, liberty to flow the grantor's land continuously for a definite period, and after that time during the winter half of the year for a stated number of years, is a lease, and not a mere license, and must be recorded. *Smith v. Simons*, 1 Root, 318, 1 Am. Dec. 48.

<sup>5</sup>*Lucan v. Cadwallader*, 114 Ill. 285, 7 N. E. 286.

<sup>6</sup>An unsealed and unacknowledged written instrument signed by the parties and recorded, whereby riparian owners on a stream consent to the erection of a milldam and waive and release all damages that may result to them from back water, is not a grant of an easement to overflow their lands, but is a license. *Stephens v. Benson*, 19 Ind. 367.

A parol grant of the right to raise the height of a dam 18 inches will not, after such dam has been washed away, entitle the transferee of the easement to erect a new dam of still greater height

in place thereof; and such transferee is liable for damages for the overflow caused by such new dam. *Farmer v. McDonald*, 59 Ga. 509.

<sup>7</sup>*Canada Co. v. Pettis*, 9 U. C. Q. B. 669.

<sup>8</sup>*Hutchinson v. Chase*, 39 Me. 506, 63 Am. Dec. 645.

A tenant in common of mill property cannot, by a grant of land owned by him in severalty lower down the stream, give any right to flow the water back on the wheel of a mill situated on the common property. *Crippen v. Moss*, 49 N. Y. 63.

But a conveyance by each of several tenants in common of land, by a separate deed, of all the right and privilege which he has to flow any land belonging to him in part, lying in common and undivided, will convey a right to flow the land to its whole extent, and is not limited to the extent which the land had been theretofore flowed under mutual license between the tenants. *Howard v. Bates*, 8 Met. 484.

<sup>9</sup>*Francis v. Boston & R. Mill Corp.* 4 Pick. 365.

mortgagor so as to bind the interest of the mortgagee,<sup>10</sup> nor by an agent without authority,<sup>11</sup> nor by one attempting to act on behalf of a minor.<sup>12</sup> So, a grant by one in possession of government land, to which he has not obtained the title, is invalid.<sup>13</sup> The right may pass as incident to other rights expressly granted, where it is necessary to their enjoyment.<sup>14</sup>

**553a. Reservation of right.**— The right to flow the upper property may be reserved by the grantor of the whole tract upon dividing it and conveying away the upper portion.<sup>1</sup> But grantor's reservation of a right to flow the land conveyed as a milling privilege, appurtenant to a mill situated on his adjoining land, which he retains, is limited to a right to flow to the same extent, only, to which the premises were flowed at the time of the conveyance; and one who succeeds the grantor in his remaining property and its appurtenant water rights is not authorized to increase the height of the dam so as to extend his

<sup>10</sup>*Ballard v. Ballard Vale Co.* 5 Gray, 468. *Gitchell*, 105 Mich. 38, 55 Am. St. Rep. 428, 62 N. W. 1003.

<sup>11</sup>The owner of land is not estopped to deny the authority of an agent, who is alleged to have granted an easement for the flowing of a portion of the land by a mill pond, by the fact that the grantee is permitted to make improvements in reliance thereon, unless the owner had actual knowledge that the improvements were being made. *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

<sup>12</sup>The attempted grant by the father of a minor of an easement to overflow the minor's land by the back water of a milldam is no defense to an action for damages caused by such overflow, brought by a purchaser of the land, who acquired title from the minor after his coming of age, although the father may have exercised general acts of ownership of the land during his son's minority, where the title was at the time in the minor by deed duly recorded. *Farmer v. McDonald*, 59 Ga. 509.

<sup>13</sup>A contract by a proposed homesteader of government land to convey a portion of it to a mill owner for dam and flowage purposes is against public policy, and will not be enforced in favor of such owner, who, together with one to whom he had sold a half interest in the mill, occupied the contracted land for a term less than the prescriptive period, where the homesteader died before his title became complete, and the land was patented to his widow, who conveyed it to third parties. *Carley v.*

*When the right to maintain a pond by means of a dam is necessary to the enjoyment of the right to draw water from the pond, granted by a deed containing a provision that no rights, privileges, easements, or appurtenances not so hereinafter set forth shall pass by this indenture by any indentment or implication, it will pass as an ancillary or secondary easement to the right to draw water from the pond.* *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. 56.

<sup>1</sup>But under a deed conveying land adjoining a stream, which was subject to certain water privileges of the grantor's lower mills, a clause by which the grantor reserves the right of entering on said land, for the purpose of erecting a dam and drawing water therefrom, does not amount to a technical reservation, but was introduced into the deed for the purpose of protecting the grantor on his covenant against encumbrances. *Hickox v. Parmelee*, 21 Conn. 87.

And an exception in a grant of land bordering on a river, of a certain portion "which is reserved for the use and flowing of water for the mill" situated lower down on the river and owned by the grantor, is void for uncertainty, and cannot be regarded as having been practically located by reason, merely, that the purpose for which it is reserved is stated in the exception. *Darling v. Crowell*, 6 N. H. 421.

right of flowage.<sup>2</sup> A right of flowage is retained from a conveyance by way of exception, and not as a reservation, when the grantor, owning land on both sides of a river, conveys the land on one bank and keeps to himself the right of flowing it as an appurtenant milling privilege for the benefit of his remaining land on the opposite bank.<sup>3</sup> To be valid the reservation must define with certainty the right which is claimed in the property conveyed.<sup>4</sup> Where a grantor of a mill privilege makes certain reservations from the grant for the benefit of his mills below, including one as to the height of the water in the pond, it will not inure to the benefit of a subsequent purchaser from him of land situated further up the stream, so as to give him the right to cut through the bank of the stream and construct an artificial course to draw off all water raised higher than the point designated.<sup>5</sup> The reservation will include the right to do anything necessary to the enjoyment of the right expressly reserved.<sup>6</sup> And the enjoyment of it will continue so long as it is necessary to the full reception of the advantages for which it was intended to be reserved.<sup>7</sup> Reservation confers no reciprocal rights upon the grantee.<sup>8</sup> And the right to be free from the flowage of a lower dam may be the subject of reservation, as well as the right to flow the upper land.<sup>9</sup>

<sup>2</sup>*Watson v. Bartlett*, 62 N. H. 447.

<sup>3</sup>*Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

<sup>4</sup>A reservation in a grant of land of all the streams of water, and the right to erect milldams and overflow land necessary for the mill ponds, is, in case the right has not been exercised, void for uncertainty if considered as an exception. *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255.

A reservation in a grant of land, of the streams of water and soil under them, with the right of erecting milldams and overflowing the land necessary for the mill ponds, will not, in case of a grant by the grantee of a portion of such land with a like reservation, inure to the benefit of the second grantee, so that he can overflow the lands of his grantor, even though he procures parol permission to do so from the original grantor, since the right can only pass from the original grantor by deed. *Ibid.*

<sup>5</sup>*Judd v. Wells*, 12 Met. 504.

<sup>6</sup>When a right to flow and reflow land is reserved in a deed of it, and the right to maintain a wing dam is essential to the enjoyment of the right to flow the land, although a reservation is to be construed more strictly than a grant, nevertheless the reservation will include the

right to maintain the wing dam. *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270, 43 N. W. 56.

<sup>7</sup>Under a reservation in a deed of land of all the timber thereon suitable for sawing, and of the right to flow the land for a pond while necessary for the manufacture of the timber on the lands, the right to overflow the land will continue for such reasonable time as may be necessary for the manufacture of the timber after removal, and the right is not extinguished by mere delay in its exercise. *Gregg v. Birdsall*, 53 Barb. 402.

<sup>8</sup>The reservation of the right to build a dam across a river from the grantor's premises situated on one bank, against any point of the grantee's land on the other bank, together with rights of flowage over the grantee's land, does not confer upon the grantee any right to flow the land of his grantor on the other side of the river. *Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

<sup>9</sup>A right to flow grantor's reserved privilege will not be obtained under a deed of "a full and perfect right to flow all lands belonging to us, situated" on a certain brook, "meaning, nevertheless, to convey no right of flowage which shall injure the privilege of" grantor's mill, although, under the rules of the Touch-

**554. Construction of grant.**—A grant of a right to flow land will be construed so as to give the grantee all the privileges which were intended to be conferred on him.<sup>1</sup> Therefore, grantors of land deeded for the express purpose of enabling grantee to erect a dam cannot complain of the natural consequences of such use.<sup>2</sup> But the grantee cannot make the grant an excuse for flowing the land to a greater extent than is necessary to effect the object for which the grant was made.<sup>3</sup> Although leave is granted to build a dam so as to flow the

stone and other ancient books, the absolute grant would not be construed to be diminished by the reservation. *Webster v. Holland*, 58 Me. 168.

<sup>1</sup>An agreement "to permit the maintenance of a dam at the height" therein specified gives, as incident, the right of flowage necessarily caused by its maintenance. *Albee v. Hayden*, 25 Minn. 267.

The conveyance of so much land as may be necessary to flow back the water of a dam when the same is raised to a certain height is a conveyance of a right of flowage over such land by a dam of that height to continue perpetually, unless abandoned permanently. *Patterson v. Siceet*, 3 Ill. App. 550.

When a miller conveys land containing his dam and mill pond, reserving the right to enter the premises from time to time to make, amend, and repair the dam and remove manure that may have accumulated in the pond, the reservation is not limited to mere right of entry, but includes the right to maintain the dam as it was at the time of the deed, and the grantee is liable if he breaks down the dam. *Valentine v. Central R. Co.* 29 N. J. L. 60.

A right to a certain dam on another's land includes all the banks by which the water is confined. *Edgett v. Douglass*, 144 Pa. 95, 22 Atl. 868.

A grant of dam and flowage rights on another's land confers, as incidental thereto, the right to enter on the land to repair and cleanse it. *Frailley v. Waters*, 7 Pa. 221; *Holden v. Chandler*, 61 Vt. 291, 18 Atl. 310; *Fountain v. Perth Amboy*, 60 N. J. L. 410, 38 Atl. 676.

The Missouri court has made a somewhat doubtful application of this rule in holding that the reservation in a grant of land of a right to mine coal and other minerals from under the surface will include the right to make a pond on the surface to run the mining machinery, although an express reservation is made of the right of sinking air shafts, while no mention is made of the

right to make the pond. *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605.

The pond is certainly not necessary to run the machinery and cannot be held to have been included in the reservation, unless custom or actual use at the time of the grant made it part of the mining right.

<sup>2</sup>*Frizzle v. Patrick*, 59 N. C. (6 Jones Eq.) 354.

<sup>3</sup>The grant of a right to raise water at a spring for use at a tannery does not give a right to erect a dam below the spring in such a way as to collect water from other sources, and flow the grantor's land with a pond. *Merrill v. Calkins*, 74 N. Y. 1, Affirming 10 Hun, 495.

A grant of a right to conduct water from a river to a factory through a ditch on land of the grantor will not include the right of damming back the water to make a reservoir on the grantor's land to facilitate the flow of the water through the ditch. *Estes v. Wells*, 9 Cush. 487.

A grant to a lower owner of upper milling property and the water privileges thereto belonging, extending up the creek on the balance of the section in which the tract is located, for the purpose of building mills below the mills conveyed and damming up the creek, with a provision that it is understood that the grantee is not to build any dam on the creek above the mills conveyed, but shall have the right to back up water from dams below such mills "as far as said" grantee "may see proper,"—does not convey an unlimited right to overflow the lands of the grantor beyond the extent of the existing water privilege conveyed, since the expression "as far as he may see proper" is to be construed as referring to the building of dams, and not to the backing of water, which is consistent with the rest of the deed; or, if it does refer to the backing of water, construed in connection with the other parts of the deed, it clear-



upper proprietor's land in a certain way, there will be liability in case it is flowed in another way.<sup>4</sup> The grantor can do nothing to defeat the grantee's enjoyment of the privilege.<sup>5</sup> So, under a conveyance by the owner of land on which is a mill, of premises higher up the stream, reserving all mines and minerals, and all the creeks, kills, runs, and streams of water upon the premises granted, the reservation will be absolute, and not confined to the use of water for mines, etc., and will continue the right of flowage by a mill pond on the lower property existing at the time of the conveyance.<sup>6</sup> To be effectual the grant must specify with certainty what is intended to be conveyed. Therefore, where the deed of a plaintiff granted as much of a certain lot as would be overflowed by a milldam the grantee was about to erect, while it would not operate to pass the estate in the land intended to be overflowed, by reason of uncertainty as to what land it could be applied to, it would, when the grantee and his successors for more than twenty years overflowed the land to a certain extent for the purpose of working a mill, operate as a grant of an easement in the land for that purpose.<sup>7</sup> The grant of water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument containing the grant. Hence, where a mill owner grants the right to erect dams above and below the mill, and it appears that had it not been for the preservation of the power of the grantor the

ly was intended to confer the right to back up the water below the mills conveyed on that part of the creek not embracing the water privilege appurtenant to such mills, to an extent sufficient to enjoy that privilege, but not to extend beyond it. *Bobo v. Wolf*, 18 Ohio St. 463.

<sup>4</sup>*Hutchinson v. Granger*, 13 Vt. 386.

Under a deed conveying certain flowage rights in general terms, in order to effect the purposes of the grantee, stated in the recital of the deed, of obtaining a greater head of water by raising the grantee's old dam or building a new one higher than the old one, the grantee may build the dam in contemplation only at the site of the old one, and not at some other place. *Woods v. Nashua Mfg. Co.* 5 N. H. 467.

A stipulation in a contract giving the right to construct and maintain fishponds on premises and to build dams, embankments, etc., that the licensee shall not have the right to dam up the water so as in anywise to overflow or injure

the main spring, embraces the spring as it then was artificially controlled, or as it might become by reverting to its natural state, and gives no right to construct a dam with a narrow opening through it at a point near the main spring, where the water naturally flows in a wide stream, causing mud to accumulate over the bottom thereof, rendering the water less clean and free from impurities, and injuring it both in beauty and accessibility, in the absence of any covenant by the owner to keep it in an artificial condition. *Ford v. Lukens*, 81 Ga. 633.

<sup>5</sup>A conveyance, with full covenants of warranty, of the right of flowing or raising the waters of a pond over the grantor's land for the purpose of creating a storage reservoir, conveys an easement with which the grantor cannot interfere by raising the grade of the land. *Wattappa Reservoir Co. v. Mackenzie*, 132 Mass. 71.

<sup>6</sup>*French v. Carhart*, 1 N. Y. 96.

<sup>7</sup>*Brown v. Street*, 1 U. C. Q. B. 124.

lower dam would have been sufficient to supply power to the grantee, the grant will be construed as not conferring upon the grantee the right to construct the lower dam to such a height as will destroy the power of the grantor above.<sup>8</sup> But, if the lower privilege is granted absolutely, the grantee has a right to make use of his privilege, although the result is to destroy that of his grantor.<sup>9</sup> The right of the grantee is not exhausted by the construction of one dam, but he may restore or rebuild or reconstruct the dam so long as he does not injure the rights of the grantor.<sup>10</sup> The grant for a nominal consideration of the right to boom logs in the stream will not include the right to dam back the water so as to overflow and destroy the whole farm of the grantor.<sup>11</sup> The grantor may limit the right of flowage to particular purposes, but the use of the grantee cannot be restricted if the grant is in fee, without conditions.<sup>12</sup> One who grants a mill

<sup>8</sup>*Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740.

A devise of a portion of a tract of land to one, and of another portion lower down the stream to another, "together with the privilege of the stream," will not give the latter a right to flow the upper land by a dam higher than that maintained by the grantor, although a limitation is expressed in the devise of the privilege that it shall not be used so as to injure mills lower down the stream. *Davis v. Wilson*, 6 Cush. 203.

<sup>9</sup>Persons in possession of sawmill property under an agreement by the owners thereof for a conveyance of it with the water privileges and appurtenances thereunto belonging have the right to tighten and raise the dam connected therewith to the extent necessary to the enjoyment of the mill privileges, even though a race conveying water to their grantor's gristmill on the same stream be thereby stopped up to the injury of such grantors. *Brugger v. Butler*, 6 Or. 459.

<sup>10</sup>*Butz v. Ihrie*, 1 Rawle, 218; *Hall v. Turner*, 111 N. C. 180, 15 S. E. 1037.

One having the right to maintain a dam at a certain height as appurtenant to a mill may permanently extend the dam over and across an artificial channel washed out around one end of the dam so as to afford greater security thereto, if no injury is thereby done to adjacent property subject to the easement of the dam. *Lammott v. Evers*, 106 Ind. 310, 55 Am. Rep. 746, 6 N. E. 636.

But a grant of a right to make a dam of a certain height to accommodate a

mill, in a deed granting the mill, will not give a right to maintain two dams, if the effect of the second, which is constructed to regulate the height of the water, is to raise the water higher than it was raised by the first, to the injury of the grantor. *Baker v. Sanderson*, 3 Pick. 348.

And a grant of the right to construct a dam upon the land of the grantor for the purpose of raising a head of water, together with the right of making repairs upon and altering the same, will confer the right of making only one dam; and, when that has been completed, there is no right to make a new location, or to change the structure so that it will cover more of the grantor's land, or cause more land to be flowed. *Goodrich v. Longley*, 1 Gray, 615.

<sup>11</sup>*Rasicot v. Little Falls Improv. & Nav. Co.* 65 Minn. 543, 68 N. W. 212.

But a conveyance by a riparian owner of the right to erect piers, booms, and assorting works in the river will carry with it the right to overflow the grantor's land so far as necessary to the beneficial enjoyment of the right expressly granted for the purpose for which the grant was made, although the grantee must exercise the right so as to do no more injury than is necessary to the grantor's premises. *Grovels v. Little Falls Improv. & Nav. Co.* (Minn.) 77 N. W. 217.

<sup>12</sup>*Hathaway v. Mitchell*, 34 Mich. 164.

A grant of the right to keep up a milldam at a certain height, and imposing no restrictions on its use, cannot be limited to the supply of a sawmill as then contemplated, but may be used to

site, together with the right to erect a dam upon his property and to flow his land up to a specified point, cannot recover damages for a flowage of his land which does not extend above the point indicated, although the dam is constructed at a point outside the boundaries of the granted lands. The right to flow and to build the dam on the grantor's premises are separable, and one may be exercised without the other.<sup>13</sup> A grant of the right of "flowing the great pond" will limit the rights of the grantee to the existing dam.<sup>14</sup> And a grant of the privilege of flowing one tract will not include the right to flow another belonging to the same grantor, where the necessity of it was not patent or expected by either party at the time of the grant.<sup>15</sup> A grant of "all the land that the dam flows" will include all that the dam flows when actually used for the purpose for which it was erected, although at the time of the conveyance it was out of repair, and flowed only a small tract of land.<sup>16</sup> Under a deed which conveyed a portion of grantor's lands bordering on a stream, granting the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the grantor or his successors in title to the adjoining lands should be entitled to have the damage assessed by arbitrators, and that the grantees should pay the amount awarded,—the grantees are liable, not only for damages caused by the flooding of lands, but also for all other damages occasioned by them in constructing the dams, etc.<sup>17</sup>

furnish water power for a paper mill erected after the sawmill burned down. *Hathaway v. Mitchell*, 34 Mich. 164.

A right of flowage exists for all times of the year under a grant of a mill privilege, the height of the head of water being limited during certain seasons. "and at other seasons as may be hereafter agreed," no such subsequent agreement having been made. *Rackley v. Sprague*, 17 Me. 281.

<sup>13</sup>*Kilgore v. Hascall*, 21 Mich. 502, 2 Mich. N. P. Supp. 12.

<sup>14</sup>*Bennett v. Kennebec Fibre Co.* 87 Me. 162, 32 Atl. 800.

<sup>15</sup>*Foster v. Parham*, 74 N. C. 92; *M'Kilip v. M'Ilhenny*, 2 Watts. 466.

But a grant of a right to flood and overflow certain described property for a pond carries with it, if necessary, by reason of the natural configuration of the ground, for the enjoyment of the right, a license to flood other lands of the grantor contiguous thereto, but conveys no title or right of possession to the servient estate, or right to prevent a

change in the configuration of the land which will prevent such flooding. *Simpson v. Wabash R. Co.* 145 Mo. 64, 46 S. W. 739.

Under a grant of a right of flowage on 80 acres on one end of a certain lot, "excepting 30 acres set off to the widow," etc., the grantee acquires a right to flow only the 50 acres then belonging to grantor, and intended to be conveyed. *Berry v. Billings*, 44 Me. 416, 69 Am. Dec. 107.

A grant of land with the right of "following up the ditch to the bounds of land owned" by a certain person named does not limit the right of flowing to the ditch, but fixes the height to which the dam may be maintained and the land of the grantor flowed, so that the change of channel of the stream will not defeat the right of flowage. *Clinton Gaslight Co. v. Fuller*, 170 Mass. 82, 48 N. E. 1024.

<sup>16</sup>*Morse v. Marshall*, 13 Allen. 288.

<sup>17</sup>*Hamelin v. Bannerman*, 31 Can. S. C. 534.

**555. Effect of grant.**— A grant of the right to erect a dam so as to flow the land of the grantor will prevent the latter from treating the dam as an unlawful structure, although the water was raised to a greater height than provided for by the deed. The remedy in such case will be to enforce the contract, and not to ignore it and proceed for damages as for a tort.<sup>1</sup> The grant of flowage rights is binding upon a subsequent grantee of the servient estate.<sup>2</sup> The grant of a right of way across a stream will entitle the grantee to dam back the stream to effect a passage in case the grantor destroys the bridge.<sup>3</sup> If the grant is to the grantee, "his heirs and assigns forever," the right is transferable, and the transferee will obtain all the rights of the original grantee.<sup>4</sup> Conversely, a deed granting a right to flow land, without words of inheritance, gives only a life estate.<sup>5</sup> A right reserved by a grantor to flow the grantee's premises as a milling privilege appurtenant to land retained by him becomes attached to such land as an easement in perpetuity without any mention by the grantor of his heirs or assigns.<sup>6</sup> The right of flowage, conferred by a conveyance of land, together with the privilege of damming a river passing through it, does not pass in a subsequent grant of the land by implication, so as to permit a subsequent grantee to cast back water upon the upper mill, when neither the mill nor the dam had been erected at the time of his grant.<sup>7</sup>

**555a. Grant with flowage rights established.**— The rule is applicable to flowage rights, that if one, having established an artificial con-

<sup>1</sup>*Peay v. Salt Lake City*, 11 Utah, 331, 40 Pac. 206.

<sup>2</sup>*Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

<sup>3</sup>The fact that the owner of the servient estate has for his own convenience changed the location of the way to its present location across the stream is immaterial. *Hamilton v. White*, 5 N. Y. 9, Affirming 4 Barb. 60.

<sup>4</sup>*Peaslee v. Tower*, 62 N. H. 434.

<sup>5</sup>*Temple v. Morse*, 178 Mass. 336, 59 N. E. 845.

So, a grant of a privilege of backing water on grantor's land, as much as grantee may think necessary, by a certain dam, with a stipulation that grantor shall never claim any other or greater damages for backing said water than what is then agreed upon, confers a purely personal privilege in the grantee, and the dam he erects is a monument of his exercise of the grant, which cannot subsequently be increased by his representatives. *Hogg v. Bailey*, 5 Pa. Super. Ct. 426.

In *Hall v. Turner*, 110 N. C. 292, 14 S. E. 791, however, it has been held that a grant of a flowage right, to continue so long as the grantee shall keep up his mill, creates an easement which descends with the land to grantee's heirs, who have, in equity, a base, qualified, or determinable fee, as it cannot be presumed that the grantee would have erected his works on the strength of a mere personal right.

<sup>6</sup>*Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

So, a reservation of a right of flowage to a mill owner who sells a portion of his property, part of which is flowed land, creates an easement in favor of the mill; and a conveyance of such mill property, together with "all the mill privileges which I own," includes such reserved right of flowage, without words specially describing the easement, in the deed. *Watson v. Bartlett*, 62 N. H. 447.

<sup>7</sup>*Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

dition upon his property by which one portion has been subjected to an easement in favor of the other, grants the dominant portion, the grant will carry the easement with it. And this rule is applicable, not only to protect the one who constructs the dam,<sup>1</sup> but his grantee, also.<sup>2</sup> But the rule does not apply to a grant of government lands upon which the first grantee has exercised a flowage easement over lands granted to a subsequent grantee.<sup>3</sup> Limitations upon the flowage right established by the grantor against the first grantee will inure to the benefit of a subsequent grantee.<sup>4</sup> So far as the cases dealing with water rights have gone, the rule is not applied in favor of the grantor himself, so that, in case he conveys land without reserving the right to flow it, he loses the flowage right, although it was actually established and visible at the time of his grant.<sup>5</sup> But the right of one owning an estate, on which, from time immemorial, there has existed a mill, pond, and dam, to overflow its lands, is not extinguished or impaired, in respect of the premises conveyed, by his deed of a parcel of it, nowhere bounded by the pond or stream, containing a general warranty against encumbrances and no reservation whatever; but such right passes to the subsequent grantee of the mill site.<sup>6</sup> The fact that the right of the grantor is extinguished by the conveyance without reservation of the right prevents the fact that he has exercised a flowage right for more than twenty years over the parcel conveyed from being a breach of covenant against encumbrances.<sup>7</sup>

**556. To what level may water be raised under grant.**— If the grant specifies the point to which the water shall be raised the grantee cannot exceed that limit if it can be ascertained.<sup>1</sup> Thus, if the water is to be raised so far as a hole in a rock, it cannot be raised further

<sup>1</sup>*Calkoun v. Palmer*, 8 Gratt. 88.

<sup>2</sup>*Hathorn v. Stinson*, 10 Me. 224, 25 Am. Dec. 228.

<sup>3</sup>*Wilcoxon v. McGhee*, 12 Ill. 381, 54 Am. Dec. 409.

So, a state grant of land containing a mill site will give the grantee a right to flow adjoining land subsequently granted by the state to a third person only as the right is expressly given, although the latter grant refers to a map showing the land flowed to the extent and in the manner claimed. *Colvin v. Burnet*, 2 Hill, 620.

A right to flow another's land without payment of damages will not be acquired where, after obtaining a right of flowing all of grantor's land, except that grantor's privilege must remain unin-

jured, the common grantor deeded his estate to another, and then the said mill and privilege were acquired and flowed by the first grantee, as the reservation does not become void as against the other grantee, and the first grantee's flowage rights are therefore not extended. *Webster v. Holland*, 58 Me. 168.

<sup>4</sup>*Preble v. Reed*, 17 Me. 169; *Burr v. Mills*, 21 Wend. 290. See *post*, § 832.

<sup>5</sup>*Harwood v. Benton*, 32 Vt. 724.

<sup>6</sup>*Kidder v. George*, 18 N. H. 511.

<sup>7</sup>*Pray v. Great Falls Mfg. Co.* 38 N. H. 442.

A clause in a will devising a mill and water privilege, and devising, also, the right "at all times to raise the water in the pond until the surface of it shall reach a certain mark," will limit the

than that point.<sup>2</sup> If the privilege is granted to flow the water back to a tailrace, the mouth of the race will be the limit.<sup>3</sup> If the right is granted to flow the water "up to" a specified object situated above the dam, the grant will be held to mean up to a line drawn across the stream at that point, and will not entitle the grantee to raise the entire level of the water up to the body of the object mentioned.<sup>4</sup> If a high-water mark is mentioned the dam cannot be maintained at that height if the effect is to raise the water at the point mentioned above that height.<sup>5</sup> The height of the dam is not the most accurate test of the flowage right. As said in *Town v. Faulkner*,<sup>6</sup> while the height and capacity of a dam are common instruments wherewith to measure the extent of a water right, other monuments may be, and often are, adopted. The more certain measure of the right of the grantee is the distance the water is set back.<sup>7</sup> But the height of the

right to raise the water to that mark, although the right had been exercised by the testator of raising it beyond that point. *Denton v. Leddell*, 23 N. J. Eq. 64, Affirmed in 24 N. J. Eq. 567.

"But a hole in a rock, drilled by the grantee nineteen years after a deed had been made giving a right to flow land to the height of a hole in a certain described rock, which was not at that time drilled, cannot be made the limitation to which the flowage may be maintained. *White v. Bliss*, 8 Cush. 510.

<sup>2</sup> Where one who has granted the right to carry water from an upper mill through a tailrace over his land grants to a lower owner the right to flow his land in such a manner as not to obstruct or interfere with the right of the upper mill owner, "meaning and intending to grant the liberty to flow the land by a dam of sufficient height to flow back the river to the tailrace," he will convey no right to flow higher than the mouth of the tailrace, although it might be flowed higher than that without interfering with the rights of the upper owner. *Riley v. Parks*, 11 Met. 424.

<sup>3</sup> *Wilder v. Clough*, 55 N. H. 359.

A grant of a water privilege lying on the stream between two mills of the grantor, "commencing at a certain permanent rock," thence running to the lower dam, reserving therefrom the right of taking water from the upper dam to themselves, will give no right of flowing the land higher than the rock mentioned. *Crittenden v. Field*, 8 Gray, 621.

No right is given to flow lands of the grantor above the distance specifically called for as the extent of the line up

a creek in a deed describing the land as part of a certain quarter section beginning at a designated point "far enough up the bank to raise a 9-foot head" at a designated mill, and thence up the bottom lands "100 rods," to include all the bottom lands on both sides of the creek within the designated bounds; as the reference to the distance sufficient to raise such head is merely descriptive, and intended, in connection with other descriptions therein, to fix a definite starting point. *Coats v. Taft*, 12 Wis. 388.

<sup>4</sup> *Brady v. Blackinton*, 113 Mass. 238; *Hiscox v. Sanford*, 4 R. I. 55.

And evidence that the water was above the mark referred to when the grant was made will not be admitted to show that the right was given the grantee to raise the water at the dam above the height of the mark. And in such a case, the acts of the parties to the deed, immediately after and subsequent to the grant, in keeping the water at the dam at the height of the mark, will not be admitted for the purpose of showing the practical construction of the grant by the parties, as the language in the deed is not ambiguous, and the intent of the parties can be ascertained therefrom. *Hiscox v. Sanford*, 4 R. I. 55.

But the grantee of flowage rights up to a certain line is not required to keep the whole dam at the water level, if there are waste ways enough to carry off the water under all ordinary circumstances. *Thatcher v. Baker*, 109 Pa. 22.

<sup>5</sup> 56 N. H. 255.

<sup>6</sup> *Lacy v. Arnett*, 33 Pa. 169.

dam may be the test, and, if it is, that will govern.<sup>8</sup> By a dam 9 feet high is meant such a dam as, under given circumstances, will pond the same quantity of water that a dam exactly and uniformly 9 feet high would pond under the same circumstances.<sup>9</sup> But where stipulations for the regulation of the height of water are introduced into a deed which was intended to regulate flowage rights which are plainly contrary to the real intention of both parties under a material mistake, the deed will be reformed, and the mistake corrected.<sup>10</sup> A grant of flowage rights to a certain line refers to the ordinary condition of the stream.<sup>11</sup> And, if a dam is a lawful structure, the usual or ordinary condition of the stream above the dam is that which exists when the pond is full, and the stream is unaffected by exceptional or accidental causes.<sup>12</sup> In a grant of the privilege to flow

<sup>8</sup>A contract stipulating that a mill owner, after making certain specified alterations in an existing dam, may "then keep the water at the height the dam will raise it," fixes the full right of that dam, and gives no right to erect a new one of the same height as the older one, if it in fact raises the water higher than that one did. *Brown v. Collum*, 112 Ga. 68, 37 S. E. 91.

A deed granting the right to flow so much of the grantor's land as would be flowed by raising a milldam to the height of 12 feet will not be canceled on the ground of fraudulent representations, although the flowage covered 75 acres instead of 30, as expected, where the grantor's agent inspected the premises before the execution of the conveyance, and the grantee did nothing to mislead him. *Sanford v. Nyman*, 23 Mich. 326.

A clause in a deed by which the owner of a dam having the right to maintain flashboards thereon to the height of 2 feet acquires the right to add 1 foot during certain months of the year, that "such flashboards shall not be renewed, replaced, or repaired" during the specified months when the right to maintain the additional foot does not exist, does not take away the right to do the acts necessary to maintain to the height of 2 feet. *Amoskeag Mfg. Co. v. Shirley*, 69 N. H. 269, 39 Atl. 976.

And where a mill owner acquires a right by a grant to maintain flashboards supported by pins not less than 4 feet apart, and, by a subsequent grant, acquires the privilege of maintaining the boards at an increased height without any restrictions as to means of main-

taining them, he may use such reasonable means as will render the grant effective, notwithstanding the former restrictions. *Amoskeag Mfg. Co. v. Shirley*, 70 N. H. 577, 85 Am. St. Rep. 646, 49 Atl. 90.

<sup>10</sup>*Hall v. Turner*, 110 N. C. 292, 14 S. E. 791.

<sup>11</sup>*Winnipisseege Lake Cotton & W. Mfg. Co. v. Perley*, 46 N. H. 83.

So where, in reducing to writing an agreement by which a right was to be conveyed to maintain a dam to the height of a certain mark, a license was inserted of the right to raise the water to the height of that mark, such license will not operate as a limitation of the grant, although by raising the dam to that height the water is sometimes raised above it. *Salmon Falls Mfg. Co. v. Portsmouth Co.* 46 N. H. 249.

<sup>12</sup>*Thatcher v. Baker*, 109 Pa. 22.

<sup>13</sup>*McConnell v. American Bronze Powder Mfg. Co.* 41 N. J. Eq. 447, 5 Atl. 785.

But where a deed conveying land on a stream with mill privileges contains a prohibition against raising the water by the erection of a dam so high as to overflow the springs along the creek bank, if the waters of the springs in the place where they issued from the ground at the date of the deed are flowed over or impeded by the erection of a dam by the grantee, there is a violation of the restriction contained in the deed: and it seems that, in such a case, where a spring boils up from the bottom of a creek, it is overflowed by that creek notwithstanding its waters may issue with such force as to rise above the level of the creek. *Salado College v. Davis*, 47 Tex. 131.

land, where the height to which the grantee may raise his dam is indicated by tree marks of a specified height above the dam, no two of which are on the same level, the marks will be considered as points or levels from which to measure downward the number of inches specified to the point or line beyond which the water cannot be raised.<sup>13</sup> If the right to maintain the pond is granted without limiting the height, the law will limit it to such point as will afford a reasonable use of the privilege.<sup>14</sup> But it has been held that, in the first instance, the right to determine the location of a dam and the extent to which lands shall be flowed on both sides of a river by a dam built across such river is in the owner of the right to build the dam and flow the lands.<sup>15</sup> If the dam is to be located below that of the grantor and the height is limited, it will be presumed that the restriction was for the purpose of preserving the mill privilege of the grantor, and that no right was conferred to destroy it.<sup>16</sup> The extent of the flowage right will be determined by natural objects, if possible, rather than by the conclusions and measurements of engineers.<sup>17</sup> If the grantee is prohibited from backing the water onto cultivated lands of the grantor, he cannot raise the water so high as to destroy those lands by sobbing.<sup>18</sup> If the rights of the parties cannot be determined by the terms of the grant, they will be determined according to the practical construction of the parties, so that in case the flowage is maintained to a certain point for a series of years it cannot be changed.<sup>19</sup> But if the grantee acting under his grant constructs the dam to a certain height, he will be held to have exhausted his power so that he cannot subsequently raise it to a greater height.<sup>20</sup> A conveyance by a landowner of the entire possession of a creek flowing through his land for the purpose of se-

<sup>13</sup>*Heffelman v. Otsego Water-Power Co.* 78 Mich. 121, 43 N. W. 1096.

<sup>14</sup>*Hull v. Fuller*, 4 Vt. 199.

And a grant of a right to maintain a dam and flow the water so high as will answer, and not impair or obstruct the water wheel of the grantor above, may be made certain by parol evidence of the height of dam which will answer the requirements of the grant. *Dryden v. Jepherson*, 18 Pick. 385.

<sup>15</sup>*Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

<sup>16</sup>*Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740.

So, a deed conveying the right to construct a dam, but providing that it shall not be of a height that will injure the grantor's mill by backing water upon it,

cannot be explained, varied, or annulled by representations or stipulations of the grantor permitting the erection of a dam of greater height. *Gooch v. Conner*, 8 Mo. 391.

<sup>17</sup>*Broton v. Bush*, 45 Pa. 61; *Deborah Woolen Mill Co. v. Greer*, 58 Iowa, 86, 12 N. W. 126.

<sup>18</sup>*Cogle v. Parker*, 97 N. C. 271, 2 S. E. 76.

<sup>19</sup>*Meyer v. Horst*, 106 Pa. 552; *Lau v. Mumma*, 43 Pa. 267; *Watson v. Bartlett*, 62 N. H. 447.

<sup>20</sup>*Goodrich v. Longley*, 4 Gray, 379.

Where an ancient grant to erect a mill and dam is without limitation as to height, it will be construed with reference to the conduct of the grantee, and he will not be permitted to increase the



curing to the grantee the entire water privilege as far as the same is required for a mill then being erected by him, with permission to erect a new mill and to cut a race through his land to supply water thereto, does not give such grantee the right, as against a subsequent purchaser of the land, to overflow such land by raising the height of the dam above that at which it was erected and maintained for a long period of time.<sup>21</sup> On the other hand, where a grantor of a right to maintain a dam to flow his land without paying damage therefor, as far and high as it can be done without setting the water back on his wheel, provides that it shall be of a certain height, and points out the place where it is to be erected, a subsequent grantee of the mill cannot maintain a bill for injunction against the owner of the dam, although the water therefrom interferes to some extent with the wheel.<sup>22</sup>

**557. License.**— Although a deed is necessary to confer permanent rights to flood land, temporary rights may be conferred by lease or license, which are valuable and enforceable until the license is revoked, and which confer upon the licensee all the rights of an owner of the property so far as protection against the acts of strangers is concerned. It has been said that a parol license to flow lands is void.<sup>1</sup> But that must be taken to mean that it confers no rights which are not subject to be taken away by revocation, for, until it is revoked, it justifies the acts of the licensee which are done under it.<sup>2</sup> It will protect the licensee from an action of trespass on the case for flowing the land as authorized.<sup>3</sup> The rights conferred by a parol license are, however, of the most precarious nature, for not only may it be revoked at the pleasure of the licensor,<sup>4</sup> but one attempt to exercise it

height of the dam after the lapse of a long period, to the prejudice of intervening purchasers of land above the dam. *Davidson v. Fowler*, 1 Root, 358; *Barret v. Hoamer*, 1 Root, 271.

A deed from an adjoining proprietor to an owner of a milldam of "the right of way for a mill race, with ground sufficient for abutments to a dam across" such stream, does not authorize the acts of a subsequent grantee in raising the height of the dam above that at which it stood when the conveyance was executed, so as to injure such land by back water. *Scheible v. Law*, 65 Ind. 332.

<sup>21</sup>*Toney v. Johnson*, 26 Ind. 382.

<sup>22</sup>*Prentiss v. Wood*, 118 Mass. 589.

<sup>1</sup>——— *v. Deberry*, 2 N. C. (1 Hayw.) 248.

<sup>2</sup>*Thatcher v. Baker*, 109 Pa. 22.

<sup>3</sup>*Millerd v. Reeves*, 1 Mich. 107; *Kerr*

*v. Bearinger*, 29 U. C. Q. B. 340; *Robinson v. Fetterly*, 8 U. C. Q. B. 340; *Winham v. McGuire*, 51 Ga. 578; *Bell v. Elliott*, 5 Blackf. 113; *French v. Owen*, 2 Wis. 250.

<sup>4</sup>*Calhoun v. Palmer*, 8 Gratt. 88.

It is a good defense to an action by one landowner against an adjoining landowner for obstructing a water course so as to prevent the escape of the waters collected therein by a system of drainage constructed by the former to drain his land, that the obstruction complained of was an artificial outlet to ponds of water on the former's land, made by him under a parol license, which license was granted without consideration, and was afterwards revoked, and the outlet was filled up, but not so as to obstruct the natural flow from said pond, in the absence of allegations that

will exhaust the rights of the licensee so that he cannot make an addition to his dam in case the one erected proves insufficient.<sup>5</sup> A deed conferring perpetual flowage rights, either with or without rental, will be construed as a grant of the right to maintain a dam, and not as a mere license.<sup>6</sup> The license will be revoked by any act which shows an intention to terminate it. Thus, a sale of the property will constitute a revocation, or a foreclosure sale under a pre-existing mortgage will do so.<sup>7</sup> So, the commencement of a suit to recover damages for the flowage will constitute a revocation, and damages may be recovered from the time the action is commenced.<sup>8</sup> After revocation the licensor may remove the dam and may enter upon the land of the licensee for that purpose.<sup>9</sup> Upon the revocation of a parol license to flow the licensor's land the expense of removing the dam built by the licensee on his own land for the benefit of both of them is not to be borne by the licensee alone, in the absence of an express contract on his part to remove it, but, in justice, is to fall upon all for whose benefit it was erected.<sup>10</sup> If a consideration was given for the license and the license has been executed by the expenditure of money in the construction of the improvement, equity will protect the interests of the licensee by taking jurisdiction to enforce performance of the contract.<sup>11</sup> But equity will afford no re-

any act was done, or money expended, on the faith of the license, which would prevent the revocation. *Clauser v. Jones*, 100 Ind. 123.

<sup>5</sup>*Hendry v. English*, 18 Grant Ch. (U. C.) 119; *Preble v. Reed*, 17 Me. 169.

<sup>6</sup>A written agreement permitting the erection of a dam, and conferring a perpetual right of flowage upon payment of damages, but containing no clause of forfeiture on default, is an absolute sale and right of immediate and perpetual possession in consideration of a future payment, and in no sense a license of a revocable character. *Fitch v. Constantine Hydraulic Co.* 44 Mich. 74, 6 N. W. 91.

An instrument "demising and leasing" the right to flow a tract of land for the use of a sawmill for an annual rental, and providing for a forfeiture upon the grantee's failure to flow it for one year, the grantor covenanting that the grantee shall use the premises as long as he sees fit to use them for such purpose, is not a lease from year to year, but is a grant by deed of an easement appendant to the mill. *Tuttle v. Harry*, 56 Conn. 194, 14 Atl. 209.

<sup>7</sup>*Brown v. Spaulding*, 1 Pittsb. 361.

<sup>8</sup>*Lockhart v. Geir*, 54 Wis. 133, 11 N. W. 245.

<sup>9</sup>*Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

<sup>10</sup>*Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

<sup>11</sup>After a flowage license given for a valuable consideration has been acted upon, it is binding as against a subsequent purchaser of the land for a valuable consideration, although at the time of sale the old dam had fallen down and had not yet been rebuilt. *Campbell v. McCoy*, 31 Pa. 263.

An agreement entered into between a landowner and a railroad company, by which the former agreed to dismiss his suit for damages for the flooding of his land if the latter would build a new bridge over a natural stream so as to abate the nuisance in the future, is binding upon such landowner where the railroad company has performed its part of the agreement, and he cannot evade the same by amending his declaration and seeking to recover upon new grounds, all, however, growing out of the original act complained of. *Peoria & P. Union R. Co. v. Barton*, 38 Ill. App. 469.

lief if the consideration was not paid.<sup>12</sup> The licensor may estop himself from revoking the license by remaining silent when the licensee sells the property, including the right of flowage, to one who is ignorant of the fact that it is not permanent.<sup>13</sup> A few cases have applied the erroneous doctrine of executed license to prevent the licensor from revoking the license. Under this doctrine it is held that if one receiving a parol license to flow another's land makes expenditures upon the faith of it, the license cannot be subsequently revoked.<sup>14</sup> This doctrine cannot be supported by any legal principle.

<sup>12</sup> A corporation does not acquire a perpetual easement to overflow land under an oral license from the owner, by virtue of a provision in its charter authorizing it to enter upon and take possession of any land necessary to the erection of slack-water navigation in a river, said land to be paid for at such prices as might be agreed upon with the owner, where it has failed to pay such owner the sum agreed upon when the license was given. *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083.

No right to maintain a dam at an increased height is acquired by the consent to such increase, of those in possession of lands overflowed, under a contract for the purchase thereof conditioned upon the making of certain payments, and subject to forfeiture for non-payment, and subsequently rescinded for the default of the purchaser, which will entitle a grantee of the owner of the dam to an injunction against the enforcement of a judgment obtained by the owner of the land overflowed, prior to the making of the contract of sale, restraining the maintenance of the dam above a height lower than such increase, and requiring its abatement to such lower height. *Palmer v. Moore*, 18 Kan. 68.

<sup>13</sup> *Harrelson v. Kansas City & A. R. Co.* 151 Mo. 482, 52 S. W. 368.

Where a plaintiff's ancestor, with full knowledge, acquiesced, consented, and agreed to the construction at great expense of a milldam upon adjoining land, which penned up the stream, thereby overflowing his land a little, and the mill was afterwards worked and dam maintained with the consent and acquiescence of the ancestor and those claiming under him, including plaintiff, the latter may not maintain an action for the penning back of the water upon his land against a successor in interest of the mill owner. *Dean v. Gray*, 22 U. C. C. P. 202.

Where the owner of land by a parol license permits a railroad company to construct a dam across a stream, resulting in an overflow of his land, and permits such obstruction to continue until the bed of the stream fills up from disuse and disappears, without revoking the license, equity will not restrain the continuance of the obstruction as against an innocent purchaser of the railroad without notice or knowledge of the previous existence of the stream. *Harrelson v. Kansas City & A. R. Co.* 151 Mo. 482, 52 S. W. 368.

But one whose land is overflowed by the waters of a milldam is not estopped from denying the right to maintain the dam at that height, and claiming damages for the wrongful overflow, on the ground that the milldam owner, who was a stranger, purchased the property believing that he had a legal right to maintain the dam at the same height as it was when he purchased, which belief was based upon information from land-owners in the vicinity whose lands were affected by the dam, and the silence of the owner of the overflowed land, although he knew that the purchaser was making inquiries with a view to purchase, and was aware of the character of the information he had received, and did not make known his claim, where it does not appear that the purchaser had actually paid the purchase money. To constitute an estoppel, the purchaser must have parted with the purchase price, in which event he could not recover, although he remained silent from no fraudulent design, and may not have known his legal rights in the premises, if he knew the facts upon which they were based. *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

<sup>14</sup> A landowner cannot enjoin the rebuilding and repairing of a milldam as it was before being washed away by a flood, on the ground that the back water therefrom overflows such owner's land.

One who acts upon a parol license to flow another's land knows at the time he does so that his rights depend upon the mere goodwill of the licensor, and he takes all the risk of the continuance of the permission. He cannot be permitted to take advantage of the kindness of his neighbor and then insist that his kindness and good nature has deprived him of his property rights. As said in a note to *Pifer v. Brown*,<sup>15</sup> a parol license can never impose an irrevocable burden on land, because as soon as the burden is established it becomes an estate or an easement, which is an interest of a higher grade than a license. An easement can only be created by deed, and an agreement for an estate must be in writing under the statute of frauds. The only equitable relief must be on the basis of a distinct promise for a definite interest, express or implied, forming part of a contract which may be enforced specifically. Estoppel cannot avail, because fraud is a necessary ingredient of an estoppel, and there can be no fraud in permitting one to make expenditures which the licensor has a right to assume are made in contemplation of the unstable character of the title under the statute of frauds, for considerations satisfactory to the licensee. A parol license to construct a dam may be shown by the affidavits of a former owner of the mill and dam that they were erected by him more than twenty-five years previous in pursuance of an agreement between him and the then owner of plaintiff's lands.<sup>16</sup> The fact that an upper proprietor was

where the same had been overflowed continuously to the same extent for the preceding fifty years under a license from the grantor of the present owner, upon the faith of which the mill and dam were erected at a large expense, and of which the present owner had notice when he purchased. *Ogle v. Dill*, 55 Ind. 130.

A dam which has existed about thirty years under an agreement that the person maintaining it may raise the water to a certain height will not be abated by injunction, where it is not clearly shown that the water was raised higher than was agreed upon. *Cobb v. Slimmer*, 45 Mich. 176, 7 N. W. 806.

The latter case seems to indicate an idea that long enjoyment, based on the license, will ripen into a right. For a discussion of the question as to how far such idea is well founded attention is called to § 787 *post*.

A parol grant of an easement in land, permanent in nature, for the backing of water thereon by the construction of a milldam and mill, will be sustained in

equity, although such grant is an interest in land required by the statute of frauds to be in writing, where the grantee, in reliance thereon, has gone into possession and expended large amounts of money in making improvements. *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582.

A purchaser of milling property, who, himself, obtained a license from a railroad company to continue the mill and dam which had been constructed by his vendor under a license from a superintendent of the company, partly upon and overflowing the company's land, has a right of action against the railroad for maliciously and without probable cause bringing a bill in equity for injunction restraining the rebuilding of the dam after its destruction by a flood, where he suffered special damage by being temporarily deprived of the use of his property by an interlocutory injunction granted therein. *Mitchell v. Southwestern R. Co.* 75 Ga. 398.

<sup>15</sup> 49 L. R. A. 407.

<sup>16</sup> *Winham v. McQuire*, 51 Ga. 578.

present as a laborer, and assisted a lower owner in constructing a dam, is not conclusive evidence of a license so as to prevent his maintaining an action for the flooding of his lands.<sup>17</sup> If the licensee agrees that, in case the dam injures the land of the licensor, he may remove it, he cannot complain if the licensor removes it on its actually causing injury.<sup>18</sup> A condition annexed to the license must be strictly complied with.<sup>19</sup> But equity will not restrain the reerection of a dam because the owner had theretofore failed to carry out contract stipulations as to the maintenance of a float, for which the remedy at law is adequate.<sup>20</sup>

**558. Right to flow land may be acquired by prescription.**—The right to dam water back upon the upper riparian owner being the subject of grant may be acquired by prescription.<sup>1</sup> Permitting water to be thrown back upon another's land for the prescriptive period will raise the presumption of a grant unless it is shown to have been done under some other right.<sup>2</sup> If time runs against the Crown, a prescriptive

"The question is for the jury, in connection with other circumstances of the case,—particularly such circumstances as tend to show that the upper proprietor was not aware of the effect of the dam. *Smith v. Scott*, 3 N. B. 1.

"*Egan v. Russ*, 39 La. Ann. 967, 3 So. 85.

"The condition annexed to a license to flow land is subsequent, and not precedent, where it consists of an agreement to protect a well on the premises overflowed, or to pay for all damages that may be caused thereby. *Jones v. Loomis*, 19 Mo. App. 234.

"*Friszle v. Patrick*, 6 Jones Eq. 354.

"*Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514; *Gerenger v. Summers*, 24 N. C. (2 Ired. L.) 229; *Columbus Power Co. v. City Mills Co.* 114 Ga. 558, 40 S. E. 800; *Haas v. Choussard*, 17 Tex. 588; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Ludlow Mfg. Co. v. Indian Orchard Co.* 177 Mass. 61, 58 N. E. 181; *Rochester v. Erickson*, 46 Barb. 92; *Paine Lumber Co. v. United States*, 55 Fed. 854; *Munroe v. Gates*, 48 Me. 463; *Re Clark*, 21 N. Y. S. R. 711, 4 N. Y. Supp. 259; *Jessup v. Loucks*, 55 Pa. 350.

The right to erect a dam that will set the water back into a lake and its tributaries, and thereby overflow intermediate lands belonging to others, is one that may be acquired by prescription. *Hall v. State*, 72 App. Div. 360, 77 N. Y. Supp. 282.

A right to flow land with a mill pond

may be acquired by prescription even after the passage of the mill acts, if the dam is erected and kept up for the prescriptive period without paying damages for the injury caused. *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

Where a road across a navigable river is taken possession of and used as a dam for more than twenty years with the knowledge of riparian owners on the stream, no action can be maintained for injuries thereby caused to land of such owners. *Borden v. Vincent*, 24 Pick. 301.

One who, for over twenty years, without objection or interruption, maintains a dam in a highway in such a manner as not to interfere with the public use, acquires a right by prescription to flow the land of a third person situated above on the stream. *Perley v. Hilton*, 55 N. H. 444.

In an action against a railroad company for flooding plaintiff's land by the maintenance of an improperly constructed bridge, a verdict for the plaintiff will be set aside, where the bridge had been maintained without complaint for twelve years before suit was brought, and the land had been long subject to overflow by reason of a dam some distance below, and the plaintiff's premises had formerly been protected by rapping, which had since been neglected. *Hodge v. Lehigh Valley R. Co.* 56 Fed. 195.

"*Carlisle v. Cooper*, 19 N. J. Eq. 256; *Hurlbut v. Leonard*, *Brayton* (Vt.) 201;

right may be acquired to flow land belonging to it.<sup>3</sup> But where it does not run against the state and state land has been subjected to flowage, the term of adverse possession to establish a right of flowage will begin to run from the date of sale by the state, and not before.<sup>4</sup> In order to obtain a prescriptive right the adverse user must be for the prescriptive period established by the statute of limitations, or, in the absence of statutory provision, for the period necessary to presume a grant of real estate.<sup>5</sup> And it is immaterial that no use is being made of the upper property.<sup>6</sup> The old and erroneous doctrine of prior appropriation<sup>7</sup> has sometimes been applied to give a right to dam back the water in less than the statutory period.<sup>8</sup> And under the Maine statutes the right will be acquired by merely taking possession of a mill site and erecting a dam.<sup>9</sup> The continuous flowage of the upper land is sufficient notice that the use is claimed to be adverse.<sup>10</sup> When the right has been acquired by prescription it is as absolute as any other right.<sup>11</sup> And, after that, negotiations by its owner with the owner of the upper land, which seem to assume that the right does not exist, will not destroy it; and therefore the acceptance of a lease by one who has a prescriptive right will not estop him from subsequently insisting upon his prior prescriptive right, when the lease does not assert any title in the lessor respecting the flowage beyond merely what is implied in the act of leasing.<sup>12</sup> But the right

*Field v. Brown*, 24 Gratt. 74; *Lau v. Mumma*, 43 Pa. 267; *Baldwin v. Calkins*, 10 Wend. 167.

An action is not maintainable for penning back water upon plaintiff's land by means of a dam, when it appears that the right of maintaining the dam and the right of closing the gates therein as often as occasion might require for the milling purposes carried on, and the right of damming back the water on such occasions and of causing the same to overflow a portion of plaintiff's land, doing no unnecessary damage in the use of such right, had been exercised without interruption for twenty years before the suit commenced. *Bechtel v. Street*, 20 U. C. Q. B. 15.

*Boulby v. Woodley*, 8 U. C. Q. B. 318.

The right to overflow lands by a dam may be acquired by user thereof for twenty years, although during a part of that period the lands were owned by the state, under a statute of limitations providing that the limitations prescribed shall apply to actions in the name or for the benefit of the state in the same manner as to actions by private persons,

where such period expired before the amendment thereof by later statutes providing respectively that no title by adverse possession, prescription, or user can be acquired against the state, and that such title can be acquired only by forty years' adverse possession, prescription, or user. *Scheuber v. Held*, 47 Wis. 340, 2 N. W. 779.

*Kinsell v. Daggett*, 11 Me. 309.

*Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 866; *Griffin v. Foster*, 53 N. C. (8 Jones L.) 337.

*King v. Tiffany*, 9 Conn. 162.

<sup>3</sup> See *ante*, § 534.

<sup>4</sup> *Tye v. Catching*, 78 Ky. 463.

<sup>5</sup> The right to flow another's mill privilege is obtained by erecting a dam at a time when said privilege is temporarily unused owing to an abatement of the dam as a nuisance to the owner of a third privilege flowed thereby. *Lincoln v. Chadbourne*, 56 Me. 197.

<sup>6</sup> *Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737.

<sup>7</sup> *Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514.

<sup>12</sup> The acceptance of such a lease will

extends only to the flowage of the land and confers no title to the land itself.<sup>13</sup> After the right is acquired it will continue, although it is no longer used.<sup>14</sup> And it will not be affected by an application of the owner of it to purchase the right from the owner of the servient estate.<sup>15</sup> If the right is exercised to the full extent required by the dam the title by prescription will not fail because of indefiniteness of the claim.<sup>16</sup> It has been said that in pleading a prescriptive right the use should be alleged to be for the prescriptive period "next before the commencement of the suit."<sup>17</sup> But it is not necessary to establish a right that the use should have continued to the time of suit. If the right has been acquired it is not lost by mere nonuser short of the time necessary to have it destroyed by prescription. In an action for throwing the water back upon and obstructing the plaintiff's mill by the erection lower down on the stream of a dam for defendant's mill, an allegation that defendant had actually enjoyed the right of maintaining the milldam for twenty years is equivalent to an assertion of the exercise of the right for that time.<sup>18</sup> A granted right to flow the land may be lost by nonuser for the prescriptive period, during which the grantor is making adverse use of the property.<sup>19</sup> The right may be obtained whether the obstruction to the flow of the stream is a natural or artificial one.<sup>20</sup> Joint owners of a dam cannot acquire an adverse right to flow the individual land of one of them over which the pond extends.<sup>21</sup>

**559. What is necessary to give prescriptive right.**— To perfect a prescriptive right to flow the lands of an upper owner it may be said in a general way that the flowage must be under a claim of right, open, notorious, and adverse to the true owner; and it must be continuous, and of such a character as to interfere with the rights of the one against whom it is claimed. As said in *Grigsby v. Clear Lake Waterworks Co.*<sup>1</sup> a prescriptive right to overflow the lands of another by back water from a dam can be acquired only by an actual unin-

estop the lessee from claiming such flowage right by prescription, only during the period covered by the lease. *Page v. Kineman*, 43 N. H. 328.

<sup>13</sup>*Costello v. Harris*, 162 Pa. 397, 29 Atl. 874; *Indianapolis Water Co. v. Kingan*, 155 Ind. 476, 58 N. E. 715; *Williams v. Barber*, 104 Mich. 31, 62 N. W. 155.

<sup>14</sup>*Vickery v. Providence*, 17 R. I. 651, 24 Atl. 148.

<sup>15</sup>*Perrin v. Garfield*, 37 Vt. 304.

<sup>16</sup>*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

<sup>17</sup>*Buel v. Ford*, 10 U. C. C. P. 206;

*Haley v. Enis*, 10 U. C. Q. B. 404.

<sup>18</sup>*Smith v. Walbridge*, 6 U. C. C. P. 324.

<sup>19</sup>*Ruttan v. Winans*, 5 U. C. C. P. 379.

<sup>20</sup>*Brown v. Bush*, 45 Pa. 61.

When from time immemorial a stone row has flowed the land of another, the owner of the land on which it is situated may clear it out, and may raise his dam so as to cause the same amount of flowage. *Brown v. Bush*, 45 Pa. 64.

<sup>21</sup>*Wilder v. Clough*, 55 N. H. 359.

<sup>1</sup>40 Cal. 396.

interrupted enjoyment, under claim of right, for the statutory period, to the knowledge of the owner of the premises, such as to occasion damage and give him a right of action. Moreover, the adverse user must be against the one having the title to the property, and therefore a grant of an absolute right to flow lands by one in possession and claiming to hold by contract under another, to one who knows the extent of the claim of his grantor, is not admissible to lay the foundation of adverse user on behalf of the grantee against the one under whom his grantor held, or his assignee.<sup>2</sup> Something more than mere nonuse by the upper owner of his right is necessary to confer a prescriptive right on the lower owner.<sup>3</sup> Merely maintaining a dam on one's own land, without thereby raising the water above, will not create a prescriptive right to flow another's land; it is only the uninterrupted flowing of the lands for the statutory period that will create such right.<sup>4</sup> So, in order to gain a prescriptive right the use must be made during the period of the year for which the right is claimed.<sup>5</sup>

**559a. Use must be adverse.**— To ripen into title, the flowage of the upper land must have been adverse, and not under permission of the upper owner.<sup>1</sup> And it must have been at a time when the one against

<sup>1</sup>*Pitts v. Wilder*, 1 N. Y. 525.

But an act of the legislature under which a dam is erected, authorizing its construction in such a manner as not to interfere with the operation of a mill on the stream above the dam, may constitute color of title upon which to found an adverse possession of the right to flow back water upon that mill. *Close v. Samm*, 27 Iowa, 503.

And a grantee of a mill site from a corporation whose franchises are subsequently forfeited at the suit of the attorney general will hold the rights granted adversely to the grantors of the corporation from the date of the judgment of ouster, so that continuance for the prescriptive period will ripen into title. *Campbell v. Talbot*, 132 Mass. 174.

And enjoyment of a right to flow land under a lease from one who has previously parted with the title is sufficient color of title to ripen into a prescriptive right. *Wilklow v. Lanc*, 37 Barb. 244.

So, as a grant by a vicar of a right to pen back the water of a stream so that it injures the vicarage house will not bind his successor, therefore, existence of the obstruction for twenty years will not justify its continuance, although it may amount to evidence of an ancient grant when the time of its construction

does not appear. *Wall v. Nison*, 3 Smith, 316.

<sup>2</sup> Nonuse of a water course for a time will not be treated as an abandonment of the right to use it, so that relative rights of drainage of dominant and servient estates are not altered by the construction of a canal under powers of eminent domain, which has suspended their exercise. *Gordon v. Pennsylvania R. Co.* (Pa.) 6 Rep. 727.

<sup>3</sup>*Re Minnetonka Lake Improv. Co.* 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295.

<sup>4</sup> A prescriptive right to raise the water of a pond from May to October so far as can be done without injuring the grass of meadows above the dam is not established by a habit for more than thirty years of nailing flashboards on the dam for short periods between May and October, when the rise of water did not hurt the grass, and by a single instance of refusing at such time to draw the water off at the request of the injured property owner. *Pierce v. Travers*, 97 Mass. 306.

<sup>5</sup>*Hart v. Vose*, 19 Wend. 365; *Colwin v. Burnet*, 17 Wend. 564.

A grant of a flowage easement will not be presumed from the fact that the water has adversely and continuously been maintained at a certain depth in the ba-



whom the right is claimed was not disabled from resisting the claim.<sup>2</sup> Therefore, where a statute authorized the flowing of another's land by a dam, no presumption of grant will arise as against the owner of the land, notwithstanding that the undisturbed right of flowage has been enjoyed for forty years, as the undisturbed enjoyment of a known legal right furnishes no ground of presumption either way.<sup>3</sup> But the owners of land who suffer the adverse use thereof by the backing of water thereon from a milldam constructed with their knowledge at the expenditure of a large sum of money, and continuously maintained for a period of twenty-four years, without having their damages paid or ascertained, cannot, after such a lapse of time, maintain a bill in chancery to enjoin the rebuilding and repair of a part of the dam carried away by a flood, on the ground either that their damages have never been paid, or because the health of those in the neighborhood will be injuriously affected thereby, it not appearing that their health has been or will be affected, by reason of the dam.<sup>4</sup> Since the user must be adverse to ripen into a prescriptive right, if it begins under a license and the nature of the user never changes, no prescriptive right will be acquired.<sup>5</sup> But to have the effect of defeating the prescriptive right the permission to flow the land must have been express, and not by acquiescence or silence on the part of the upper owner. The transaction must have been such as to show that the one exercising the right acknowledged that he did not possess it, and therefore sought to obtain permission to exercise it from the one having the right to grant the permission.<sup>6</sup> Therefore, after the enjoyment of an easement of overflowing the lands of another for twenty years, the person submitting to it must, in order to defeat its continuance, show that it was by license or permission; and the owner of the easement is not compelled to prove an express claim of right to characterize the user as adverse,<sup>7</sup> because

sin, but because for a period of twenty-one years before suit brought the dam has been openly, continuously, and uninterruptedly maintained under a claim of right, the breast wall or structure of which was at all times during that period of the same height, whilst the owner and possessor of the lands was under no disability to resist the use. *Gehman v. Erdman*, 105 Pa. 371.

<sup>2</sup>*Lane v. Miller*, 27 Ind. 534.

<sup>3</sup>*Tinkham v. Arnold*, 3 Me. 120.

<sup>4</sup>*Vail v. Miz*, 74 Ill. 127.

<sup>5</sup>*Lane v. Miller*, 27 Ind. 534.

<sup>6</sup>*Ballard v. Struckman*, 123 Ill. 636, 14 N. E. 682.

Although the construction of a dam may have been permitted by one riparian owner, such fact does not affect the adverse character of its use as against another owner who did not consent to it, and a prescriptive right to maintain it may be acquired against the nonassenting owner. *Lynn v. Thomson*, 17 S. C. 129; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; *Wilson v. Wilson*, 15 N. C. (4 Dev. L.) 154.

<sup>7</sup>*Hammond v. Zehner*, 21 N. Y. 118, *Affirming* 23 Barb. 473.

flowing land of another, if long continued, will be presumed to be adverse.<sup>8</sup> Express acquiescence on the part of the upper owner in the flowage is not necessary to the acquisition of a prescriptive right against him; and, therefore, if the owner of a dam and mill pond raised thereby and of the land under it is disseised of a portion of the land, his acquiescence is not necessary to the acquisition of an adverse title; so that no declaration of abandonment by him of the right to flow such portion is necessary to the acquisition of title to it by adverse possession.<sup>9</sup> But acquiescence on the part of the upper owner is strong evidence of the existence of the right, and in order to perfect the prescriptive right there must be at least tacit acquiescence on his part, for if the right is exercised against his protest it will not ripen into title.<sup>10</sup>

**559b. Use must be continuous.**— To ripen into title by prescription the flowage of the upper land must have been continuous and uninterrupted. This rule does not require that there shall be absolutely no cessation of use. The flowage may cease during times of low water and for the purpose of making repairs. All that is necessary is that the use shall be maintained so continuously and under such claim of right as to notify the upper owner that his rights are being invaded.<sup>1</sup> The cessation of use during certain seasons of the year

<sup>8</sup>*Chalk v. Moality*, 11 Rich. L. 153; *Perrin v. Garfield*, 37 Vt. 304.

While it is doubtful if the fact that premises have been flooded by a dam for about one hundred years makes a technical adverse possession, still it is possession sufficient to give the plaintiff the benefit of any presumption which may be indulged in to supply defects. *Dosoris Pond Co. v. Campbell*, 25 App. Div. 179, 50 N. Y. Supp. 819.

All formal consideration of the adverseness of possession is precluded in a suit to establish a right to flowage rights by adverse possession, where that is done without the exhibition of any grant or license from the owner of the lands. *Davis v. Brigham*, 29 Me. 391.

So, in a hearing on a petition for an injunction restraining the reconstruction of a milldam, it is material that the petitioner and those under whom he claims have submitted to the grievance of a milldam for forty years, and that he, himself, bought his land twenty-five years previously, when he must have calculated the value and inconvenience of the mill, and its attendant consequences. *Atty. Gen. ex rel. Fason v. Perkins*, 17 N. C. (2 Dev. Eq.) 38.

An answer to an action for flowing land, which sets up prescription of an easement during twenty years, without showing that it was adverse, will be sufficient to allow evidence of adverse use, if issue is taken on it instead of the filing of a demurrer. *White v. Spencer*, 14 N. Y. 247.

<sup>9</sup>*Middlesex Co. v. Lane*, 149 Mass. 101, 21 N. E. 228.

<sup>10</sup>*Buntin v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 414.

<sup>1</sup>*Lane v. Miller*, 27 Ind. 534; *Gerenger v. Summers*, 24 N. C. (2 Ired. L.) 229; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; *Gilford v. Winnipiseogee Lake Co.* 52 N. H. 262; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001.

Flooding the land of an adjoining owner with water on only two or three previous occasions does not establish in a railroad company a prescriptive right to overflow such land,—especially as, on one of these occasions, the owner made complaint to the agents of the company, thereby rebutting the presumption of a grant. *Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415.

A prescriptive right to overflow lands

does not prevent the acquisition of rights during the periods when the flowage is maintained.<sup>2</sup> Fluctuation in the height of the water, caused either by extraordinary, or by extreme or unusual, drouths, or by excessive drafts upon the water for the use of the mill occasionally, will not affect or impair the prescriptive right to flow land with back water from the dam to the usual height acquired during ordinary seasons by the uninterrupted use for ten consecutive years.<sup>3</sup> A prescriptive right of flowage may be obtained notwithstanding that during that same time the same lands have been subject to an easement of a canal for shipping lumber, and thereby the mills operated by the power generated by said flowage have had to be shut down at times.<sup>4</sup> But if the interruption is such that the one claiming the prescriptive right loses his power to continue the flowage, or if the owner of the upper property regains the enjoyment of the land, the prescriptive right is defeated.<sup>5</sup> And, during the time while the prescriptive period is alleged to have been running, the claimant must not have acknowledged that he had no title to the easement; and, therefore, evidence of a suit brought within twenty years against the occupants of a milldam for injury to an owner's land for overflow, but dismissed upon a compromise, is admissible in a subsequent action for the same cause to rebut the presumption of an easement to overflow such land, acquired by prescription.<sup>6</sup> In order to make the use continuous, it must have been by the claimant or some per-

by the construction of a milldam is shown, although during the prescriptive period a sawmill was removed, and a year elapsed before a clover mill was worked by the water. *McKechnie v. McKees*, 10 U. C. Q. B. 37.

A dam owner, who for twenty years claims and exercises the right to raise the water as high as his dam will raise it when there is sufficient water to flow it, acquires a right to the extent of his claim, which is not affected by the fact that upon reconstruction of the dam it was maintained for a few months at a slightly decreased height, when it was later brought up to the height of the former dam. *Norway Plains Co. v. Bradley*, 52 N. H. 86.

<sup>2</sup>*Augusta v. Moulton*, 75 Me. 284.

<sup>3</sup>*Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514.

If it clearly appears that the dam breast, through a period of twenty-one years prior to the time of the complaint, has been in fact unchanged, variations in the depth of the water, during the

continuance, after that, of the structure at the same height, may be fairly attributed to the varying condition of the stream, or the evidence thereof to a difference of opinion as to what is the ordinary stage of the water. *McGeorg v. Hoffman*, 133 Pa. 381, 19 Atl. 413.

Maintaining a milldam at a uniform height for twenty consecutive years without any claim of damages therefor gives the owner a prescriptive right to maintain the water as high as the dam will raise it, although it has not been kept at that height during all the time. *Ray v. Fletcher*, 12 Cush. 200.

<sup>4</sup>*Davis v. Brigham*, 29 Me. 391.

<sup>5</sup>When it appears that such use was at times suspended,—once by invasion of the public enemy, and at other times by the action of the public health authorities,—during which time the land was enjoyed by the owner, the user has not ripened into title. *Rhurray v. Simons*, 1 Vt. 53.

<sup>6</sup>*Postlethwaite v. Payne*, 8 Ind. 104.

son with whose title he is in privity.<sup>7</sup> In case the upper property changes hands, all that is necessary is that the user shall be continued against each subsequent grantee until the prescriptive period is made out, although there may have been a change of possession every year. It is not necessary that the entire adverse use shall have been against one owner.<sup>8</sup> A change in the location of the dam or in the use which is made of it will not prevent the user from being continuous if no change is made in the effect upon the upper property.<sup>9</sup> Although there be changes made in a dam to facilitate the running of lumber, with the consent of the parties in possession and without interrupting their occupancy, there is not an interruption of the adverse use of the land on which the dam stands, affecting the running of the statute of limitations.<sup>10</sup> But a continuous use, by the aid of three successive dams, of a stream for propelling machinery, cannot give a prescriptive right to throw back waters on the lands of upper proprietors, where the last dam only has, for less than the statutory period, caused a reflux upon such land.<sup>11</sup>

**559c. Rights of upper owner must have been invaded.**— In order to obtain a prescriptive right to flow property further up the stream the acts of the one claiming the right must have been such as to constitute an actual invasion of the rights of the upper owner and to give him a right of action to redress his injuries. There must have been an actual trespass upon his property rights.<sup>1</sup> Therefore, the mere fact that a dam has been in existence for the prescriptive time is not sufficient if it did not cast the water back across the boundary line.<sup>2</sup> So, if a certain right has accrued by a leaky dam there will be no right

<sup>7</sup>*Benson v. Soule*, 32 Me. 39.

Possession of mill property and water privileges by successive grantees under their deeds for at least nine years previous to the burning of the mill, together with proof of possession after the burning of the mill and of possession by their predecessors in title, which altogether amounts to twenty years, is sufficient to establish a prescriptive title, both by prescription of seven years under color of title, and, also, by twenty years' adverse possession under the statute. *Cook v. Winter*, 68 Ga. 259.

<sup>8</sup>*Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201; *M'Kellip v. M'Ilhenny*, 4 Watts, 317, 28 Am. Dec. 711.

<sup>9</sup>*Stackpole v. Curtis*, 32 Me. 383; *Davis v. Brigham*, 29 Me. 391; *Janssen v. Lammers*, 29 Wis. 88.

Repairing or rebuilding operations during a time when a dam owner is un-

avoidably prevented from exercising flowage rights is evidence of his intention to maintain that flowage, and will not interfere with his acquisition of flowage rights through adverse possession for twenty years. *Wood v. Kelley*, 30 Me. 47.

<sup>10</sup>*Pioneer Wood Pulp Co. v. Chandos*, 78 Wis. 526, 47 N. W. 661.

<sup>11</sup>*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

<sup>1</sup>*Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; *Simpson v. Bowden*, 33 Me. 549; *Terre Haute & I. R. Co. v. Zehner*, 15 Ind. App. 273, 42 N. E. 756; *Murray v. Scribner*, 70 Wis. 228, 35 N. W. 311.

<sup>2</sup>*Charnley v. Shawano Water Power & River Improv. Co.* 109 Wis. 563, 63 L. R. A. 895, 85 N. W. 507; *Griffin v. Bartlett*, 55 N. H. 119; *Stiles v. Hooker*, 7 Cow. 266; *Ellington v. Bennett*, 59 Ga. 286; *Smith v. Russ*, 17 Wis. 228, 84 Am.

to repair it so as to make it tight and flood the upper land to an increased extent.<sup>3</sup> And boards that are necessarily used on a dam in seasons of low water so as to increase the water in the pond without overflowing the lands above, and used at intervals only, cannot gain the right to keep the dam at the height to which they raise it if that will make the level of the water upon the upper lands higher than maintained for the period of twenty years.<sup>4</sup> The period requisite to presume a grant to maintain a dam raising the water of a stream to a particular height does not begin to run while the dam is in the course of erection, during which the water is kept raised by a temporary dam, but begins to run only when the permanent dam is so far completed as to answer the purpose for which it was intended.<sup>5</sup> No easement is acquired to overflow the lands of another by the maintenance of a dam and pond at the same height and head for the required statutory period, which will defeat an action for damages therefrom, where the flowage has not existed for such period, but has gradually come about by accumulations and obstructions in the stream caused by the maintenance of such dam.<sup>6</sup>

**560. Extent of prescriptive right.**— Since the acquisition of a prescriptive right depends upon actual invasion of the rights of the upper owner, it will extend no further than such invasion is extended. The right is measured by the amount of water which has been kept standing upon the upper property, and not by the height of the dam, or the facilities which the lower owner had to cast the water across the boundary line.<sup>1</sup> Flashboards constitute a part of the dam, and

Dec. 739; *Sabine v. Johnson*, 35 Wis. 185.

But in the face of all those decisions it has recently been held by the Georgia court that it is not necessary to maintain a dam at a certain place, of a certain height, and with certain privileges for the full term of twenty years without any change in order to obtain a prescriptive right to maintain it, but the rule is that the capacity of the dam from its height is the measure of the easement, and the party has a right to repair his dam and build a better, though not a higher, one. *Whelchel v. Gainesville & D. Electric R. Co.* 116 Ga. 431, 42 S. E. 776.

<sup>1</sup>*Mertz v. Dorney*, 25 Pa. 519.

<sup>2</sup>*Carlisle v. Cooper*, 19 N. J. Eq. 256; *Marley v. Shultz*, 29 N. Y. 346.

<sup>3</sup>*Branch v. Doane*, 17 Conn. 402.

<sup>4</sup>*Murray v. Soribner*, 74 Wis. 602, 43 N. W. 549.

<sup>5</sup>*Carlisle v. Cooper*, 21 N. J. Eq. 576;

*Russell v. Scott*, 9 Cow. 279; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Postlethwaite v. Payne*, 8 Ind. 104; *Horner v. Stillwell*, 35 N. J. L. 307; *Griffin v. Bartlett*, 55 N. H. 119; *McGeorge v. Hoffman*, 133 Pa. 381, 19 Atl. 413; *McNab v. Adamson*, 6 U. C. Q. B. 100; *Powell v. Lash*, 64 N. C. 456; *Burleigh v. Lumbert*, 34 Me. 322.

Where, for several years, the water was penned back only to a small extent, and only during two or three months of the year, and at a time when the water was high and from which no injury was inflicted upon the lower owners, the prescriptive right acquired is limited to the use made of the water during those years. *McKechnie v. McKeyes*, 10 U. C. Q. B. 37.

A prescriptive right gained by constructing a weir and penning back the water of a stream is no greater than the user; and where, during the time of acquiring such prescriptive right, no in-

measure the height to which the water may be raised.<sup>2</sup> The fact that for short periods of time the dam is permitted to become leaky so that it does not hold the water back to the level where it is ordinarily held will not, however, prevent the acquisition of the right to maintain it at that level.<sup>3</sup> In one case it was held that a prescriptive right to maintain a pond will extend to the height of water which the dam is capable of maintaining when tight.<sup>4</sup> But that cannot be regarded as correct unless the dam was kept tight enough all of the time to indicate that the flowage caused by the tight dam was what was claimed by the owner. One who has acquired a prescriptive right to flow the land of another is not entitled, in the operation of an additional mill by improved machinery, to flow the land in a different manner or for a longer period than he had previously done, although in so doing he does not raise the water above the height of the ancient dam.<sup>5</sup> If the flowage right has been exercised only during certain months of the year, it cannot be claimed for other months.<sup>6</sup> The owner of the easement will be enjoined from attempting to increase it to the injury of the servient estate.<sup>7</sup> And a prescriptive right to raise water in a stream to a certain stage is no defense to an action for damages to land resulting from the overflow caused by raising the water above such stage.<sup>8</sup> Where the practice in the use of a dam and its appendages during the period of acquiring a prescriptive right to flow upper lands has been to control the height of the water in the pond

jury is inflicted upon other riparian owners, the prescription cannot be continued after it floods or injures adjoining lands. *O'Brien v. Enright*, Ir. Rep. 1 C. L. 718.

<sup>2</sup>*Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

Where flashboards have been maintained on a lower dam for more than twenty years, being removed, on complaint of the upper mill owner, only sufficiently to prevent interference with the upper mill wheel, a prescriptive right to maintain them has been acquired, limited only by its noninjury to the upper mill. *Hall v. Augsbury*, 46 N. Y. 622.

<sup>3</sup>*Carlisle v. Cooper*, 19 N. J. Eq. 256; *Yoter v. Hobbs*, 69 Me. 19.

<sup>4</sup>*Jackson v. Harrington*, 2 Allen, 242.

<sup>5</sup>*Griffin v. Bartlett*, 55 N. H. 119.

<sup>6</sup>*Griffin v. Bartlett*, 55 N. H. 119.

When premises above a dam are continuously overflowed during three months of the year for the purpose of

floating logs, although during other months the land is not overflowed, the user after fifteen years will ripen into an easement by adverse possession for those months. *Swan v. Munch*, 65 Minn. 500, 35 L. R. A. 743, 60 Am. St. Rep. 491, 67 N. W. 1022.

<sup>7</sup>*A. P. Cook Co. v. Beard*, 108 Mich. 17, 65 N. W. 518.

But a milldam which has been maintained for over sixty years, and stands upon the land of the defendant, who has acquired the right to flow adjoining lands, will not be abated, although the overflow in times of high water extends beyond his right; but the defendant ought to be permitted to hold and enjoy his property until it is taken away by the verdict of a jury or in some statutory proceeding, and since the rights of the complainant can be enforced at law as well as in equity. *Ronayne v. Loranger* 66 Mich. 373, 33 N. W. 840.

<sup>8</sup>*Tucker v. Salem Flouring Mills Co.* 13 Or. 28, 7 Pac. 53, 15 Or. 581, 16 Pac. 426.

in times of high water by removing the gates and permitting the water to flow off, the mode of user qualifies the right which has been acquired by prescription.<sup>9</sup> The prescriptive right of a railroad company to maintain its embankment over a natural stream as originally constructed gives it no right to increase the height of such embankment, thereby preventing the natural flow of water in a natural direction, and claim such increased height as a prescriptive right, until the full term has run from the time of such increased height to give a prescriptive right.<sup>10</sup> No greater right will be acquired than is necessary to maintain the easement, and therefore a title in fee will never be implied from user, where an easement only would have secured the privileges enjoyed.<sup>11</sup> But the owner of the easement acquires all rights which are necessary to make the easement available.<sup>12</sup> The building, rebuilding, and repairing of successive dams on the land of another, which are the rightful and necessary acts of one seeking to maintain and enjoy a prescriptive right of flowage for his own benefit, cannot be the basis of a claim of title to the land by adverse possession.<sup>13</sup>

**561. What will prevent acquisition of right.**— Since the acquisition of a prescriptive right depends upon continuous adverse user, anything which will interrupt the user will prevent the acquisition of the right. The interruption may be in other ways than by bringing suit.<sup>1</sup> But a mere protest against the adverse use of the land is not sufficient to interrupt the running of the prescriptive period.<sup>2</sup> The protest must be accompanied by some overt act which will interfere with, or interrupt, the user.<sup>3</sup> But if the owner of the upper estate continually resists the exercise of the right, it cannot be held to exist.<sup>4</sup> In *Haag v. Delorme*,<sup>5</sup> it is said that the interruption of

<sup>9</sup>*Carlisle v. Cooper*, 21 N. J. Eq. 576.

<sup>10</sup>*Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589.

But, it has been held that the right to maintain a dam acquired by prescription may be enjoyed, although new and increased injuries result from its enjoyment unless such injuries are caused by increasing the height of the dam. *Lynn v. Thomson*, 17 S. C. 129.

<sup>11</sup>*DeLancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822 (1893), Affirming 63 Hun. 169, 17 N. Y. Supp. 681.

<sup>12</sup>Thus, one having the right to overflow adjoining lands in order to supply his mill with water, by the exercise thereof for over twenty years, has, as incident to that right, authority to enter upon the land and repair breeches in

the natural state of the soil of the dam, but not to add thereto so as to cause additional overflow. *Ruttan v. Winans*, 5 U. C. C. P. 379.

<sup>13</sup>*Costello v. Harris*, 162 Pa. 397, 29 Atl. 874.

<sup>1</sup>*Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737.

<sup>2</sup>*McGeorge v. Hoffman*, 133 Pa. 381, 19 Atl. 413.

<sup>3</sup>*Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605.

<sup>4</sup>*Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Nichols v. Aylor*, 7 Leigh, 546.

When a person has, by numerous suits for damages and for abatement, challenged the right of the owner of a dam to flow the other lands, the use and en-

the flowing of land in order to prevent the acquisition of the privilege by prescription may be by disseisin, or fraud, or any other means, although a merely temporary or accidental interruption because of dry weather, washing out of the dam, necessity for repairs, and the like, will not stop the running of the prescription if there be no intent to abandon the easement. Breaking down the dam is a sufficient overt act to interrupt the running of the prescriptive period.<sup>6</sup> The prescriptive right cannot be claimed when the one asserting it altered his user whenever the upper owner complained of it.<sup>7</sup> Where a lower mill owner claims a prescriptive flowage easement, but his enjoyment is interrupted by alteration of the marks by an upper owner, in the absence of allegation or proof to the contrary, such trespass, as against the lower owner, will be assumed to have been committed before his occupancy had ripened into right.<sup>8</sup>

**562. Loss or abandonment of right.**—The question whether or not a flowage right can be lost by nonuser admits of some nice distinctions. Mere nonuser is not sufficient to defeat this right, but nonuser accompanied by adverse user on the part of the owner of the servient tenement will accomplish that result.<sup>1</sup> To destroy the right the user on the part of the owner of the servient estate must be adverse to the flowage easement. Therefore, the owner of a privilege to flow lands of another does not lose such right by his grantor's use of the land in the pasturing of his cattle, as such use is not incon-

joyment of the land for purposes of flowage may not be considered adverse, exclusive, and uninterrupted, so as to create a right under the statute of limitations. *Cobb v. Smith*, 38 Wis. 21.

<sup>1</sup> 30 Wis. 591.

<sup>2</sup> *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

<sup>3</sup> *Willey v. Hunter*, 57 Vt. 479.

A prescriptive right to maintain flashboards on a milldam cannot be acquired when they are taken down whenever complained of by an upper mill owner. *Sumner v. Tileston*, 7 Pick. 198.

<sup>4</sup> *Henley v. Wilson*, 77 N. C. 216.

<sup>5</sup> *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544; *Buckholder v. Sigler*, 7 Watts & S. 154; *Patterson v. Sacet*, 3 Ill. App. 550.

The right to maintain a milldam overflowing the lands of a railroad company is not lost by delay on the part of a transferee of the license in rebuilding on the destruction thereof, where the evidence shows that such delay was not due to laches on his part, but to his inability to secure a mechanic who could do

the work at once. *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

The liability of the owner of a new milldam, erected in place of an old one at no greater height than was permitted in the original grant, for obstructing the wheels of a mill above by back water from such new dam, based upon the acquisition by such upper mill owner, by adverse enjoyment on his part and nonuser of the privilege of maintaining his dam at the full height on the part of such lower dam owner for a period of twenty years, of the right not to have the wheels of his mill obstructed by back water more than they have been at any time during such period of twenty years,—depends upon whether or not the new dam raises the water higher than the old dam had done at any time within twenty years before the erection of the new one, and, if so, whether that raising invades the rights acquired by such adverse enjoyment and nonuser; and does not depend upon the mere fact that such wheels are actually more obstructed since the new dam was built than at



sistent with the privilege granted.<sup>2</sup> If the upper owner makes adverse use of the property free from the easement, however, for the prescriptive period, the right of flowage is lost.<sup>3</sup> In one case it was held that the right may be abandoned or forfeited by nonuser; but the court adds that the forfeiture will not be incurred unless the nonuser was for a period sufficient to raise the presumption of a release or abandonment.<sup>4</sup> But a release cannot be presumed merely from nonuser. There must be adverse user on the part of the owner of the servient estate to effect that result. It has been intimated that a prescriptive right to flow the upper estate might be lost under circumstances which would not be sufficient to destroy a right originating in grant.<sup>5</sup> But there does not seem to be any ground for such a contention. The foundation of a prescriptive right is the presumption of a grant, and the right acquired under it is equal to one obtained by express grant, and cannot be lost except under circumstances which are necessary to destroy the granted right. Therefore, it is held that mere nonuser does not raise a presumption of the abandonment of a prescriptive right.<sup>6</sup> And whether or not a right to flow

any time during the preceding twenty years. *Manier v. Myers*, 6 B. Mon. 132.

<sup>2</sup>*Smith v. Moodus Water Power Co.* 35 Conn. 392.

So, cutting hay, digging out mud, enlarging and using springs upon the land, and occupying a portion of it for a hen yard, is not such an adverse use of land as will extinguish an unexercised right of flowage. *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128.

The prescriptive right to flow land for the purpose of creating power for the operation of a mill is not extinguished by the owner of the servient tenement gathering timber from the land flowed, unless such act is inconsistent with the easement so as to constitute an adverse user. *Polson v. Ingram*, 22 S. C. 541.

The mere failure to exercise the right, acquired by prescription, to flow lands, during which time the owner of the servient estate cultivated them, does not set in operation the statute of limitations against the easement, as such possession for the purpose of cultivation was not inconsistent with it. *Parkins v. Dunham*, 3 Strobb. L. 224.

That a mill owner has lowered the outlet of his pond so that he can in dry seasons draw the water lower than before, whereby meadow lands formerly flooded have been drained so that hay can be gathered thereon, does not deprive him of the right to flow such lands

in wet seasons, where the height of the dam has not been lowered, and for over fifty years he has exercised the right of holding back the water to the height of the dam. *Bucklin v. Truell*, 54 N. H. 122.

<sup>3</sup>*Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. No. 6,281; *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Sherwood v. Burr*, 4 Day, 244, 4 Am. Dec. 211.

The right to keep up a pond and flow land is extinguished by the construction of a mill further up the stream and on part of the land flowed by the pond, which rendered it necessary to let the water out of the pond in order to operate the upper mill the pond not being again raised except occasionally for the purpose of flowing rice, both of the mills being thereafter operated by means of water conducted through artificial canals until the destruction of the upper mill, when the mill owner attempted to again raise the pond for the purpose of operating the lower mill. *Taylor v. Hampton*, 4 McCord L. 96, 17 Am. Dec. 710.

<sup>4</sup>*Winham v. McGuire*, 51 Ga. 578.

<sup>5</sup>*Mower v. Hutchinson*, 9 Vt. 242.

<sup>6</sup>*Polson v. Ingram*, 22 S. C. 541; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93, 13 Atl. 804.

A right to maintain a dam of sufficient height to set back the water into

lands acquired by prescription has been abandoned by nonuser does not depend upon the length of the nonuser, but is a question of fact to be determined from the surrounding circumstances.<sup>7</sup> The owner of the easement may estop himself from resuming it if he has ceased to use it under circumstances which show an intention to abandon, and the owner of the servient estate has changed his position in such a way as to make it inequitable to resume the exercise of the easement.<sup>8</sup> Therefore, a lower mill owner, who has permitted an upper proprietor to expend a large sum in the construction of a dam within the area in which the lower proprietor has a vested right of flowage, may be restricted in his right to use flashboards for flowage purposes in consideration of an award of damages.<sup>9</sup> Prescriptive rights may be abandoned by contract.<sup>10</sup> But they are not lost by obtaining a license from the owner of the servient estate.<sup>11</sup> Unity of possession of the two estates will extinguish the easement if it was disused before the unity of possession, and not revived during it.<sup>12</sup> A partition by tenants in common of property on which there had been a mill privilege, but the dam of which was taken down, by an instrument which provides that neither the grantor nor his heirs, nor any person claiming from or under him or them, shall have any right or title to the aforesaid premises or their appurtenances or to any part or parcel thereof, will extinguish the right of flowage.<sup>13</sup> Mere changes in the structure of the dam do not constitute an abandonment of the right.<sup>14</sup> In *Maguire v. Baker*,<sup>15</sup> it was held that possession for seven years of land subject to overflow from the back water of a milldam without its having been overflowed to the full capacity of

a lake, being acquired by prescription, is not lost by six years' nonuser, as the mere suspension of the exercise of a right is not sufficient to establish an intention to abandon it. *Hall v. State*, 72 App. Div. 360, 77 N. Y. Supp. 282.

<sup>7</sup>*Parkins v. Dunham*, 3 Strobb. L. 224.

<sup>8</sup>*McConnell v. American Bronze Powder Mfg. Co.* 41 N. J. Eq. 447, 5 Atl. 755.

<sup>9</sup>*Cornicell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001.

<sup>10</sup>A dam owner will lose all his claim to existing prescriptive flowage rights by entering into a contract with the other riparian owners to maintain his dam at a specified height, and thus be exempt from liability for substantial damages for flowage caused by his dam: and the covenants of his contract will not be held dependent on his pre-existing rights. *Stinson v. Gardiner*, 33 Me. 94.

<sup>11</sup>*Perrin v. Garfield*, 37 Vt. 304.

<sup>12</sup>*Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. 6,281.

Where the owner of a mill, having the right, as against the owner of an upstream privilege, to the uninterrupted flow of a stream of water for the purpose of operating the mill, purchases, together with a third person, the upstream privilege, no such unity of title is created as will merge and extinguish all former or special rights or privileges appurtenant to the mill; and the court expressed the opinion that, had the owner of the mill become the sole owner of the upstream privilege, it would not have extinguished his former rights.—at most it would only have suspended them. *Tucker v. Jewett*, 11 Conn. 311.

<sup>13</sup>*Hamilton v. Farrar*, 128 Mass. 492.

<sup>14</sup>*Keller v. Stoltz*, 71 Pa. 356.

<sup>15</sup>57 Ga. 109.

the dam on account of the defective condition thereof does not relieve the land of such servitude in the absence of anything to show an intention on the part of the mill owner to abandon his right to use such dam to its full capacity. But that decision seems to place the emphasis in the wrong place. The loss of right does not depend upon intention to abandon, but upon the adverse use, and if, under the statute, seven years is sufficient to gain an adverse use, and such use is maintained for the requisite period, the flowage easement is lost, regardless of the intention of its owner. The admission by the claimant of the easement is conclusive that it does not exist.<sup>16</sup> In an action against a riparian proprietor by another riparian proprietor for damages which have resulted from the backing of water upon the land of the plaintiff, by means of a dam which the defendant claims a right by prescription to maintain, the defendant has the burden of proving that his right by prescription has not been lost by the adverse possession of the plaintiff and those under whom he claims. It seems that the rule would not be the same in a case where the defendant claimed the right to maintain the dam by virtue of an express grant.<sup>17</sup>

**563. Title to land flowed.** To entitle one to maintain a pond on another's property, he need not have title to the soil, and therefore the grant of a right to maintain the pond will not carry such title.<sup>1</sup> And a prescriptive right to flow the land will not give title to the soil.<sup>2</sup> An agreement to take a certain annual compensation for injuries caused by flowage is not an agreement for a sale of land within the statute of frauds.<sup>3</sup> But the owner of the easement has an interest in the pond which cannot be interfered with, either by the upper owner or by strangers, by placing structures in it which will interfere with the enjoyment of the easement.<sup>4</sup> The owner of the land, and not of the easement, is entitled to use the land, however, and he may make

<sup>16</sup>The admission of a mortgagor in possession that he does not hold the right to dam water back on adjoining property adversely is binding on the mortgagee. *Betts v. Davenport*, 3 Conn. 286.

<sup>17</sup>*Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

<sup>1</sup>A deed of a piece of land "together with the mill privilege, sawmill, and erections belonging to the same; and also the pond or flowage above the said mill," conveys no right to the soil of the mill pond, but only an easement to dam the water and overflow the land for the purpose of the mill below. *Herbertson v. Cunningham*, 14 N. B. 235.

<sup>2</sup>*Den ex dem. Green v. Harman*, 15 N. C. (4 Dev. L.) 158; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17; *Den ex dem. Everett v. Dockery*, 52 N. C. (7 Jones L.) 300; *Terre Haute & I. R. Co. v. Zehner*, 15 Ind. App. 273, 42 N. E. 756; *De Lancey v. Pieppgras*, 138 N. Y. 26, 33 N. E. 822, Affirming 63 Hun, 169, 17 N. Y. Supp. 681; *Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455.

<sup>3</sup>*Short v. Woodward*, 13 Gray, 86.

<sup>4</sup>*Cornicell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001.

Equity has jurisdiction of a bill to prevent interference with an easement of flowage by the building of a railroad embankment, where the statute gives juris-

such use of it as he can without infringing the rights of the owner of the easement. The landowner has the right of placing booms and wharves in the water.<sup>5</sup> The owner of the easement cannot remove from the property subject to the easement an ordinary fence placed on the property to facilitate its use for pasturage purposes.<sup>6</sup> The rights of fishery are in the owner of the soil.<sup>7</sup> And he has the right to remove the ice from the pond,<sup>8</sup> which right is limited only by the condition that in removing it he must not remove such a quantity of

dictation in all cases of nuisance. *Boston Water Power Co. v. Boston & W. R. Corp.*, 16 Pick. 512.

*Jordan v. Woodward*, 40 Me. 317; *Finley v. Hershey*, 41 Iowa, 389.

*Smith v. Langevald*, 140 Mass. 205, 4 N. E. 571.

<sup>7</sup> The easement acquired by the grantee of flowage does not entitle him, as against the owner of the fee, to maintain on the shore a notice forbidding fishing in the pond. *Sullings v. Carter*, 105 Mich. 392, 63 N. W. 411.

A riparian owner's right of fishery is not divested or extinguished by any legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

But one who consents to the flowing of his land by means of a dam in consideration of the right to use the pond so created as a highway, and for fishing and boating purposes, and thereafter releases all easements and rights therein except the privilege of using a limited supply of water from the pond for milling purposes, thereby loses the right to fish in any part of the pond, even that portion of it over his own lands. *Sidwell v. Greig*, 32 App. Div. 212, 40 N. Y. Supp. 968, 53 N. Y. Supp. 1115.

*Abbott v. Cremer* (Wis.) 95 N. W. 387; *Reyssen v. Roate*, 92 Wis. 543, 66 N. W. 599; *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 27 Am. St. Rep. 51, 50 N. W. 514; *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160, 2 N. W. 13; *Dodge v. Berry*, 26 Hun. 246; *Searle v. Gardner* (Pa.) 12 Cent. Rep. 420, 13 Atl. 835; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Hazleton v. Webster*, 20 App. Div. 177,

46 N. Y. Supp. 922; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800.

One by merely backing the waters of a non-navigable stream does not gain a right to enter and take the ice formed in such back water over the land of another. *Julien v. Woodsmall*, 82 Ind. 568.

An injunction will not be granted at the suit of a mill owner who received the mill together with the water right in the river, to restrain an upper owner who owns the land under the mill pond from taking ice from the river, when it is not shown that the taking of the ice materially reduced the flow of water through plaintiff's mill. *Lathrop v. Haley*, 81 Iowa, 649, 47 N. W. 878.

Ownership of the "water privileges belonging to" a milldam, and the rightful maintenance of the dam at his own expense, does not authorize such owner to enter upon the land of another and take the ice formed over such land in the waters of the dam. *Julien v. Woodsmall*, 82 Ind. 568.

A Connecticut case is out of harmony with the rule on this subject in holding that the owners of the water of a mill pond own the ice formed upon it, and the riparian proprietors have no right, as owners of the soil, to remove it. *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462.

But in a subsequent case it was held that, since the ice on a mill pond belongs to the owner of the soil, and not to the owner of the right to flow, a statute making applicable to one desiring to build a dam to create an ice pond the provisions of the statute regulating the proceedings for assessing the damages for flowage for mill purposes will not give a right to the ice on the pond so created. *Geer v. Rockwell*, 65 Conn. 316, 32 Atl. 924.

water as to interfere with the rights of the mill owner.<sup>9</sup> The ownership of the ice does not prevent the mill owner from operating his mill in the usual manner, although the ice is thereby injured or destroyed.<sup>10</sup> But the mill owner will be liable if he needlessly and wantonly draws down the water so as to injure the ice.<sup>11</sup> It has been held that the grantee of the right to overflow lands by means of a dam, without limitation as to the use to which the waters may be applied, may remove the ice from over such land if he needs the water in its congealed form.<sup>12</sup> And if the owner of the pond has acquired title to the soil, he has title to the ice.<sup>13</sup> The lessee of a mill and of a water power and rights of flowage appurtenant, but who is not a riparian owner on the pond, nor the owner in fee of the bed thereof, cannot maintain trespass against one who goes on the pond when frozen, places timbers thereon, and cuts and removes ice therefrom, where his right of flowage is not interfered with, or his water supply lessened.<sup>14</sup> A grant of land subject to an easement of flowage for mill purposes entitles the grantee to receive the rent payable therefor, notwithstanding an exception in the conveyance of the right to flow the land, since the reservation is invalid because appertaining to a thing which the grantor, having conveyed, had no right to grant, and because the thing reserved does not issue out of the thing granted in the deed.<sup>15</sup>

## II. WHO IS LIABLE FOR DAMMING BACK WATER.

**564. Whoever causes injury may be sued.**—The casting of the water upon the land of the upper proprietor is a trespass or a nuisance, and the one who commits the act or contributes to it is liable for the injury caused by his act. Thus, a mill owner, who is also the owner of a reservoir dam, is responsible for the flowage caused thereby, and that others may be benefited by the water saved thereby does not in the least relieve him from liability, though their dams and mills be nearer the reservoir than his own.<sup>1</sup> It is not essential to a party's liability in damages for injury caused by the back water of a dam which he erected, that he should own the freehold of the whole, or

<sup>9</sup>*Howe v. Andrews*, 62 Conn. 398, 26 Atl. 394; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800.

<sup>10</sup>*Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

<sup>11</sup>*Hidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868.

<sup>12</sup>*Myer v. Whitaker*, 55 How. Pr. 376.

<sup>13</sup>*Wright v. Woodcock*, 86 Me. 113, 25 L. R. A. 499, 29 Atl. 953.

<sup>14</sup>*Reysen v. Roate*, 92 Wis. 543, 66 N. W. 599.

<sup>15</sup>*Pollock v. Cronise*, 12 How. Pr. 363.

<sup>1</sup>*Dingley v. Gardiner*, 73 Me. 63.

that of a part, of the land on which the dam is situated.<sup>2</sup> In case the injury is done by an agent without the knowledge or consent of his principal, the agent alone is liable unless the principal continues the wrong after having an opportunity to abate it.<sup>3</sup> Under the rule that the one who is liable for the commission of the wrongful act is answerable for the injury done thereby, the lessee of water power of a dam belonging to canal commissioners is liable for the overflow of an island in the stream above caused by the raising by such lessee of the height of the dam by means of flashboards, although the same were put on with the consent of the canal superintendent.<sup>4</sup> A corporation, which must act only through agents, is ordinarily responsible for the acts of its agents and will be held liable for their flooding of private property unless it can show that the act was done against its consent. And it may be sued jointly with the responsible agent.<sup>5</sup> A corporation cannot escape liability by the fact that the act was authorized by its charter, since, if the obstruction was necessary, it would be a taking of property for which compensation must be made; and, if it was not necessary, the charter cannot be held to have authorized it.<sup>6</sup> But stockholders of a corporation organized for the maintenance of a reservoir dam cannot be made individually lia-

<sup>2</sup>*Dorman v. Ames*, 12 Minn. 451, Gil. 347.

<sup>3</sup>In an action by the owner and operator of a cotton mill driven by water, against an owner of a mill on the same stream, to recover damages for the unlawful raising of a stream below, the facts that one of the defendants is the wife of the other, as well as the owner in fee of the land upon which the dam was unlawfully raised, and that her husband was in possession of the land, do not, as a matter of law, disentitle the plaintiff to a verdict against both. *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

When a flowage of another's privilege has been caused by trustees of a deceased person's estate, damages cannot be recovered in a case action brought against those representatives as executors for acts *ultra vires* if done by executors. *Plimpton v. Richards*, 59 Me. 115.

But a *cestui que trust*, as well as the trustee, is liable for damages occasioned by the continuance of the flowage of land by a milldam, where their answer does not deny interest, but only that the dam was wrongfully maintained, and they claim to have the right to maintain the same as grantees and assigns of one

of the contractors thereof. *Cobb v. Smith*, 38 Wis. 21.

<sup>4</sup>*Economy Light & P. Co. v. Cutting*, 49 Ill. App. 422.

<sup>5</sup>In an action for maintaining a continuing public nuisance, which consists of an embankment which causes an overflow of plaintiff's lands, a railroad company may be joined with the receiver of its property as defendant. *St. Louis, A. & T. R. Co. v. Trigg*, 63 Ark. 536, 40 S. W. 579.

Where one railroad company organizes another as a mere instrument to construct a section of its roadway, and such company in constructing such roadway builds a culvert or passageway for the water of a natural stream, over which the roadway leads, of insufficient capacity, so as to obstruct the flow of the water and cause an overflow of adjacent lands, both companies will be liable to the owner of such lands for the injury thus caused. *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621.

<sup>6</sup>A water company is liable for damages to land by the overflow thereof caused by the cutting of its ditch, constructed across and damming up ravines and gulches, so as to turn flood waters on such land, instead of cutting it so as

ble for the injuries caused by the flowage therefrom in the absence of express statutory provision.<sup>7</sup> So far as parties contributing to the injury act in the same right, they may be joined as defendants in an action.<sup>8</sup> Thus, two riparian proprietors of opposite sides of a creek, each of whom constructs a dam from an island in midstream to his own shore, the joint effect of which is to cause an overflow of lands of an upper riparian owner, are properly joined as defendants in trespass on the case; and a verdict against one and excusing the other will be sustained.<sup>9</sup> But if the acts of the wrongdoers were separate, they cannot be sued jointly, although the acts of all of them contributed to the injury.<sup>10</sup> The death of one of three persons sued for wrongfully throwing the water back on the wheels of an upper mill is no ground for abating the action.<sup>11</sup> But a release by a landowner to one of several owners of a water privilege who join in raising the dam to the injury of such landowner will release all of the wrongdoers, although it provides that it shall not affect any person interested in the dam except the one named.<sup>12</sup> In case the dam which caused the injury is owned jointly by several owners, one may be sued separately for the injury inflicted by it, since each is responsible for the whole injury.<sup>13</sup> One co-owner is liable for injury to the joint property or to the separate property of his joint tenant.<sup>14</sup>

to turn them into ravines and gulches, which would have prevented injury to the plaintiff's land. *Turner v. Tuolumne County Water Co.* 25 Cal. 397.

Where a canal company, in constructing a dam in a river, is not acting under a public franchise, it is liable for injuries inflicted upon adjoining landowners by causing the stream to overflow. *Townes v. Augusta*, 46 S. C. 15, 23 S. E. 984.

So long as a corporation maintains its dam under authority rightfully granted by the state, it will not be permitted to say that its dam is built somewhat higher than is absolutely necessary to carry out some of its corporate purposes. It must pay damages to the land actually overflowed. *Charnley v. Shawano Water Power & River Improv. Co.* 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

<sup>7</sup>*Norton v. Hodges*, 100 Mass. 241.

<sup>8</sup>*Wilson v. Myers*, 11 N. C. (4 Hawks) 73, 15 Am. Dec. 510.

<sup>9</sup>*Wright v. Cooper*, 1 Tyler (Vt.) 425.

<sup>10</sup>When different acts of the same kind by independent lower riparian owners obstruct the flow of a natural stream, both contributing to injure an upper proprietor, the wrongdoers are not joint

tortfeasors, but each is liable only for such part of the damage as his own wrongful acts cause. *Ames v. Dorset Marble Co.* 64 Vt. 10, 23 Atl. 857.

A joint action cannot be maintained against the owners of two dams for the flowing of lands by the back water therefrom, where they were constructed independently of each other and at different times in different channels of the same river. *Lull v. Fox & W. Improv. Co.* 19 Wis. 100.

A cause of action against two jointly for erecting a milldam cannot be joined with a cause of action against one of them for continuing it. *Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393.

<sup>11</sup>*Sumner v. Tileston*, 4 Pick. 308.

<sup>12</sup>*Delong v. Curtis*, 35 Hun. 94.

<sup>13</sup>*Loic v. Mumford*, 14 Johns. 426, 7 Am. Dec. 409.

<sup>14</sup>One joint tenant may sue the other for flowing the lands belonging to the joint estate for the exclusive benefit of his mill, as such exclusive appropriation amounts to an ouster. *Jones v. Weatherbee*, 4 Strobh. L. 50, 51 Am. Dec. 653; *Great Falls Co. v. Worster*, 15 N. H. 412; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387.

And the owner of an interest in property is liable for injuring the interests of other persons.<sup>15</sup> In a suit for damages for the penning back of water the recovery must be limited to the time of defendant's death, in case he dies pending suit, and his administrator is substituted as defendant in the action.<sup>16</sup>

**565. One who has parted with title.**— Since the casting of water on the property of the upper owner is a wrongful act, the one responsible therefor cannot relieve himself of liability by parting with title to the property on which the dam is located.<sup>1</sup> And if he conveys with covenants of warranty he will continue liable for injuries done after he has parted with the title.<sup>2</sup> So, if he reserves an interest in the dam or pond, he will be held liable for the injuries which occur after he makes the transfer.<sup>3</sup> And one whose land is overflowed by the erection of a milldam will not be prevented from recovering judgment against the person originally erecting and owning the dam by the fact that such owner has conveyed it to another, where the conveyance was with the intention of hindering and delaying him in the recovery of his damages, as such conveyance as to him is fraudulent and void under the statute relating to conveyances fraudulent as to creditors.<sup>4</sup> It is not necessary that the grantees of the right to

<sup>15</sup> A flowage by a mortgagee of the mortgaged premises by a dam created on other land belonging to the mortgagee, and unauthorized by the nature of the mortgage, is a tortious act, and cannot be regarded as a possession under the mortgage title. *Great Falls Co. v. Worster*, 15 N. H. 412.

One who purchases premises subject to a mortgage is not entitled, under La. Civil Code, 462, art. 48, to erect a dam lower down the stream whereby the operation of a mill on the mortgaged premises is completely impeded. *Boatner v. Henderson*, 5 Mart. N. S. 186.

<sup>16</sup> *Reagan v. Grim*, 13 Pa. 508.

<sup>1</sup> *Bean v. Hinman*, 33 Me. 480; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Lohmiller v. Indian Ford Water Power Co.* 51 Wis. 683, 8 N. W. 601.

The fact that a railroad company has leased its road and appurtenances to another does not deprive one injured by a dam built by it of his right of action against such company, the dam being the primary and continuing cause of the injury complained of. *Anderson v. Cincinnati Southern R. Co.* 86 Ky. 44, 5 S. W. 49.

A mill owner whose mill is injured by a dam erected and kept up without right

may maintain an action against the person who erected it for injuries sustained after the wrongdoer has conveyed the dam to a third person. *Prentiss v. Wood*, 132 Mass. 486.

But in one case it was held that an action will not lie against the owner of a mill pond by an adjoining owner whose premises have been overflowed thereby where the mill pond had been leased to a third person, who was in possession, and no notice was given to the owner of the pond of the condition of the premises prior to the commencement of the suit, nor is it shown that he knew of its condition. *Miller v. Church*, 2 Thomp. & C. 259.

<sup>2</sup> *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Blunt v. Aikin*, 15 Wend. 522, 30 Am. Dec. 72, limited, in which it was held that an action on the case will not lie against one who erected a dam and flowed land, if the premises have passed into possession of third persons who occupy them as their own, and not as tenants of the one who built the dam.

<sup>3</sup> *Curtice v. Thompson*, 19 N. H. 471.

<sup>4</sup> *Purcell v. McCallum*, 18 N. C. (1 Dev. & B. L.) 221.

A statute providing that a person cre-



draw and use water from the power created by a dam should be made parties to a suit against the proprietors by the owners of lands injured by overflow of back water, for the abatement of the dam.<sup>5</sup> Since the wrongdoer cannot absolve himself from responsibility by relieving himself of the title to the property, a railroad company which constructs an embankment, and erects, as a part of a culvert, a bridge upon a public street, which is used by the public so that it has become the property of the city, is liable for damages from back water caused partly by such bridge.<sup>6</sup> The rule applies with full force to the owner of property who leases it with a nuisance on it. The general rule is that, under such circumstances, the lessor is responsible for injury to a stranger by nuisances which he has placed upon the property and left there when he makes his lease. And therefore the owner of land on which are a milldam and two mills, who leases each of the mills to a separate tenant, is liable to one whose land is overflowed by the acts of the tenants in penning back the water by means of the dam.<sup>7</sup>

**566. Purchaser of property.**— One who purchases or leases a dam is not liable for the injury caused by the backing of water on adjoining land of a third person merely because he continues the dam. To render him liable he must have notice that the dam constitutes a nuisance, and be requested to remove it.<sup>1</sup> Such purchaser is not liable for the injuries caused before he acquired title, but only for

ating a nuisance by erecting a mill or dam shall not be liable for the continuance of the nuisance after a conveyance of the mill and dam applies only to a bona fide sale, and not to a feigned or fraudulent one. *Ibid.*

<sup>5</sup>*Newell v. Smith*, 26 Wis. 582.

<sup>6</sup>*Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

<sup>7</sup>*Breathour v. Bolster*, 23 U. C. Q. B. 317.

<sup>1</sup>*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 441; *DeLaney v. Georgia, C. & N. R. Co.* 58 S. C. 357, 79 Am. St. Rep. 843, 36 S. E. 699; *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Reversing* 52 Barb. 390; *Woodman v. Tufts*, 9 N. H. 88; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396; *Castle v. Smith* (Cal.) 36 Pac. 859; *Orvis v. Elmira, C. & N. R. Co.* 17 App. Div. 187, 45 N. Y. Supp. 367; *Felker v. Calhoun*, 64 Gr. 514; *Philadelphia & R. R. Co. v. Smith*, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679; *Pierson*

*v. Glean*, 14 N. J. L. 36, 25 Am. Dec. 497.

The grantee of a railroad is not liable for injury to an owner's land from the depositing of coal slack thereon from the railroad, occasioned by the inadequacy of a culvert constructed by the former owner of the railroad, until notice to abate such nuisance is given. *Wabash R. Co. v. Sanders*, 47 Ill. App. 436.

Where the defendant's grantor erected the dam complained of, the mere fact that the defendant continued to use it does not make him the author of the injury so as to obviate the necessity of a request for its removal before an action will lie against the grantee. *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 406.

A railroad company is not liable for damages from a nuisance created by an embankment across a water course with a culvert insufficient to carry all water which may reasonably be expected to flow therein, resulting in the overflow of land by back water, where it did not construct the road, but operates it under a lease, unless it is shown to have knowl-

those inflicted thereafter.<sup>2</sup> And, therefore, if the injury was complete before he acquired title, he is not liable for any damages.<sup>3</sup> But in case of the transfer of property belonging to public service corporations the legislature may render the grantee liable for injuries caused by conditions which were created by the grantor; and therefore, under a statute permitting a railroad corporation to succeed to the rights and duties of another as to the running of the road, and making it subject to all the legal obligations then resting upon the former corporation, it is bound to maintain a culvert under the railroad track in such a way that it will not dam back the water flowing in the stream.<sup>4</sup> So, a new corporation formed by the consolidation of two other corporations, one being the original owner of a railroad and the other its lessee, is subject to a provision in the charter of the former company imposing upon it a duty to leave all streams crossed by its roadway in such condition as not materially to destroy their usefulness, and is, therefore, liable for injuries to the land of an owner from the overflow of water thereon from a stream, the flow of which is obstructed by the piling of a bridge across such stream, together with the piling of an old bridge which was not removed when the present bridge was built by the lessee company with a longer span, and which, since the consolidation, has been maintained and used by the new corporation; and in such case no notice or request to abate the nuisance is necessary before the bringing of the action.<sup>5</sup> So, an agent who merely carries on a mill for the owner's benefit is not liable because its dam, a permanent structure, was maintained at too great a height to the injury of an upper mill owner.<sup>6</sup> A lessee is not responsible for conditions created by his lessor and which he has no authority to modify.<sup>7</sup> In an action against a railroad company for damages alleged to arise from the erection of a roadbed

edge that it is maintaining a nuisance. *Missouri P. R. Co. v. Webster*, 3 Kan. App. 106, 42 Pac. 845.

<sup>2</sup>*Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

<sup>3</sup>*Rizer v. Ottumwa Hydraulic Power Co.* 70 Iowa, 145, 30 N. W. 172.

A mill owner is not liable for injuries to land further up the stream by the setting back of water by a sluiceway under a road which his predecessor in title had changed with the consent of the proper authorities for the benefit of the pond. *Stetson v. F. Carver Co.* 97 Mass. 402.

<sup>6</sup>*Penley v. Maine C. R. Co.* 92 Me. 59, 42 Atl. 233.

<sup>7</sup>*Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524.

<sup>4</sup>*Leri L. Brown Paper Co. v. Dean*, 123 Mass. 267.

<sup>5</sup>The lessee of land will not be compelled to construct a tumbling bay for the discharge of the water of a river so as to prevent the overflow of plaintiff's land, where such construction would be a waste upon the estate of the lessor. *Alder v. Savill*, 5 Taunt. 454.

A riparian proprietor injured by the negligent construction of a railroad bridge cannot recover from a lessee thereof, as the injury did not result merely from the operation of the road. *Kearney v. Central R. Co.* 167 Pa. 362, 31 Atl. 637.

across the outlet of a basin or pond so as to stop up the outlet and overflow the land at times, proof showing an erection of the nuisance complained of by another company and its continuance only by the defendant is a variance which will prevent recovery.<sup>8</sup> If the grantee has notice that the obstruction which causes the damming back of the water is wrongful, he is responsible for the injuries caused by his continued maintenance of the obstruction; and one disseised of land may maintain an action on the case for nuisance against the grantee of the disseisor, who maintains on the land a dam whereby other lands of the disseissee are flooded.<sup>9</sup>

**566a. Liable if flowage knowingly continued.**—If the purchaser of the dam continues to maintain it with knowledge that it is a nuisance, he will be liable for the injury inflicted by his use of it.<sup>1</sup> The rule is well stated in *Union Trust Co. v. Cuppy*,<sup>2</sup> as follows: A trust company in possession of and managing a railroad as trustee or mortgagee under a contract with the company and others is liable for damages to land and crops from the maintenance of an insufficient culvert constructed by the railroad company in an embankment across a water course, where it had actual knowledge of the insufficiency thereof and of the damage likely to be occasioned thereby, express notice of such insufficiency and request to remedy it being unnecessary. No one has a right to maintain a nuisance, and, if the successor in title continues to use the property in such a manner as to inflict injury upon adjoining property owners with knowledge of the facts, he cannot escape liability on the ground that he did not originate the nuisance.<sup>3</sup> As said in the early case of *Beswick v. Combdon*.

<sup>8</sup>*Southern R. Co. v. Cook*, 106 Ga. 450, 32 S. E. 585.

A New York court, not of last resort, however, has held that a fatal variance is not caused in an action for construction of obstructions to a water way by evidence that the defendant merely continued the obstruction which had been erected by another. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.* 3 Hun, 523.

<sup>1</sup>*Fisfield v. Bailey*, 55 N. H. 380.

<sup>2</sup>*Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130; *Kenney v. Kansas City, P. & G. R. Co.* 74 Mo. App. 301; *Pinney v. Berry*, 61 Mo. 359.

Damages may be recovered by a landowner whose land is overflowed by back water from a mill caused by raising a dam, although the land was overflowed in the time of the mill owners grant or who had not acquired the right to cause

such overflow, any time within ten years after the raising of the dam causing the overflow, the reason being that an action to recover the possession of the land could not be barred until ten years after its occupation. *Sutliff v. Johnson*, 17 Neb. 575, 24 N. W. 217.

The purchaser of a railroad is liable for damages caused by its maintenance of an embankment so negligently constructed as to dam back waters. *Brown v. Carolina C. R. Co.* 83 N. C. 128.

<sup>3</sup>26 Kan. 754.

<sup>4</sup>*Kenney v. Kansas City, P. & G. R. Co.* 74 Mo. App. 301; *Cobb v. Smith*, 38 Wis. 21.

A tenant under a lease for nine hundred and ninety-nine years is liable for injuries to upper riparian owners for maintaining the abutments of a bridge in the condition in which they were when the lease was granted, the effect

case will lie against the feoffee of riparian land for the continuance of an unlawful flowage of higher lands by his grantor.<sup>4</sup> This doctrine is very ancient and is firmly imbedded in the principles of the common law. In *Brent v. Haddon*,<sup>5</sup> it was held that the lessee of a mill and dam is liable for the continuance of a nuisance created by her lessor in constructing the dam so high that the water overflowed adjoining land; and a request to the lessor to abate is not necessary, such a request made to the lessee being sufficient.

**566b. Liable for adding to nuisance.**—If the grantee by his own acts adds to the nuisance, he will be liable for the injury thereby inflicted upon the adjoining owner.<sup>1</sup> As said in *Curtice v. Thompson*,<sup>2</sup> the grantee of land having a dam thereon, who alters it by making it higher and tighter than the old dam, and thereby causes a greater flowage than he is entitled to, is the author, and not the adopter, merely, of a nuisance, and is not, therefore, entitled to notice of the injurious nature of the structure and a request for its removal, before becoming liable in an action for maintaining it. So, a railroad company is not excused from liability for the overflow of an owner's land because the earthworks and embankment of a certain pond were constructed by its lessor prior to its possession, where the damage complained of was caused by changes made by the lessee since its possession so as to prevent a natural stream from draining its waters in their usual way and course.<sup>3</sup> But if the lessee merely repairs and preserves the railroad embankment without adding to the injury and without knowledge that it is causing a nuisance, it is not liable in the absence of notice and a request to remove, or liability explicitly placed upon it by statute.<sup>4</sup>

**566c. Effect of request to abate.**—If the purchaser has no knowledge that the dam is unlawful, he is entitled to notice and a request to abate the nuisance before action is brought against him.<sup>1</sup> But

of which is to cast the water back upon such land. *Meyer v. Harris*, 61 N. J. L. 83, 39 Atl. 690.

<sup>1</sup> F. Moore, 353.

<sup>2</sup> Cro. Jac. 555.

<sup>3</sup> *Snow v. Corlies*, 22 N. H. 296; *Carlleton v. Redington*, 21 N. H. 291.

<sup>4</sup> 19 N. H. 471.

The purchaser of a dam using flashboards upon it, thereby raising the water to a greater height than lawful for him to do, is not entitled, by reason of the previous use of the flashboards by his grantor, to notice before the person injured can maintain an action where the flashboards had been placed upon

the dam by his grantor only for occasional use, as the state of the water might make them necessary or convenient, and not as part of the dam. *Ocum Co. v. A. & W. Sprague Mfg. Co.* 34 Conn. 529; *Noyes v. Stillman*, 24 Conn. 15.

<sup>1</sup> *St. Louis, A. & T. H. R. Co. v. Ellis*, 58 Ill. App. 110.

<sup>2</sup> *Philadelphia & R. R. Co. v. Smith*, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

<sup>3</sup> *Beluea v. Hamm*, 13 N. B. 27; *Thornton v. Smith*, 11 Minn. 15, Gil. 1; *Middlebrook v. Mayne*, 96 Ga. 449, 23 S. E. 398; *Fenter v. Toledo, St. L. & K. O. R.*

such notice may be conveyed by acts as well as words; and when he should have known from the conduct of the owner of the flowed land in removing flashboards from the dam that the latter denied his right to flow his land in that manner, and was unwilling that it should be done, and desired its abatement, he will be considered as having sufficient notice of the existence of the nuisance to be charged with its continuance.<sup>2</sup> And the purchaser of an existing railroad may be shown to have notice of the consequences which will naturally follow from maintaining an existing culvert, by its character and that of the stream and surrounding country, together with common knowledge with which it is legally charged concerning rainfalls to which the particular country is subject.<sup>3</sup> The notice must, however, be so distinct and definitely stated as to convey clearly the ground of complaint and that the nuisance must be abated.<sup>4</sup> If the nuisance is continued after notice and request to abate, the act of the grantee is wilful and he is liable for the injury inflicted by his act.<sup>5</sup>

### III. WHAT MAY CONSTITUTE AN ILLEGAL DAM.

**567. Anything which casts the water back is illegal.**—As a general rule it may be stated that any act of the lower owner which casts the water of the stream back upon the property of the upper owner is an illegal obstruction, for the effect of which he may be liable. If the lower owner undertakes to place a structure over the stream, he must take care that it will not interfere with the accustomed flow of the water so as to cast it back upon the upper owner.<sup>1</sup> There may be liability for injury caused by placing in the river a wall,<sup>2</sup> or a conduit pipe,<sup>3</sup> or a railroad embankment;<sup>4</sup> or for the caving-in of the

Co. 20 Ill. App. 250; *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469; *Hubbard v. Russell*, 24 Barb. 404; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

<sup>2</sup>*Carleton v. Redington*, 21 N. H. 291.

<sup>3</sup>*Southern R. Co. v. Plott*, 131 Ala. 312, 31 So. 33.

<sup>4</sup>*Woodman v. Tufts*, 9 N. H. 88.

<sup>5</sup>*Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

<sup>1</sup>*Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

<sup>2</sup>*Rochester v. Erickson*, 46 Barb. 92.

<sup>3</sup>*Warren v. Carey*, 145 Mass. 78, 12 N. E. 999.

<sup>4</sup>An action will lie against a railroad company for so negligently constructing its railway as to obstruct a water

course by which land had been drained, thereby causing the same to overflow and injure crops, if brought within six months from the time when the injury accrued. *Vanhorn v. Grand Trunk R. Co.* 18 U. C. Q. B. 356.

An action will lie against a railroad company for the unskilful and negligent construction of its embankment across a stream thereby causing land to be overflowed, when from the evidence no presumption will lie that the landowner at the time of acquiescing in the construction of the railroad across his land had obtained compensation for the negligence complained of. *McGillivray v. Great Western R. Co.* 25 U. C. Q. B. 69.

banks of the stream caused by the act of the lower owner.<sup>5</sup> And in *King v. Wharton*<sup>6</sup> it was held that the owner of a river is liable to indictment for failure to cleanse it, whereby adjoining land is overflowed. But that liability is dependent upon local English statutes, for in general the lower owner is not bound to interfere with conditions not created by himself. As said in *Saxby v. Manchester & S. R. Co.*<sup>7</sup> the owner of the soil of a stream is not liable for failing to remove an obstruction placed therein by strangers, without his consent, and from which he derived no advantage, and which he offered to allow the plaintiff to enter and remove, as he could not be compelled to assume the expense and responsibility of removing the obstruction, which would involve a conflict and a law suit with those who had put it there.<sup>8</sup> But if the stream is caused to fill up by the act of the lower owner, he will be liable for the injury thereby caused to the upper owner.<sup>9</sup> So, one who constructs a grating across a water course in such a way that it will be likely to accumulate rubbish and back the water upon the upper proprietor will be liable for injuries in case it does so.<sup>10</sup> There is liability for causing overflow of the water by stopping or booming logs in the stream.<sup>11</sup> If a municipal corporation, in acting under authority of a statute giving it the right

<sup>5</sup>*Orchard Place Land Co. v. Brady*, 53 Kan. 420, 36 Pac. 728.

<sup>6</sup>Holt, 499, 12 Mod. 510.

The owner of land across which flows a water course is bound to keep it free of obstructions which would pen back the water and cast it onto adjoining land; and he is not relieved from liability for failure so to do by the fact that the obstruction consists of a fallen wall which has been located upon the adjoining land and the tenant of which has failed to keep it in repair, where it does not appear that the owner of such land is at all responsible for the existence or condition of the wall. *Bell v. Twentyman*, 1 Q. B. 766, 1 Gale & D. 223, 6 Jur. 336. In that case the action was by the owner of a reversion.

<sup>7</sup>38 L. J. C. P. N. S. 153, L. R. 4 C. P. 198, 19 L. T. N. S. 640, 17 Week. Rep. 293.

<sup>8</sup>*Kemmerer v. Edelman*, 23 Pa. 143.

But a railroad company which has failed to clean out an abandoned canal and channel as it covenanted to do is liable for damages resulting from the overflow of water caused thereby, although the overflow was caused by extreme high water. *Jones v. De Coursey*, 12 App. Div. 164, 42 N. Y. Supp. 578.

<sup>9</sup>A mill owner is liable for damages to a riparian proprietor on a creek flowing into his mill race, caused by the sand washing into the creek being prevented from flowing out by the mill-pond water. *Cline v. Baker*, 118 N. C. 780, 24 S. E. 510.

The owner of a lower mill is liable for damage from flooding the higher riparian land of another because of the filling of his dam with mud naturally washed down after the removal, with notice, of a dam on the land of the upper owner, as the lower owner, alone, is at fault. *Hardin v. Ledbetter*, 103 N. C. 90, 9 S. E. 641.

But it has been held that the owner of the lower dam is not liable for the flowage of a wheel above him if it was caused by the filling of the stream with sediment above the dam, which was not anticipated when the dam was constructed. *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

<sup>10</sup>*Babbitt v. Safety Fund Nat. Bank*, 160 Mass. 301, 47 N. E. 1018.

<sup>11</sup>*Baumgartner v. Sturgeon River Boom Co.* 120 Mich. 321, 79 N. W. 566; *Bald Eagle Boom Co. v. Sanderson*, 81 Pa. 402.

to improve a water course flowing through its limits, negligently fails to provide a sufficient outlet for the water to pass off from the land of upper owners, as it had formerly done, it will be liable in an action of tort, although the statute provides a remedy for injuries done in the construction of the work.<sup>12</sup>

**568. A bridge may be an obstruction.**—From the fact that the construction of a bridge across the stream will, unless great care is exercised, narrow the space through which the water is accustomed to flow, if the bridge is negligently constructed it may become an illegal obstruction or dam which will cast the water on the land of the upper owner in such a manner as to cause the one owning or constructing the bridge liable for the injury. The one exercising a franchise to erect a bridge over a stream will be liable for damages resulting from his obstructing the water course more than is necessary for its proper construction.<sup>1</sup> So, a municipal corporation is liable for flowing of riparian lands by the negligent construction of its bridge, as, if a pier is placed in a river 22 feet wide when none was needed.<sup>2</sup> The degree of care and foresight one constructing embankments and culverts over natural streams must use in order to avoid liability for injury to adjacent property from flooding is that which a discreet and cautious man would or ought to use if the risk and loss were to be exclusively his own, and must be in proportion to the nature and magnitude of the injury likely to follow from the occurrence to be anticipated and guarded against.<sup>3</sup> If he exercises such care, liability for the injury does not necessarily follow from the fact that water is held back by the bridge.<sup>4</sup> One whose property is located above a causeway or bridge approach, which in times of high water acts as a dam to prevent the free flowing of it, cannot maintain an action to enjoin the building of the causeway in a particular manner merely because of possible slight injury to his property, where there is nothing to show that the productiveness of his land will be materially diminished, or that the decay or depreciation of his buildings will be capable of appreciation or such as to materially lessen the intrinsic

<sup>12</sup>*Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320.

<sup>1</sup>*Chestnut Hill & S. H. Turnp. Co. v. Rutter*, 4 Serg. & R. 8, 8 Am. Dec. 675; *Tremblay v. Quebec North Shore Turnp. Road*, Rap. Jud. Quebec, 13 C. S. 329.

One authorized to make a road must, in carrying it over water courses on private land, construct bridges, culverts,

or other means of carrying off the water effectually, and keep the same in suitable repair. *Rowe v. Granite Bridge Corp.* 21 Pick. 344.

<sup>2</sup>*Krug v. St. Mary*, 152 Pa. 30, 34 Am. St. Rep. 616, 25 Atl. 161, 162.

<sup>3</sup>*Madison v. Ross*, 3 Ind. 236, 54 Am. Dec. 481.

<sup>4</sup>*Wheeler v. Worcester*, 10 Allen, 591.

value of his property.<sup>5</sup> The fact that by reason of the manner of the construction of the bridge it causes an ice jam, which floods the upper property, does not of itself render the owner of the bridge liable. The question of liability will depend upon the authority by which the bridge was constructed and the measure of care used in its construction. If the bridge was constructed and maintained by a municipal corporation in accordance with its statutory obligation, and had existed for more than thirty years without prior injury, the municipality will not be liable for the injury caused by the damming back of water by obstructed ice upon a single occasion. And if, in addition to the fact of the obstruction, it appears that the ice was cut from the river and sent down by persons seeking to free the river from its ice-bound condition, and that the ice did not go down by natural causes, the municipality will not be liable.<sup>6</sup>

**569. Railroad bridge; duty as to construction.**—A railroad company having authority to construct its road over a water course owes adjoining landowners some duty to see that the water is not unduly obstructed to their injury. While the company cannot be made liable for every injury merely because it has bridged the stream, yet it is bound to exercise care to provide for the flow of whatever water may naturally be expected to flow in the stream. If, in consequence of building a railroad over a stream, with the use of all reasonable safeguards and precautions in constructing the work, occasional disturbances to the adjoining land will arise from winter freshets, it is the misfortune of the adjoining landowner, for which the railroad company is not liable.<sup>1</sup> But if the necessary result of the construction of the railroad across a stream is the flooding of adjoining property, there is a taking of property for which compensation must be made.<sup>2</sup> If the railroad company is required by its charter to restore streams to their former state, it cannot obstruct their flow.<sup>3</sup> Therefore, al-

<sup>1</sup>*Rigelow v. Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 502.

<sup>2</sup>*Patterson v. Peterborough*, 28 U. C. Q. B. 505.

<sup>3</sup>*Bellinger v. New York C. R. Co.* 23 N. Y. 42.

<sup>4</sup>*Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Ohio & M. R. Co. v. Singletary*, 34 Ill. App. 425; *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

It is the duty of a railroad company, in constructing its roadway over natural streams, to make sufficient openings for the passage of the water so as to inflict

no injury upon adjoining landowners by flooding, that can be avoided by proper care and skill. *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

<sup>5</sup>*Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

Where a state statute authorizes the building of a railroad across water courses, but requires that they be restored to their former state and usefulness, the railroad company should, in so constructing its road, provide an outlet, not merely for the water falling within



though a railroad company has, under its charter, the right to erect a bridge across a stream, it must do so in a proper and skilful manner, leaving ample way for the passage of water so as to save riparian owners from overflow, where it appears that it is within the power of the company to so construct the bridge; and if the company fails to do this, and, by reason of the structure narrowing the natural channel, back water is caused, overflowing the premises of a riparian owner and causing him damage, the company is liable.<sup>4</sup> A railroad company, in constructing its embankment across a pond the watershed of which is much greater on the upper side, is bound by common prudence and a just regard for the rights of others to construct its culverts so as to keep the water on each side at the same level; and it is not sufficient merely to provide culverts adequate to carry the waters of the feeding stream alone.<sup>5</sup> If the passageway by which the stream is carried under the roadbed is such that it will not carry the water naturally flowing in the stream, the railroad company is liable for the resulting injury.<sup>6</sup> And this rule applies to times of freshets.<sup>7</sup> And the railroad company is bound to anticipate and provide for the increase of flow of the water which is likely to result from the develop-

the banks of the stream, but also for all water which had been accustomed to flow into the stream from the surface of the adjacent country. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 513, 22 S. W. 170.

A cause of action is presented against a railway company by a declaration that in constructing its railway over and upon the land of another in a negligent and unskilful manner, it obstructed a stream running through the land draining the same, and omitted to restore it to its former state so as not to impair its usefulness, within a reasonable time as required by statute, in consequence of which omission the lands were flooded and crops destroyed. *Moison v. Great Western R. Co.* 14 U. C. Q. B. 102.

*Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29.

*Bryant v. Bigelow Carpet Co.* 131 Mass. 492.

*Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, 87 N. W. 167; *March v. Portsmouth & C. R. Co.* 19 N. H. 372; *Knight v. Albemarle & R. Co.* 111 N. C. 80, 15 S. E. 929.

*St. Louis, A. & T. H. R. Co. v. Winkelmann*, 47 Ill. App. 276; *Fick v. Pennsylvania R. Co.* 157 Pa. 622, 27 Atl. 783; *Ohio & M. R. Co. v. Wachter*, 123 Ill.

440, 15 N. E. 279; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 527, 62 Fed. 129; *Gulf, C. & S. F. R. Co. v. Holiday*, 65 Tex. 512; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Wabash R. Co. v. Sanders*, 58 Ill. App. 213; *Bellinger v. New York C. R. Co.* 23 N. Y. 42.

But it is not liable for failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen. *Houghtaling v. Chicago G. W. R. Co.* (Iowa) 91 N. W. 811; *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

But if, at the time of the construction of a railroad, extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against. Hence, where lands have been overflowed by reason of the construction of an embankment by a railroad company, it cannot defend, in an action to recover damages, on the ground that the damage was caused by reason of an extraordinary flood, where it appears that there was a similar overflow at a time thirty-two years previous to the one in question, and that there were two similar overflows, one nine years and the other nineteen years before such previous overflow. *Gulf, C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722.

ment and improvement of the country.<sup>8</sup> To build a railroad culvert that is insufficient to carry off the water, whereby water is ponded on another's land, is a wrongful and negligent construction.<sup>9</sup>

**569a. Measure of care required in construction.**— The liability of a stream in times of high water to do injury to adjoining property if its flow is in any manner interfered with is a matter of such notoriety that a railroad company carrying its tracks across such stream is bound to take notice of the fact; and its duty to its neighbors requires that it exercise the highest circumspection in making provision for unusual stages of water for the benefit of adjoining landowners.<sup>1</sup> As stated in *Columbus & W. R. Co. v. Bridges*,<sup>2</sup> a railway company in locating bridges and trestles should regard the size and nature of the stream, the character and features of the adjacent country, the relative position and formation of the abutting land, its liability to overflows, and their probable extent and effect. They should be so constructed as not to be subject to the risks and perils arising from rain-falls known by experience to be incident to the particular region of the country though rarely occurring, or which competent and skilled engineers could reasonably anticipate. But the company is not bound to provide against unusual and extraordinary floods such as have never previously been known to occur and which could not have been foreseen by competent and skilful persons.<sup>3</sup> The work must be done in accordance with skilful engineering and the demands of a proper construction of the road.<sup>4</sup> The measure of the duty of the railroad

<sup>8</sup>*Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621, Affirming 30 Ill. App. 552.

<sup>9</sup>*Fleming v. Wilmington & W. R. Co.* 115 N. C. 676, 20 S. E. 714.

A railroad company is liable to a landowner for overflow of his lands and destruction of his crops caused by the construction across a stream of a bridge having a culvert 7 feet wide, when one at least 20 feet wide was necessary in order to carry away the water when the stream was full. *Moison v. Great Western R. Co.* 14 U. C. Q. B. 109 (and five other cases)

<sup>1</sup>*New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

<sup>2</sup>86 Ala. 448, 11 Am. St. Rep. 58, 5 So. 864.

<sup>3</sup>*Peoria & P. Union R. Co. v. Barton*, 38 Ill. App. 469; *Southern R. Co. v. Plott*, 131 Ala. 312, 31 So. 33; *Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415; *Ohio & M. R. Co. v. Thillman*, 143 Ill.

127, 32 N. E. 529; *Drake v. New York, L. & W. R. Co.* 75 Hun, 422, 27 N. Y. Supp. 739; *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535.

<sup>4</sup>*Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108; *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98.

In planning and constructing a bridge across a river, the company must bring to the execution of the work the engineering knowledge and skill ordinarily practised in such works, and see to the practical application of such knowledge and skill to the work in hand. *Omaha & R. Valley R. Co. v. Brown*, 14 Neb. 170, 15 N. W. 321.

The reasonable precaution with respect to the construction of bridges, culverts, or other provisions for carrying off the water necessary to relieve one constructing a road over water courses on private land from the charge of negligence, is that such person bring to their construction all the engineering

company is to provide against injury by floods which an ordinarily prudent man would have anticipated.<sup>5</sup> And therefore a railroad company is not released from liability for a failure to provide a sufficient culvert over a stream by the fact that such culvert was built according to the advice of skilled engineers, since the company must provide, not for the danger which a skilful engineer did anticipate, but for the danger which he ought to have anticipated.<sup>6</sup> There are some cases which state the liability of the corporation as being the exercise of reasonable and ordinary care and diligence.<sup>7</sup> These decisions, however, are not far different from those which state the duty in stronger terms, because the reasonable care which must be exercised must be determined in view of the circumstances of the case and the dangers attending a failure to take proper care; and, when such dangers are taken into account, reasonable care is seen to be a very high degree of care, although it is only what is reasonable under the circumstances. In *Gulf, C. & S. F. R. Co. v. McGowan*,<sup>8</sup> it is said that the mere fact that, when tested, the openings are found to be insufficient is not enough to charge the railroad company with liability, if it exercised due care and there was nothing prior to that time to show that the openings would not perform the work for which they were intended.

**569b. Liability for injury.**—A railroad company which leaves an opening under its tracks which is insufficient to carry the water flowing in the stream is liable under the rules laid down in the preceding section for the injury caused by damming back the water upon the land of the upper proprietor.<sup>1</sup> And the liability extends to injuries

knowledge and skill ordinarily applied to work of like kind in view of the size and habits of the stream, the character of its channel, and the declivity of the circumjacent territory forming the watershed, so as to avoid all danger from flooding in all ordinary floods or freshets. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

<sup>5</sup>What a prudent man would do with reference to danger to his own property is not the test by which to determine the liability, for he might be willing to take the risk rather than to incur expenses to make provision against the danger; and he will not be justified in taking the risk when it will involve the destruction of another's property. *Gulf, C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722.

<sup>6</sup>*Houghtaling v. Chicago G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811.

<sup>7</sup>*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 441.

A railroad company, in constructing a box culvert through which, by reason of the manner of construction of its road, most of the waters of a creek pass during high water, instead of through a pile trestle over the main channel of the creek, through which they were intended to pass, is bound to exercise reasonable and ordinary care and diligence to make such culvert sufficient to carry off all the water of the creek naturally flowing thereto in times of high water, or caused to flow thereto by reason of such manner of construction. *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

<sup>8</sup>73 Tex. 355, 11 S. W. 336.

<sup>1</sup>*Robitaille v. Canadian P. R. Co. Rap. Jud. Quebec*, 15 C. S. 246; *State ex rel. State Bd. of Health v. Jersey City*, 55

by unusual, though not extraordinary, floods.<sup>2</sup> The liability will extend to injuries done by coal slack or other *débris* washed upon the property by the flood.<sup>3</sup> And the company will be liable for causing the water to flow into mines over which the road is constructed.<sup>4</sup> The liability is not limited to injuries caused by the bridge itself, but to those caused by means adopted to protect the bridge as well.<sup>5</sup> And if the company suffers pilings to remain in the bed of a stream under a bridge after they are no longer necessary for the construction or maintenance of such bridge, it is liable for injuries to adjoining property resulting from the consequent obstruction of the stream.<sup>6</sup> The facts that the bridge is authorized by the legislature and that the injured land is not strictly riparian will not relieve the company from liability.<sup>7</sup> The company is liable for damages to land and crops occurring while the road is in the possession of a receiver or trustee, caused by the backing of water thereon by reason of the insufficiency of a culvert in an embankment previously constructed by the railroad company over a water course.<sup>8</sup> A bridge which, because of its negligent construction, prevents the free passage of ice and water, is a nuisance, for every continuance of which, when damages have been sustained, an action will lie for the recovery of such damages as accrued before the action was brought; and one action is not a bar to a

N. J. Eq. 116, 35 Atl. 835; *Texas C. R. Co. v. Dunlap* (Tex. Civ. App.) 26 S. W. Co. v. *Clifton*, 2 Tex. App. Civ. Cas. 655; *Kansas City, Ft. S. & M. R. Co. v. (Willson)* § 489, p. 433; *Texas & P. R. Cook*, 57 Ark. 387, 21 S. W. 1066; *St. Co. v. Snyder* (Tex.) 18 S. W. 559; *Louis, I. M. & S. R. Co. v. Lyman*, 57 *Pittsburg, Ft. W. & C. R. Co. v. Gil- Ark. 513, 22 S. W. 170; Higgins v. New* land, 56 Pa. 445, 94 Am. Dec. 98; *John- York, L. E. & W. R. Co. 78 Hun, 567,* son v. *Atlantic & St. L. R. Co.* 35 N. H. 20 N. Y. Supp. 563; *Brown v. Pine* 569, 69 Am. Dec. 560; *Cleveland, C. C. Creek R. Co.* 183 Pa. 38, 38 Atl. 401; & *St. L. R. Co. v. Nuttall*, 59 Ill. App. *Union Trust Co. v. Cuppy*, 26 Kan. 754. 639; *St. Louis, A. & T. H. R. Co. v. El- Wabash R. Co. v. Sanders*, 58 Ill. App. 213.

It is immaterial that the action is not brought under the statute providing for the construction of necessary culverts or sluices in roadbeds, and prohibiting the unnecessary obstruction of streams by railroad companies, for the reason that such cause of action rests upon the broader ground that one who obstructs the waters of a running stream to another's hurt is responsible in damages therefor. *Gulf, C. & S. F. R. Co. v. Steel* (Tex. Civ. App.) 69 S. W. 171.

<sup>2</sup>*Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914; *Gulf, C. & S. F. R. Co.* Vol. II.—WATERS, 116.

<sup>3</sup>*Bagnall v. London & N. W. R. Co* 7 Hurlst. & N. 423, 31 L. J. Exch. N. S. 121, 8 Jur. N. S. 16, 10 Week. Rep. 232 Affirmed in 1 Hurlst. & C. 544, 31 L. J. Exch. N. S. 480, 9 Jur. N. S. 254, 9 L. T. N. S. 419, 10 Week. Rep. 802.

<sup>4</sup>*Higgins v. New York, L. E. & W. R. Co.* 78 Hun, 567, 29 N. Y. Supp. 563. *St. Louis & S. F. R. Co. v. Craig*, 10 Tex. Civ. App. 238, 31 S. W. 207.

<sup>5</sup>*Brink v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 177.

<sup>6</sup>*Brown v. Cayuga & S. R. Co.* 12 N. Y. 486; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433.

<sup>7</sup>*Union Trust Co. v. Cuppy*, 26 Kan. 754.

second action brought for damages thereafter sustained.<sup>9</sup> A railroad company maintaining a bridge across a stream is liable for injuries to adjoining land resulting from its suffering the channel to become stopped up, thereby causing the water to flow back onto such land, although the bridge was not negligently constructed.<sup>10</sup> The company is liable for injuries caused by backing water onto a mill wheel.<sup>11</sup> The company is relieved from liability only when it has constructed the bridge in a careful and prudent manner, with openings large enough to discharge all the water flowing down the stream in any freshet that might be expected.<sup>12</sup>

**569c. Satisfaction or release of liability.**—A release to the company from liability for all claims for damages by reason of taking and using the land for a railroad will include damages caused by an insufficient culvert.<sup>1</sup> But a release to a railroad company of all claims for damages sustained, or to be sustained, by reason of the location, construction, and operation of the road, does not cover damages arising from the negligent construction of the railroad embankment after the date of such release.<sup>2</sup> Therefore, if damages have been paid in condemnation proceedings, an action will not lie for injuries caused by the proper construction of the road.<sup>3</sup> But such damages are fixed on the supposition that the work will be constructed with proper care and skill, and payment of them will not bar an action for injuries caused by the negligent construction.<sup>4</sup> A grant of a right of way will pre-

<sup>9</sup>*Omaha & R. Valley R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183; *Omaha & R. Valley R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39.

The erection by a railroad company of a culvert over a stream of insufficient capacity to take care of the waters thereof when the same is swollen by rains, thereby causing the flooding of adjacent property, is a private nuisance, for the continuation of which a grantee or alienee of such railroad company may become responsible, either to the original owner of such adjacent land, or to another deriving title from him; but such responsibility does not begin unless such alienee, after reasonable notice, refuses or neglects to reform or abate the nuisance, even though he has actual knowledge of its existence, for, until such notice is given, the injured owner is presumed to acquiesce in its continuation. *West v. Louisville, C. & L. R. Co.* 8 Bush, 404.

<sup>10</sup>*Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130; *Ohio & M. R. Co. v.*

*Wachtler*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279.

<sup>11</sup>*Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444.

<sup>12</sup>*Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.* 3 Hun. 523.

<sup>1</sup>*Updegrove v. Pennsylvania Schuylkill Valley R. Co.* 132 Pa. 540, 7 L. R. A. 213, 19 Atl. 283.

An owner of land is estopped from recovering damages because of the placing of an insufficient culvert in a railroad embankment, when, after its construction, he discharged the corporation forever from all suits, claims, demands, and damages whatever that might result from its erections. *Hoffeditz v. Southern Pennsylvania R. & Min. Co.* 129 Pa. 264, 18 Atl. 125.

<sup>2</sup>*Brown v. Pine Creek R. Co.* 183 Pa. 38, 38 Atl. 401.

<sup>3</sup>*Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

<sup>4</sup>*Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12

vent an action for injuries caused by work constructed in a careful and prudent manner.<sup>5</sup> But no reservation of a right to flood lands, conveyed by a railroad company, with water of a river backed up by the faulty construction of the embankment on which its tracks are laid, will be implied from the mere fact that the conveyance was made after the embankment was finished.<sup>6</sup> An owner of land is not estopped from claiming damages for the overflow of his land caused by the negligent construction by a railroad company of a bridge over a natural stream, on the ground that he and his predecessors had knowledge of the erection of the bridge and the manner of its construction, and made no objections, in the absence of proof that he knew that the bridge would flood his land, or that he acquiesced in such flooding.<sup>7</sup>

**569d. Effect of contributory causes.**— The fact that the land was flooded before the construction of the road will not relieve the company from liability for increased injury caused by its works.<sup>1</sup> The company is not relieved from liability by the fact that the accumulation of the water in the stream is increased by natural causes, such as the clearing and cultivation of the land.<sup>2</sup> If the bridge is ample to carry the water of the stream, the company is not liable for injuries caused by the jamming of ice under it so as to constitute a dam and throw the water back up the stream.<sup>3</sup> Nor is it liable for injuries caused by driftwood jamming under the bridge.<sup>4</sup> But it is the duty of a railroad company, in constructing its roadway over a natural water course, not only to provide such a passageway for the water as is required by the natural lay of the land, but to maintain such water way so as to prevent its becoming filled up so as to obstruct the flow of water.<sup>5</sup> Therefore, where there are loose timbers along a stream, due care in the construction or maintenance of a trestle may call for

*S. E. 348; Winchester & P. R. Co. v. Washington*, 1 Rob. (Va.) 67; *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

A riparian proprietor is not estopped from recovering damages resulting from an improperly constructed railroad culvert by damages having been awarded on condemnation proceedings, as it was then assumed that the corporation would perform its work properly and without negligence. *Southside R. Co. v. Daniel*, 20 Gratt. 344.

*Harrelson v. Kansas City & A. R. Co.* 151 Mo. 482, 52 S. W. 368; *Wallace v. Columbia & G. R. Co.* 34 S. C. 62, 12 S. E. 815; *Hodge v. Lehigh Valley R. Co.* 39 Fed. 449.

*Sellers v. Texas C. R. Co.* 81 Tex. 458, 13 L. R. A. 657, 17 S. W. 32.

*Sherlock v. Louisville, N. A. & O. R. Co.* 115 Ind. 22, 17 N. E. 171.

*Texas & P. R. Co. v. Padgett*, 14 Tex. Civ. App. 435, 37 S. W. 92.

*Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38, 7 So. 212.

*Berninger v. Sunbury, H. & W. R. Co.* 203 Pa. 516, 53 Atl. 361; *Omaha & R. Valley R. Co. v. Brown*, 14 Neb. 170, 15 N. W. 321, 16 Neb. 161, 20 N. W. 202.

*Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271, 53 Am. Rep. 581.

*Ohio & M. R. Co. v. Long*, 52 Ill. App. 670; *Omaha & R. Valley R. Co. v. Standen*, 29 Neb. 622, 46 N. W. 46; *St. Louis, A. & T. H. R. Co. v. Brown*, 34 Ill. App. 552.

A railroad company is not liable for the result of the clogging of its culvert by debris which it could not have antic-

plans and methods to prevent their lodgment, and so prevent them from obstructing the flow of the water.<sup>6</sup> And the company is bound to keep the passageway clear so as to prevent as far as possible the occurrence of jams at the bridge.<sup>7</sup> Where the channel of a stream becomes filled and choked by reason of *débris* lodging against a bridge maintained by a railroad company, its successor is not liable for a continuance of the nuisance if the removal of the bridge by it would not have affected the accumulations which had filled the channel during the maintenance of the bridge by the original company.<sup>8</sup> A railroad company is liable for the flooding of an owner's land if the manner in which the railroad embankment was constructed is the cause of producing certain other results, the combined operation of which causes the overflow complained of.<sup>9</sup>

**569c. Recovery of damages.** — If the injuries are caused by negligent construction of the roadbed, the action must be for the tort; but if they are the necessary result of a careful construction of the road, the damages must be recovered in the eminent-domain proceedings in which the right of way is secured.<sup>1</sup> In case the road is negligently

ipated would be carried down by the water; but such freedom from liability does not extend to the result of clogging caused by *débris* being carried down by the stream during a freshet not extraordinary and unprecedented. *Houghaling v. Chicago G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811.

A railroad company is liable for the damage resulting from the overflow of a natural stream if it is caused by the negligent placing of piles under its bridge across the stream in such a way as to catch the drift and *débris* brought down in times of high water, thus causing an obstruction which causes the accumulation of the water and consequent overflow. *Edwards v. Missouri, K. & T. R. Co.* 97 Mo. App. 103, 71 S. W. 366.

A railroad company is liable for injury caused by the overflow of the waters of a river occasioned by an ice gorge at its negligently constructed bridge, although authorized by law to construct its road across the stream. In constructing the bridge due regard must be had equally to the safety of the traveling public and to the adjoining landowners; neither should be sacrificed to the other. *McClenehan v. Omaha & R. Valley R. Co.* 25 Neb. 523, 41 N. W. 350.

*Southern R. Co. v. Plott*, 131 Ala. 312, 31 So. 33.

*West v. Louisville, C. & L. R. Co.* 8 Bush, 404.

Where a bridge as originally constructed did not interfere with the flow of the stream, but subsequently the water was raised by the gradual accumulation of *débris* under it, the injury resulting from the obstruction did not become permanent, so as to set the statute of limitations running as against future or prospective damages, until the channel was subsequently intentionally filled in and a solid embankment made by the owner of the bridge. *Buntzen v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 414.

*Buntzen v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 414.

*Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108.

*Mellen v. Western R. Co.* 4 Gray, 301; *Estabrooks v. Peterborough & S. R. Co.* 12 Cush. 224; *Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274; *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279.

Damaging an owner's land by the overflow of water thereon caused by the insufficiency of a culvert through a railroad embankment is not such a "taking" within the meaning of the Constitution, as to entitle such owner to have the damages assessed as for a "taking" as against anyone owning the road.

constructed, the right of action does not accrue until the injury is actually done.<sup>2</sup> The burden is upon the railroad company to show its authority to close the water way in order to relieve itself from liability for such act.<sup>3</sup> The company cannot relieve itself from liability by showing that it made ditches to carry off the water as rapidly as the stream would when its banks were not overflowed.<sup>4</sup> To make the railroad company liable, its work must be shown to be the proximate cause of the injury.<sup>5</sup> Evidence of the frequent occurrence of freshets supposed to be extraordinary is admissible upon the question of what the capacity of the opening should have been.<sup>6</sup> Evidence that at a subsequent freshet the embankment was cut, and its effect upon the water, may be admissible for the purpose of showing the effect of the embankment, although it cannot be considered as an admission by the company of its negligence.<sup>7</sup> Nor can such admission be shown by proof that after the flood the capacity of the culvert was enlarged.<sup>8</sup> If it appears that the injury is permanent the railroad company may have permanent damages awarded, the measure of which will be the difference in the value of the property with and without the road.<sup>9</sup> In an action against a railway company for causing overflow of land by the construction of an embankment across a branch, the company cannot set off the enhanced value given to the land by the construction of the road, where such increased value is given in common to other lands in the vicinity by the presence of the road.<sup>10</sup> The question of negligence on the part of the company is for the jury, as is also the ques-

*Wabash R. Co. v. Sanders*, 47 Ill. App. 436.

In an action against a railroad company for damages to land by flooding, the owner of such land is entitled to recover for all injuries from such cause as a result of the construction of the roadway over a natural stream, irrespective of the question as to whether the roadway was properly or negligently constructed, in the absence of any showing that the damages resulting necessarily from a proper construction of the road have been awarded in a condemnation proceeding, or otherwise paid. *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

*Cleveland, C. C. & St. L. R. Co. v. Kline*, 29 Ind. App. 390, 63 N. E. 483.

*Dowsey v. Long Island R. Co.* 35 Hun, 362.

*St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622.

*Treichel v. Great Northern R. Co.* 80

Minn. 96, 82 N. W. 1110; *Texas & P. R. Co. v. Padgett*, 14 Tex. Civ. App. 435; 37 S. W. 92; *Morris v. Richmond & D. R.* 65 Fed. 584.

In order to justify recovery for the negligent construction of a railway bridge across a river in such manner as to cause an ice gorge and the overflow of lands in the vicinity, there must be actual injuries resulting from the unlawful obstruction. *Omaha & R. Valley R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183.

*Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98.

*Gulf, C. & S. F. R. Co. v. Dunlap* (Tex. Civ. App.) 26 S. W. 655.

*Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336.

*Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730.

*St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622.



tion whether or not the flood was unprecedented.<sup>11</sup> So, it is the province of the jury to determine whether or not the trestle constitutes an obstruction to the natural flow of the stream.<sup>12</sup> In order to render a railroad company liable for maintaining its roadway in such a manner as to cause an owner's land to be flooded, where notice is necessary to the maintenance of the suit, it is sufficient if the company is so far apprised of the injury done and the claim for redress as not to be taken by surprise.<sup>13</sup>

**570. Drift and debris.**—The riparian owner is not bound to keep the channel of the stream free from *débris* which may find its way there naturally, and is not liable for injury to upper property owners by the fact that its accumulation in the stream sets the water back over the boundary line. But, in erecting artificial structures in or across the stream, he is bound to take notice of the liability of such material to be impeded by the obstruction and so become a menace to upper property, and he will be liable in case he builds his structure in such a way that it will necessarily cause drifting material to dam the water back, or in case he fails to remove the material after he sees that it is being piled up so as to form a dam. The mere fact that a dam holds the ice in a stream longer than it would have stayed in the absence of the dam does not render the owner liable for the inconvenience thereby caused to an upper mill owner.<sup>1</sup> But if the dam accumulates the ice in such a way that the water is forced back onto upper property to its injury, the owner of the dam is liable.<sup>2</sup> And he cannot accumulate logs in his pond in such a way as to throw the water back on the upper property to its injury.<sup>3</sup> A railroad company which cuts off pilings used in the construction of a bridge, and leaves them at such a height as to cause an accumulation of *débris* to such an extent as to obstruct the natural current of the river and cause the flooding of lands, is liable for the injury sustained by reason of its negligence.<sup>4</sup> It has been held that the filling of the pond with sediment, which was not anticipated when the dam was constructed, will

<sup>11</sup>*Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

<sup>12</sup>*St. Louis, A. & T. H. R. Co. v. Winckelmann*, 47 Ill. App. 276.

<sup>13</sup>*Wabash R. Co. v. Sanders*, 58 Ill. App. 213.

<sup>1</sup>*Smith v. Agawam Canal Co.* 2 Allen, 355.

<sup>2</sup>*Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Bell v. McEntook*, 9 Watts, 119, 34 Am. Dec. 507; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

<sup>3</sup>Though he may set back the water in its natural state to the boundary of the upper proprietor's land, and so maintain it, although at times the freshets might set back the water on the mill wheels to a greater extent than it otherwise would. *Richards v. Peter*, 70 Mich. 236, 38 N. W. 278.

<sup>4</sup>*Hague v. Kansas City S. R. Co.* 104 Fed. 391.

not render the owner of the dam liable for interference with the wheel of the upper owner.<sup>5</sup> But that statement unduly relieves the lower proprietor from liability. He should not be permitted to create a condition which will destroy an upper mill privilege, even though natural conditions co-operate with his acts; and therefore the better rule is that, if the dam prevents the sediment from being carried away, and the result of the combined causes is the casting of the water onto the upper property, the owner of the dam is liable.<sup>6</sup> So, if the accumulation of sand in a stream is caused by a dam erected lower down the stream, the owner of the dam is not relieved from responsibility, even if this accumulation results in part from hillside clearings of the upper owners.<sup>7</sup> No recovery can be had for damages to a mill by the back water from a lower mill if no damage was done except what was occasioned by flood wood on the land of the lower mill owner, and he removed the same within a reasonable time.<sup>8</sup> The fact that the water is held back to some extent by vegetation growing in the pond will not give the upper owner a right of action.<sup>9</sup> Where a municipality adopts a stream as an open sewer, it is bound to keep open the channel and to remove accumulations of filth, ashes, or other material that obstruct the flow of, and throw the water out of its banks upon the land of adjoining owners.<sup>10</sup> The lower owner cannot conduct a business near or along the stream in such a way as to cause its channel to become filled with *débris* and dam the water back on the upper property.<sup>11</sup> A riparian owner, who purchases of a town the material of an

<sup>5</sup>*Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

<sup>6</sup>*Turner v. Locy*, 37 Or. 158, 61 Pac. 342.

<sup>7</sup>So, if a dam causes the filling up of a stream with sand, and the raising of the water so as to leave the land on each side wet and unfit for cultivation, the owner may recover for the injury. *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885.

A navigation corporation having the care and control of a dam which it permits to become filled up by the acts of others is liable for the injury thereby done to riparian owners. *Schuylkill Nav. Co. v. McDonough*, 33 Pa. 73.

<sup>8</sup>*Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393.

<sup>9</sup>*Large v. Orvis*, 20 Wis. 696.

<sup>10</sup>*Knoll v. Light*, 76 Pa. 268.

So, those undertaking to improve the navigation of a river are not liable to an action for the flooding of adjoining lands resulting from the action of

staunches erected by them in the river, combined with the growth of weeds and accumulation of silt against the staunches, as the undertakers are under no obligation to cut the weeds or dredge the silt, except when necessary for the benefit of the navigation; and the landowner's remedy, if any, is under the compensation clause of the statute authorizing the undertaking. *Cracknell v. Thetford*, L. R. 4 C. P. 629, 38 L. J. C. P. N. S. 353.

And, a corporation owning the navigation of a river is not liable, on abandoning it pursuant to statutory authority, for failure to keep the abandoned channel free from silt and weeds, whereby the flow of the water is obstructed and adjacent lands are flooded, unless made so by statute. *Hodgson v. York*, 28 L. T. N. S. 836.

<sup>11</sup>*Blizzard v. Danville*, 175 Pa. 479, 34 Atl. 846.

<sup>12</sup>*Ames v. Dorset Marble Co.* 64 Vt. 10, 23 Atl. 857.

abandoned bridge, and allows it to remain in the stream, will be liable to upper proprietors for injuries caused by the consequent damming back of the water.<sup>12</sup> But a railroad company is not liable for the flooding of an owner's land caused by an obstruction to a natural stream beyond the line of its right of way, although such obstruction was caused by the timbers of a railroad bridge washed out on its roadway above by an extraordinary flood.<sup>13</sup>

**571. That obstruction is beneficial does not destroy liability.**—Under the influence of the old rule that the one who first makes a beneficial use of the stream has a prior right to it, it has been questioned whether or not an upper owner has a right of action in case he does not show actual injury.<sup>1</sup> But, since each riparian owner has a right to have the natural level of the water maintained through his property, any infringement of that right gives him a right of action; and even the fact that the additional quantity of water kept upon the property by the obstruction is a benefit to it will not destroy his right to recover nominal damages from the one maintaining the obstruction. While the water may be of present advantage, there may be in the future a desire to change the use of the property, when the water will be a serious disadvantage, and the upper owner has a right to choose whether he will permit it to remain there or not.<sup>2</sup> And the reason for allowing damages is, of course, stronger where no benefit is shown, but merely that there is no present injury.<sup>3</sup> Although, if the obstruction wrongfully causes the water to set back over the line, there is a right of action, yet, if the obstruction causes no greater injury than would exist without it, the owner of the obstruction is not liable.<sup>4</sup> And a railroad company, in mitigation of the damages to be paid for the construction of a railroad across a farm in such a way as to interfere with the flow of the stream of water, may show that the raising

<sup>12</sup>*Talbot v. Whipple*, 7 Gray, 122.

<sup>13</sup>*Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

<sup>1</sup>*Haas v. Choussard*, 17 Tex. 588; *Fahnestock v. Southern Pipe Line Co.* 19 Lanc. L. Rev. 233; *Worcester v. Great Falls Mfg. Co.* 41 Me. 159, 66 Am. Dec. 217.

An action to abate as a nuisance a dam which it is alleged has been increased in height so that it will interfere with the working of mining claims above and a quartz mill thereat, which it is intended shall be constructed, cannot be maintained where it does not ap-

pear that the owners have ever commenced to work the claims, or that the claims are at all injured or likely to suffer damages therefrom. *Harvey v. Chilton*, 11 Cal. 114.

<sup>2</sup>*Mize v. Glenn*, 38 Mo. App. 98; *Kimel v. Kimel*, 49 N. C. (4 Jones L.) 121; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Engard v. Frazier*, 7 Ind. 294.

<sup>3</sup>*Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145.

For a full discussion of this question, see § 551, *ante*.

<sup>4</sup>*Langdon v. Chicago, B. & Q. R. Co.* 48 Iowa, 437.

of the water will tend to convey alluvion upon the land in such a way as to enrich it.<sup>5</sup>

**572. Alteration of obstruction.**— A railroad company will not be enjoined from rebuilding a bridge upon new piling driven parallel to the old piling, which is to be removed, on the ground that such piles would obstruct the stream and flood a roadway and farms, where the outlet under such bridge is of more than double the capacity of a county bridge situated just above, and which, together with the flood-gate constructed by riparian owners, is likely to catch and detain floating *débris*, rather than the bents of the railway bridge.<sup>1</sup> And after the right has been acquired to maintain a dam in a stream, its owner has a right to keep it in repair.<sup>2</sup> Therefore, it is a good defense to an action by landowners to enjoin the erection of a mill dam on a stream, the back waters of which overflow their lands, that the dam is but being rebuilt and repaired as it existed before being washed away by high water, and as it had been continuously maintained for the preceding fifty years, overflowing such lands to the same extent as they will be overflowed after the dam is rebuilt, adversely, and under a claim of the right so to do.<sup>3</sup> And a right to maintain a dam on another's land includes as a necessary incident the right to enter upon the premises to make needed repairs.<sup>4</sup> But the obstruction cannot be repaired or reconstructed in such a way as to increase the level of the water on the upper property beyond what the owner had a right to maintain.<sup>5</sup> Therefore, the owner of land servient to a flowage easement is entitled to damages from the dominant owner if, after the erection of a new dam, the old water marks are flooded, the fitness of the land for cultivation diminished, if sand is deposited in his ditches, or, presumably, if the new dam is higher or of the same height, but tighter than the old one.<sup>6</sup> But in a suit for damages from an increased flowage of an upper tract caused by the rebuilding of a dam, when the old dam caused no damage, it must be proved that the new dam is of increased size.<sup>7</sup>

**573. Increasing height of dam.**— In case the height of a dam is increased so as to flood the upper property to a greater extent than the

<sup>1</sup>*Milwaukee & M. R. Co. v. Eble*, 4 Laoy v. Arnett, 33 Pa. 169; *Cowell v. Chand.* (Wis.) 72, 3 Pinney (Wis.) 334. *Thayer*, 5 Met. 253, 38 Am. Dec. 400;

<sup>2</sup>*Van Wert County v. Peirce*, 90 Fed. Hynds v. Shults, 39 Barb. 600; *Schuylkill Nav. Co. v. Freedley*, 6 Whart. 109.

<sup>3</sup>*Frey v. Witman*, 7 Pa. 440, 49 Am. Dec. 484; *Rosamund v. Forgie*, 18 Grant Ch. (U. C.) 370; *Butler v. Huse*, 63 Me. 447; *Baker v. McGuire*, 53 Ga. 245; *Oakley Mills Mfg. Co. v. Neese*, 54 Ga. 459; *Maguire v. Baker*, 57 Ga. 109; <sup>4</sup>*Ogle v. Dill*, 55 Ind. 130. <sup>5</sup>*Edgett v. Douglass*, 144 Pa. 95, 22 Atl. 868.

<sup>6</sup>*Shumway v. Simons*, 1 Vt. 53. <sup>7</sup>*Jenkins v. Conley*, 70 N. C. 353. <sup>8</sup>*Godfrey v. Maberry*, 84 N. C. 255.

owner had a right to flood it, the owner of the dam is liable for the injury caused by the increased flowage, the same as though he had no flowage easement.<sup>1</sup> Damages may be recovered for a new flowage caused by raising a dam, where the mill owner had lost by prescription the right of a former owner to flow such lands as much as he required.<sup>2</sup> But if no injury is done to the upper owner by the increase of height and capacity of the dam, he has no right of action.<sup>3</sup> Although the right to damages for the building of a dam under permission of a statute has been barred by lapse of time, in case the dam is raised so as to cause new injury to the upper proprietor the damages therefor may be assessed in the mode provided by the statute.<sup>4</sup> In an action for obstructing the flow of water from a mill by back water, caused by the raising of the height of a lower mill dam, it is immaterial which dam was erected first, where both originally belonged to the same remote grantor.<sup>5</sup> A mill owner entitled to maintain a dam at a given height, and, temporarily, to add flashboards thereto, has no right to replace the flashboards with a permanent structure increasing the height by the same amount, to the injury of an upper riparian proprietor.<sup>6</sup> The right to maintain a dam of a given height does not justify the construction of a flume 2 feet higher, extending 8 feet along one end thereof, as against an adjoining owner damaged thereby.<sup>7</sup> The granting of a right to maintain a dam of a certain height, with a proviso that nothing in the grant shall be construed to authorize the raising of the dam, is not a contract by the owner of the dam that he will not raise it.<sup>8</sup> A verdict for damages resulting from an increase of the overflow of lands which are subject to an easement of back water from a mill dam, by the construction of a new dam by

<sup>1</sup>*Gorman v. Trice*, 79 Ga. 731, 5 S. E. 129; *Scheible v. Law*, 65 Ind. 332; *Williamson v. Yingling*, 80 Ind. 379; *Sumner v. Tileston*, 7 Pick. 198; *Ward v. Ward*, 22 N. J. L. 699; *Schicke v. Johnson*, 39 Wis. 384.

Flowage damages may be recovered where it appears that, while respondents have maintained a dam in that town for more than twenty years, within that time they have erected another dam above the former, thereby raising the water 6 feet, it appearing that the damages were suffered only after the last dam was built. *Gleason v. Tuttle*, 46 Me. 288.

<sup>2</sup>*Russell v. Turner*, 50 Me. 256.

<sup>3</sup>*Nigh v. Sowerwine*, 12 U. C. Q. B. 67.

Where the grantee of the privilege of keeping a dam at a prescribed height, but no higher, erected a new dam, subse-

quently, lower down the stream, of the same height as the old one, he will not be restrained from placing on the dam movable stop logs to enable him to make use of the surplus water which would otherwise flow over it, where such stop logs would raise the height of the water on the plaintiff's land only when the mill is not working, and then to the extent of about 1½ inches, at which time they are, however, always removed by the defendant. *Beamish v. Barrett*, 16 Grant Ch. (U. C.) 318.

<sup>4</sup>*Baldwin v. Calkins*, 10 Wend. 167.

<sup>5</sup>*Williamson v. Yingling*, 80 Ind. 379.

<sup>6</sup>*Billings Slate & Marble Co. v. Hanger*, 62 Vt. 160, 19 Atl. 231; *Weed v. Keenan*, 60 Vt. 74, 13 Atl. 804.

<sup>7</sup>*Wilson v. Wilson*, 2 Vt. 68.

<sup>8</sup>*Cohcell v. May's Landing Water Power Co.* 19 N. J. Eq. 245.

purchasers of the mill tract, to whom the easement passes with the tract, cannot be sustained by mere proof that the overflow is greater, without any evidence to show how much greater, or the amount of damage caused by such increased overflow.<sup>9</sup> The owner of a mill seat on a stream, who alleges an unlawful increase in the height of a mill dam below, is entitled to an injunction restraining the damming and backing up of the waters of the stream by the other, only to the extent of such increase.<sup>10</sup>

**574. Change of location.**— The upper owner has no ground of complaint in case of a change in the location of the obstruction, if his property rights are infringed to no greater extent than when it was in its original position.<sup>1</sup> But the right to maintain a dam of a certain height at a given point does not give a right to erect a new one further up the stream of the same height, since the difference in conditions at the two places may be such that the new dam may raise the level of the water on the property much more than did the old one.<sup>2</sup> The right to erect a dam is not destroyed, however, by taking it down and erecting a new one farther up the stream.<sup>3</sup> Under a grant of property with the right to erect a dam across a creek on other lands of the grantor, and to take the water therefrom in raceways so as to give the grantee the best possible use of the water, the building and maintaining of a dam on the land of the grantor will not prevent the subsequent transfer of the dam to the land of the grantee in such a manner as to flow the water back on the grantor's land so far as it was flowed by the old dam.<sup>4</sup>

#### IV. EFFECT OF LOCAL CONDITIONS.

**575. Character of stream.**— In order to make the rule governing the obstruction of water courses applicable in any case, a water course must be found to exist.<sup>1</sup> But if a water course in fact exists, the fact that it is not an ancient one will not confer a right to obstruct it.<sup>2</sup> And the rule is not changed by the fact that the water was flowing in an artificial channel.<sup>3</sup> An injunction will be granted forbidding the

<sup>9</sup>*Oakley Mills Mfg. Co. v. Neese*, 54 Ga. 459.

<sup>10</sup>*Tatem v. Gilpin*, 1 Del. Ch. 13.

<sup>1</sup>*Bradley v. Warner*, 21 R. L. 36, 41 Atl. 564.

<sup>2</sup>*Stafford v. Maddox*, 87 Ga. 537, 13 S. E. 559.

<sup>3</sup>*Forbes v. Com.* 172 Mass. 289, 52 N. E. 511.

<sup>4</sup>*Barber v. Nye*, 65 N. Y. 211.

<sup>1</sup>*St. Louis Merchants' Bridge Terminal R. Co. v. Pepper*, 84 Ill. App. 116.

<sup>2</sup>*Smith v. Babb*, 1 Vin. Abr. 557.

<sup>3</sup>*Wadsworth v. McDougall*, 30 U. C. Q. B. 369; *Missouri P. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249, 40 Pac. 275.

One who constructs a grating across an artificial water course, which he has contracted with one from whose land

maintenance of an embankment which impedes the flow of the water of a natural stream fed as well by springs as from the watershed of surrounding hills, and which for twenty-five years has been conducted from complainant's land by means of an artificial ditch, which substantially followed, however, the natural flow of the water.<sup>4</sup> But a landowner cannot change the channel of a stream for which adequate provision has been made, to an artificial course, and then insist that an opening for it shall be made through the embankment of a railroad.<sup>5</sup> The channel universally taken by a stream which ordinarily loses itself in a sink hole whenever the water rises high enough to overflow the sink cannot be blocked up, although overflows do not on the average occur as often as once a year.<sup>6</sup> Overflow of water obstructed by a dam across an abandoned river bed, which was lawful, when built, is to be laid to the account of Providence, and not to the hand of man, if it would not have happened except for the filling up of the new channel of the river by natural causes.<sup>7</sup>

**576. Effect of high water.**—One erecting a structure which may impede the flow of the water of a stream is bound to take into consideration the periods of high water to which the stream is subject, and his act will be as wrongful if it obstructs the natural condition of the high water as though it obstructed the water at its ordinary stages, since the high water is a part of the natural condition of the stream which must be taken into consideration. As said in *Ames v. Cannon River Mfg. Co.*<sup>1</sup> a riparian owner has no right to maintain a dam at such height as to set the water back upon an upper proprietor at the ordinary stage of water in the stream, construing this to mean its stage in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but not to include its stage in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year.<sup>2</sup> But the Michigan court has held that the mere fact that water is backed up in times of freshets upon the wheels of an upper mill

the water flows not to obstruct in such a way that it will be likely to accumulate rubbish and back the water upon an upper proprietor, will be liable for the injuries in case it does so, even to a stranger to the contract. The liability of the contractor in reference to obstructions caused by it which would naturally injure riparian property was the same as it would have been if the parties had been riparian proprietors upon a natural stream. *Babbitt v. Safety Fund Nat. Bank*, 169 Mass. 361, 47 N. E. 1018.

<sup>1</sup>*Miner v. Nichols* (R. I.) 52 Atl. 893.

<sup>4</sup>*Harrelson v. Kansas City & A. R. Co.* 151 Mo. 482, 52 S. W. 368.

<sup>5</sup>*Carriger v. East Tennessee, V. & G. R. Co.* 7 Lea, 388.

<sup>6</sup>*Payne v. Kansas City, St. J. & C. R. Co.* 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

<sup>7</sup>27 Minn. 245, 6 N. W. 787.

<sup>1</sup>*Dorman v. Ames*, 12 Minn. 451, Gil. 347; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Humphrey v. Irvin*, 18 W. N. C. 449; *Casebeer v. Moury*, 55 Pa. 419, 93 Am. Dec. 766; *McCoy v. Danley*, 20 Pa. 88, 57 Am. Dec. 680. In the lat-

because of the maintenance of a dam by the lower proprietor and his storing logs in the pond will not give the upper owner a right of action.<sup>3</sup> But that ruling is entirely at variance with the principles governing the rights of riparian owners. One having a right to flood the lands of his neighbor by means of a dam of a given height, bound, however, to open the sluices and lower the water whenever it runs 4 inches over the top, is liable, on proper averments, when he has omitted raising the gates as required.<sup>4</sup>

**577. No liability in case of extraordinary flood.**—The one about to erect a structure over a water course is entitled to act upon the assumption that natural conditions will continue as they have existed within a reasonable time prior to that at which he proceeds with his undertaking. He is not bound to anticipate convulsions of nature, nor floods which have not previously been known to occur. Therefore, where his structure becomes injurious to his neighbor because of an unprecedented flood, he must be shown to have been guilty of negligence in the manner of constructing it, in order to be held liable for the injury.<sup>1</sup> So, a railroad company which maintains a culvert and embankment is not liable for the flooding of a mill above them, or the destruction of a lumber yard below when the embankment gave way, where the injuries were due to extraordinary rainfalls and a heavy rainstorm which followed a cyclone.<sup>2</sup> The Missouri court of appeals held that one obstructing the waters of a stream, which overflow and injure adjoining property, is not relieved from liability on the ground that the overflow was the result of an unprecedented flood, unless it appears that his act in obstructing the water did not add to or concur in producing the injury, and that it would have been the same had

ter case the court limits the statement in *Monongahela Nar. Co. v. Coon*, 6 Pa. 383, 47 Am. Dec. 474, that a riparian owner may use the water power to the full extent of the stream, by ponding the water back to his line, although the effect will be that in times of high water the obstruction will cause an overflow upon the land of an upper riparian owner, to cases in which the floods are extraordinary in character.

If the dam causes the stream to overflow the land above only when the stream is swollen, the upper proprietor will be entitled to the proportionate amount of damages. *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50.

<sup>3</sup>*Richards v. Peter*, 70 Mich. 286, 38 N. W. 278.

<sup>4</sup>*Hutchinson v. Granger*, 13 Vt. 386.

<sup>1</sup>*Peters v. Dicinney*, 6 U. C. C. P. 389;

*Welker v. Northern C. R. Co.* 1 W. N. C. 210; *Gulf, C. & S. F. R. Co. v. Pomerooy*, 67 Tex. 498, 3 S. W. 722; *Sabine v. Johnson*, 35 Wis. 185; *Cobb v. Smith*, 38 Wis. 21; *Sabine & E. T. R. Co. v. Broussard*, 69 Tex. 617, 7 S. W. 374.

Failure on the part of a railroad company to provide a bridge across a creek of sufficient size, strength, and capacity to allow the unobstructed flow of an immense volume of additional water, in which were floating logs, trees, etc., caused by an unexpected and extraordinary flood, is not negligence so as to render the company liable for the overflow of the land of an adjacent owner occasioned thereby. *Peoria & P. Union R. Co. v. Barton*, 38 Ill. App. 469.

<sup>2</sup>*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 441.



the stream been unobstructed.<sup>3</sup> But that decision carries the liability of the one making the structure too far. The true rule is stated in *Dorman v. Ames*,<sup>4</sup> as follows: One who owns a dam is not liable to one injured by an event in law called an act of God, which would not have caused injury in the absence of the dam; he is only liable for injuries which are the necessary effects of the dam. Therefore if the dam of the lower owner does not throw the water back to a bridge of the upper owner, the former will not be liable when, by reason of a great storm of wind and rain, the water backs up and destroys the bridge.<sup>5</sup> A grantee of a right to flow another's land to a certain extent is not liable if that limit is exceeded during an extraordinary rise, as otherwise he would be deprived of the beneficial enjoyment to which he is entitled.<sup>6</sup>

**577a. What is extraordinary flood.**—An extraordinary flood, for the injury caused by which in combination with an obstruction placed in the stream the owner of the obstruction is not liable, is one which men of ordinary prudence would not have anticipated and provided for.<sup>1</sup> A flood is not extraordinary which is such as residents of the neighborhood might expect from their observation.<sup>2</sup> The rule is stated by the Alabama court as follows: Floods such as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstruction of water courses. The term "act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.<sup>3</sup> And that rule must be regarded as the proper one. The Illinois court of appeals held that extraordinary floods are those not occurring annually.<sup>4</sup> But the mere fact that a flood does not occur annually will not make it an extraordinary one, if, from the climatic conditions and the character of the country, it is likely to occur, and has been known to occur, with sufficient frequency to warn those living in the vicinity that it is likely to occur at any time.<sup>5</sup> The

<sup>1</sup>*Kenney v. Kansas City, P. & G. R.* Co. 74 Mo. App. 301.

<sup>2</sup>12 Minn. 451, Gil. 347.

<sup>3</sup>*China v. Southwick*, 12 Me. 238.

<sup>4</sup>*Wallace v. Headley*, 23 Pa. 106.

<sup>5</sup>*Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

<sup>6</sup>*Brown v. Pine Creek R. Co.* 183 Pa. 38, 38 Atl. 401.

<sup>1</sup>*Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374.

<sup>2</sup>*Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

<sup>3</sup>*Dorman v. Ames*, 12 Minn. 451, Gil. 347; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087.

question whether a flood is ordinary or extraordinary is in most cases for the jury.<sup>6</sup>

**577b. Effect of negligence.**—One constructing an obstruction to a water course cannot relieve himself from liability for injuries caused by damming the water back on upper property by the fact that the injury occurred during an extraordinary flood, if he was negligent in the performance of the work so that unnecessary injury was done by the flood.<sup>1</sup> But to render him liable, his negligence must have been an active agent in bringing about the loss, without which it would not have occurred.<sup>2</sup> An embankment obstructing the flow of a water course is an efficient cause of the flooding of adjoining land, when, in concurrence with an unusual rainfall, it increased the volume of the overflow and the extent of the injury to the land and crops.<sup>3</sup> The construction of a railroad embankment in a manner that cuts off 80 per cent of the passage of freshet water is a negligent disregard of the

<sup>6</sup>*Chicago, B. & Q. R. Co. v. Schaffer*, 26 Ill. App. 280.

In an action to recover for overflows caused by the damming back of a stream, which have occurred at times of high water twice within five years, it cannot be said, as matter of law, that floods cannot be considered as extraordinary which occur only twice in a period of five years, where there is nothing to show that they have occurred so frequently during any other similar period of time. *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

A flood during which the plaintiff's lands are injured by the obstruction of water due to a railroad bridge and embankment is not, as matter of law, so extraordinary as to relieve the company from liability where similar floods have theretofore occurred. *Van Duzer v. Elmira, C. & N. R. Co.* 75 Hun, 487, 27 N. Y. Supp. 474.

<sup>1</sup>*Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087.

In an action to recover damages caused by the overflow of a lake, a charge that if the overflow was caused by an unprecedented and unlooked for storm defendant was not liable, is properly refused, where the negligence complained of was the failure to maintain sufficient outlets, and there was evidence tending to show a failure in that regard, and that if they had been properly maintained the injuries complained of

would not have happened. *Birmingham R. & Electric Co. v. Doss*, 131 Ala. 177, 32 So. 493.

<sup>2</sup>*Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476; *James v. Kansas City, P. & G. R. Co.* 69 Mo. App. 431.

Where an unusual rainfall and the negligent obstruction of a stream concurred in causing it to overflow its banks, the person causing the obstruction is liable for such injuries as would not otherwise have occurred. *Brink v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 177; *Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476.

A railroad company is not liable for an overflow of water caused by such very unusual rainfalls as would amount to an "act of God," even if they had negligently allowed a culvert to become obstructed. *Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 61 S. W. 424.

Although there may have been some degree of negligence in the maintenance of a culvert, a railroad company is not liable for damage by reason of its insufficient capacity to pass an extraordinary flood of such overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, produced the damage. *Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist.* 96 Pa. 65, 42 Am. Rep. 529, 3 Pennyp. 518.

<sup>3</sup>*Kenney v. Kansas City, P. & G. R. Co.* 74 Mo. App. 301.

right of a landowner to have the water flow past his land in its natural way without being retarded or concentrated and poured through with increased force.<sup>4</sup> In an action against a railroad company for the flooding of adjoining land, alleged to have been caused by the defective construction of its embankment over a natural stream, it is a question of fact for the jury whether such flooding was due wholly to such an extraordinary flood as ordinary prudence could not have anticipated, or wholly to the defective construction of such embankment, or to both causes.<sup>5</sup>

**578. Effect of character of injury.**— To render one liable for damming back water upon adjoining land, it is not necessary that the particular damage caused should be within the anticipation of a reasonably intelligent and prudent person.<sup>1</sup> It is sufficient if the obstruction was such that a reasonably prudent person would know that it was likely to do injury, and would have taken precautions to guard against it. Damages may be recovered for injury to personal, as well as real, property.<sup>2</sup> And this will include injury to cattle because of their being caught in the water or because of destruction of their pasture by the flood. But the owner of the cattle cannot place them in a place where they are likely to be injured, and must take due care to protect them from injury which is threatened.<sup>3</sup> And damages for injuries to real estate may include the loss caused by rendering the land wet by percolation or seepage of the water from the pond.<sup>4</sup> The

<sup>1</sup>*Lampley v. Atlantic Coast Line R. Co.* 63 S. C. 462, 41 S. E. 517.

<sup>2</sup>*Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529, Reversing 43 Ill. App. 78.

<sup>3</sup>*Schmeckpepper v. Chicago & N. W. R. Co.* (Wis.) 93 N. W. 533.

<sup>4</sup>*Bastian v. Eau Claire*, 56 Wis. 172, 14 N. W. 55.

<sup>5</sup>Therefore, a railroad company which fills up open trestle work in the embankment of its road over bottom land bordering upon a river, thereby in some degree retarding or obstructing the flow of the water of such river in times of flood, causing it to back up and cover a greater surface above the embankment, is not thereby liable to the owner of cattle for their injury during a flood while such cattle were in pens belonging to another, placed therein for the purpose of feeding and fattening them after such trestle work had been filled up,—especially as it is not certain that such flooding might not have occurred irrespective of such obstruction. *Toledo, W. & W. R. Co. v. Hunter*, 50 Ill. 325. In this case the owner of the cattle acted

with his eyes open in placing them in the pens.

So, where an owner of cattle has a mere license to pasture them on the land of another, he cannot recover against a railroad company for causing an overflow of such land which resulted in the death of his cattle for want of grass, or the value of milk which the cows would have given had they not been prevented from grazing on such lands. Such damages are too remote a result of the negligence of the railroad company. *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

A riparian owner having on hand cattle fit for the market at the time water is wrongfully backed up so as to interfere with the proper feeding of the stock is not bound to market such as are in condition, at once, in order to avoid impending loss, if the market is at that time unfavorable. *McClenehan v. Omaha & R. Valley R. Co.* 13 Am. St. Rep. 506, 41 N. W. 350.

<sup>1</sup>*Ellington v. Bennett*, 59 Ga. 286; *Pirley v. Clark*, 35 N. Y. 524, 91 Am. Dec. 72, Reversing 32 Barb. 268.

And an injury of that character may

landowner is not bound to construct drains to relieve his land from the effect of the water.<sup>5</sup>

#### V. PROCEDURE FOR SECURING REDRESS.

**579. Abatement.**—In the Year Book of 8 Edw. IV. it is said that “if water flows to another’s land, and he stops the water course so that it floods my land, I may abate that which causes the estoppel, and he shall not have an action for my entry on his close because the stopping of the water was his own doing.”<sup>1</sup> And this rule has been in force ever since, so that, in case a lower proprietor casts the water onto the land of the upper one, the latter may abate the nuisance if he can do so without breach of the peace. This may be done either by entering upon the land of the lower owner and destroying the obstruction,<sup>2</sup> or by constructing a ditch which will remove the water from the pond.<sup>3</sup> The creation of remedies by statute does not take away the right to abate the nuisance unless the statute expressly so provides.<sup>4</sup> A statute making it a criminal offense to injure a milldam does not take away the common-law right to abate such dam as a nuisance, by tearing it down, when its effect is to throw back water to an injurious extent on the wheels of the abater’s mill, although not to stop them entirely.<sup>5</sup> But the upper owner cannot divert the water from its course and make it enter the land of the lower owner at a new point for the purpose of abating the nuisance.<sup>6</sup> And the upper owner must act

be enjoined. *Fuson v. Wattier*, 25 Or. 7, 34 Pac. 756.

See also *post*, chapter XXXII.

<sup>1</sup>*Pisley v. Clark*, 35 N. Y. 524, 91 Am. Dec. 72.

<sup>2</sup>8 Edw. IV. 5, pl. 14.

<sup>3</sup>*Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Winchell v. Clark*, 68 Mich. 64, 35 N. W. 907; *Liles v. Cauthorn*, 78 Miss. 550, 29 So. 834; *Hodges v. Raymond*, 9 Mass. 316; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Overton v. Sawyer*, 46 N. C. (1 Jones L.) 308, 62 Am. Dec. 170.

<sup>4</sup>*Storm v. Manchaug Co.* 13 Allen, 10.

An upper proprietor will not be liable for cutting a ditch on his own land to drain a pond raised by a dam on the land of the lower proprietor if the ditch would not have interfered with the flow of the water had the stream remained in its natural state. *Bearse v. Perry*, 117 Mass. 211.

In order to justify the diversion of water from a milldam by the digging of a ditch for the abatement of a nuisance,

the jury must find from the facts that such dam at the time of the digging of the ditch was a nuisance either public or private, and, if the latter, that the person digging such ditch was injured by such nuisance, and that such ditch as dug did not carry off more water than was necessary to abate such nuisance. *Gates v. Blincoe*, 2 Dana, 158, 26 Am. Dec. 440.

<sup>5</sup>*Stiles v. Laird*, 5 Cal. 121, 63 Am. Dec. 110; *Great Falls Co. v. Worster*, 15 N. H. 412.

<sup>6</sup>*State v. Moffett*, 1 G. Greene, 247.

<sup>7</sup>*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

In an action for injury to a mill by the diversion of the water of the stream above, a plea in justification was held bad which alleged that the mill owner had erected a dam which penned back the water and made it overflow defendant’s land, to relieve himself from which the trenches were dug into the stream and its water thus diverted, since the wrong of the mill owner in maintaining

within a reasonable time if he wishes to abate the nuisance by removing the obstruction.<sup>7</sup> To entitle one to proceed to remove a dam, he must have an interest to protect; and an intermeddler with no such interest cannot justify his act upon the ground that the obstruction was in fact a nuisance.<sup>8</sup> Even an upper riparian owner cannot destroy an obstruction unless it backs the water upon his property or injures his property in some other manner.<sup>9</sup> One who attempts to abate the nuisance must act in a reasonable manner, and not do unnecessary injury, although he is not bound to adopt the best means of securing the desired end.<sup>10</sup> He must confine his acts, however, to the obstruction itself, and remove only such portions as are necessary to stop the injury.<sup>11</sup> An injunction will be granted to restrain the threatened destruction of a dam admitted to be built and maintained, not in excess of authority, by one whose land is flowed by it, where great destruction of property is likely to be caused, and the trespasser admits his insolvency.<sup>12</sup> When the owner of the servient estate under a flowage easement wrongfully tears away the dam, the mill owner

the dam is not a justification for the diversion of the water to the prejudice of the lower occupant. *Adamson v. McNab*, 5 U. C. Q. B. 438.

Upon appeal in 6 U. C. Q. B. 113, it was held that an attempt to justify the diversion of the water by contending that the sluices became necessary to remove the injury caused by the raising of water by the dam was no defense, the landowner having the right to prosecute the mill owner for the injury sustained; and even if he had the right to abate the nuisance in the manner chosen, he had diverted more water than the dam kept back, and had not specially pleaded a defense of this nature, which was necessary before it would be available.

One in possession of swamp lands under a certificate from the state cannot, however, be enjoined, at the suit of a lower riparian proprietor, operating a mill, from cutting a ditch on the land of which he is in possession for the drainage therefrom of surface water and water turned back thereon by the mill-dam, where the mill owner shows no right by grant, license, or prescription so to turn the water back, since, as owner of the soil on which his mill stands, he has no such right. *Wattier v. Miller*, 11 Or. 329, 8 Pac. 354.

<sup>7</sup>*Moffett v. Breuer*, 1 G. Greene, 348.

<sup>8</sup>*Toothaker v. Winslow*, 61 Me. 123.

A private owner the working of whose mill is interfered with by the dam of a

lower proprietor cannot object to the dam on the ground that it is a public nuisance interfering with the rights of navigation. *Himpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228.

Where, in the construction of a dam, a new and more convenient highway is laid out over the stream, and the slope of the dam covers part of the old highway, there is a nuisance created, where the highway was not legally changed by town authorities; but where it appears that the new highway is better than the old, and does not constitute a nuisance in fact, the owner of the land along the highway is entitled to relief against the owners of the dam only to the extent that he is individually injured; and in such a case, where the land of the plaintiff and the passway to the highway are flooded by the dam, a court of equity will grant him relief by decreeing that the owners of the dam widen the opening in it, where the land will be relieved from overflow thereby, and will not decree a complete removal of the dam from the highway and river. *Stone v. Peckham*, 12 R. I. 27.

<sup>9</sup>*Turner v. Locy*, 37 Or. 158, 61 Pac. 342.

<sup>10</sup>*Great Falls Co. v. Worster*, 15 N. H. 412.

<sup>11</sup>*Moffett v. Breuer*, 1 G. Greene, 348.

<sup>12</sup>*Winnipissioec Lake Co. v. Worster*, 29 N. H. 433.

may recover the profits he has lost by the suspension of the operation of the mill.<sup>13</sup> The right to abate the nuisance may be given by contract.<sup>14</sup>

**580. Statutory action for redress.**—If the flowage is done by a corporation acting under authority of the legislature, and the statute specifies the manner in which the damages shall be recovered, that remedy is exclusive and a common-law action will not lie.<sup>1</sup> But if the statute makes no provision for the payment of damages the injured person will not be deprived of his common-law action.<sup>2</sup> And the corporation cannot deprive the injured landowner of all redress by failure to institute statutory proceedings to establish the compensation to be provided; and in case it fails to do so and there is no provision for the institution of the proceedings by the landowner, he may proceed at common law.<sup>3</sup> If the statutory remedy is not made

<sup>13</sup>*Merriman v. Russell*, 55 N. C. (2 Jones Eq.) 470.

A mill owner who wrongfully takes down a portion of a dam on the stream below may be required to pay as damages the cost of restoring the dam, and to compensate the owner for the necessary delay of his mill, but not the necessary expense of prosecuting the suit. *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181.

<sup>14</sup>An agreement by the owner of a mill-dam, permitting the owners of land overflowed by back water therefrom to abate the same if the water is not let out of the pond at a specified time, in consideration of their agreement not to sue for damages occasioned by the overflow, entitles such owners to a judgment for the abatement thereof in an action to enforce the agreement, as it is clearly the intention of the parties to remove the injury occasioned thereby, and implies that the dam shall be kept down, although there is no covenant not to rebuild. *Ulrich v. Hull*, 17 Wis. 424.

An obligation to cut down the waste-way of a dam 20 inches, and to keep the water drawn down 20 inches below the top of the present waste way, is complied with if the waste way is cut down 20 inches. *Quinby v. Sprague*, 17 Me. 226.

<sup>1</sup>*McKinney v. Monongahela Nav. Co.* 14 Pa. 65, 53 Am. Dec. 517; *Woods v. Nashua Mfg. Co.* 4 N. H. 527; *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706, Reversing 30 N. J. Eq. 180.

Alterations in a weir across a river, by a water-supply company, which raised the water to the damage of a mill, are made pursuant to the powers given the

company by its charter, so as to entitle the mill owner to the remedies provided by it, although neither the mill, nor the weir or its site, were described in the books or plan, nor was the weir in the line of works there described; but that part of the river in which the mill and weir lay was in the plan. *King v. Nottingham Old Waterworks*, 6 Ad. & El. 355. 1 Nev. & P. 480, 6 L. J. K. B. N. S. 89.

A court of equity will not enjoin the owners of a mill, below on a stream, from so raising their dam as to flow back the water upon a watered meadow belonging to the owners of a mill above, and a drain rightfully used by them for the purpose of relieving their meadow from water taken from their mill trench during irrigation, where by statute, the meadow and drain being no part of the mill privilege, the defendants, as owners of their mill estate, have a right to flow the meadow and drain, subject, exclusively, to the remedy provided by such act; and the plaintiff will be required to seek his remedy under that act. *Bull v. Valley Falls Co.* 8 R. I. 42.

<sup>2</sup>Where a corporation is empowered to erect a dam of a certain height across a navigable stream, and maintain the water at that height continually, without any provision for compensation to one whose property is thereby injured, the remedy of the property owner is at common law, and not under the milldam acts, which empower the jury to regulate the height of dams and the times of flowage, and assess yearly damages. *Cogswell v. Essex Mill Corp.* 6 Pick. 94.

<sup>3</sup>*Nash v. Upper Appomattox Co.* 5 Gratt. 332.

exclusive, the fact of its existence will not prevent a resort to the common-law remedy.<sup>4</sup> A statute giving summary remedy for damages occasioned to other mill owners by the erection of milldams has reference to the location of new dams, and does not apply to a change in the construction of dams already erected, although the change may result in backing more water on upper mill seats.<sup>5</sup> To entitle the landowner to claim the benefit of the statutory remedy it must be applicable to the injury for which redress is sought.<sup>6</sup> To obstruct the flow of water to the injury of riparian proprietors is a private nuisance, and a statute making it a public one does not change its character so as to deprive riparian proprietors of their common-law remedies, but merely grants, as additional remedies, those existing for the suppression of public nuisances.<sup>7</sup> An action for damages for the damming back of water onto plaintiff's land is not abated by a judgment in a subsequent statutory action to abate the dam as a nuisance, where the plaintiff's damages were not assessed in the latter action, although they might have been.<sup>8</sup>

**581. Common-law actions.**—The ancient form of action for the casting of water back on an upper landowner seems to have been an assize of nuisance or a *quod permittat*. And in *Beswick v. Cunder*,<sup>1</sup> it is said that an action on the case does not lie against a purchaser of land for continuing a dam across a stream adjoining the land, thereby flooding other land, but the remedy is by an assize or *quod permittat*. But in *Sly v. Mordants*,<sup>2</sup> a case occurring six years earlier than the

The remedy of a riparian owner to restrain by injunction the raising of a dam so as to render a ford between his tracts of land impassable, which by the construction of the dam and consequent flowing back of the water had already been made difficult and dangerous to cross, is not taken away by a statute giving mill owners the power to obtain the right to construct dams and flow land by taking certain steps which they alone, and not the owner of the land flooded, can initiate, since, until such steps are taken and compensation paid, no rights are obtained by the mill owner preventing the landowner from exercising otherwise available remedies. *Kirkendall v. Hunt*, 4 Kan. 514.

<sup>4</sup>*Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 402.

<sup>5</sup>*Garrett v. Bailey*, 4 Harr. (Del.) 197.

<sup>6</sup>Under a statutory liability for damages to property fronting upon the street for a railroad excavation or embankment within the lines of the street,

the owner of such property cannot recover for damages caused by stoppage of a water course or the natural flow of surface water by its embankment outside the limits of the highway. *New Castle & F. R. Co. v. McChesney*, 85 Pa. 522.

Damages are not to be recovered by any peculiar process prescribed by the charter of a corporation authorized to hold real and personal estate necessary and convenient for the purpose of conveying to a municipality a supply of water for domestic purposes, etc., and to take water therefor, and the process is prescribed for recovery of damages incurred in the exercise of the powers thus granted, when the damage was caused by a grist mill operated by the corporation. *Clark v. Rockland Water Power Co.* 52 Me. 68.

<sup>7</sup>*Welton v. Martin*, 7 Mo. 307.

<sup>8</sup>*Gould v. Langdon*, 43 Pa. 365.

<sup>1</sup>*Cro. Eliz.* pt. 2, p. 520.

<sup>2</sup>1 Leon, 247, 1 Rolle, Abr. 104.

*Beswick Case*, plaintiff recovered judgment in an action on the case for obstructing a water course and thereby flowing his land. A motion in arrest of judgment on the ground that the plaintiff, having the freehold, ought to have an assize, was denied. And in *Plumer v. Harper*,<sup>3</sup> it is said that the remedies of assize and *quod permittat* for the damming of water back upon upper riparian land were discontinued, and the action of case substituted therefor, prior to the discovery of this country. But the assize of nuisance was recognized in 1828 in Pennsylvania as an existing remedy for injuries caused by a mill-dam.<sup>4</sup> The effort has been continually towards simplicity of legal procedure, and the course has been from the complex to the direct and straightforward statement of the complaint, and therefore, at the present time, there should be no encouragement given to the ancient forms of procedure, even if they are found not to have been expressly destroyed by the legislature. And the action should be in the form of the simple common-law action of trespass on the case.<sup>5</sup> But if the acts of the wrongdoer constitute a direct trespass upon the land of the upper owner the action should be trespass *quare clausum*, and not case.<sup>6</sup> The injured person is not limited to the mere abatement of the obstruction, but may recover the damages for the injuries which he has received.<sup>7</sup> An action may be maintained for each distinct injury inflicted.<sup>8</sup> Ejectment will not lie if the action involves merely the right to flood land.<sup>9</sup> Flowage damages may be recovered in assumpsit by one who has reserved a right thereto in a grant of the

<sup>3</sup> 3 N. H. 88, 14 Am. Dec. 333.

<sup>4</sup> *Barnet v. Ihrie*, 17 Serg. & R. 174.

<sup>5</sup> *Johns v. Stevens*, 3 Vt. 308; *Carruthers v. Tillman*, 2 N. C. (1 Hayw.) 501.

For consequential damages to one having the title to gold and ore imbedded in land, with the right to enter thereon and to the use of the water in a stream running through the premises to enable him to mine the ore, caused by the submerging of the land by back water from a dam constructed across the stream by an adjacent proprietor lower down, action on the case is the proper remedy, and ejectment does not lie where there is no adverse holding. *Ezzard v. Findley Gold Min. Co.* 74 Ga. 520, 58 Am. Rep. 445.

<sup>6</sup> *Keller v. Stoltz*, 71 Pa. 356.

But a disseised owner of land subjected to flowage for six years cannot maintain trespass *quare clausum* without first regaining possession. *Mansur v. Blake*, 62 Me. 38.

<sup>7</sup> *Will v. Sinkwitz*, 41 Cal. 588.

Equity will not restrain one from pursuing his claim for the recovery, by legal proceedings, of damages for the injury he has received from the raising of a dam which has been adjudged unlawful. *Lehigh Valley R. Co. v. McFarlin*, 30 N. J. Eq. 135.

<sup>8</sup> *Southside R. Co. v. Daniel*, 20 Gratt. 344.

Equity will not enjoin the bringing of weekly suits before the justice of the peace for maintaining an obstruction across a water course, where the suits are between two individuals, and the right has never been settled at law. *Eldridge v. Hill*, 2 Johns. Ch. 281.

<sup>9</sup> *Simpson v. Wabash R. Co.* 145 Mo. 64, 46 S. W. 739; *Wilklow v. Lane*, 37 Barb. 244; *Burke v. Carlinville Water Co.* 176 Ill. 555, 52 N. E. 266.

See post, § 586.



lands to a third party, from one who has promised by parol to pay them.<sup>10</sup>

**582. Relief in equity.**—The character of the injury caused by the obstruction of the flow of water in a stream so as to throw it back on upper land is such as to bring the case very easily within the jurisdiction of a court of equity, and such courts have always been very ready to take jurisdiction if any facts were presented to bring the case within the principles upon which equitable jurisdiction is founded. As said by Chancellor Johnson in *Lamborn v. Covington Co.*<sup>1</sup> nothing can be clearer than the power of the court to prohibit the obstruction of water courses, the diversion of streams from mills, the back flowage upon them, and injuries of like kind, which, from their nature, cannot be adequately compensated by damages at law. The protection of the rights of the upper owner is clearly within the power of a court of equity.<sup>2</sup> Keeping up a milldam to the nuisance of a mill privilege further up the stream is within the terms of a statute giving equity jurisdiction of suits touching nuisances, and is not removed from such jurisdiction by the exclusion of cases in which there is an adequate remedy at law, where the provision for the abatement of the nuisance at law is by motion, the granting of which is discretionary.<sup>3</sup> The ground upon which the equity courts have regarded it necessary to take jurisdiction of such actions is the prevention of the destruction of property and the abatement of nuisances.<sup>4</sup> As will be seen in a subsequent section, to give equity jurisdiction the remedy at law must be inadequate; but when the damming back of the water is likely to cause an injury to health, the legal remedy is not adequate and equity will entertain the suit.<sup>5</sup> And if the productiveness of the land flowed by the obstruction is destroyed, equity will take jurisdiction to redress the injury,<sup>6</sup> especially if a multiplicity of suits will thereby be

<sup>1</sup>*Jewett v. Ricker*, 68 Me. 377.

<sup>2</sup>2 Md. Ch. 409.

<sup>3</sup>*Ferris v. Wellborn*, 64 Miss. 29, 8 So. 165; *Earl v. DeHart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Masonic Temple Asso. v. Banks*, 94 Va. 695, 27 S. E. 490; *Bull v. Valley Falls Co.* 8 R. I. 42.

<sup>4</sup>*Bemis v. Upham*, 13 Pick. 169.

<sup>5</sup>*Carlisle v. Cooper*, 21 N. J. Eq. 576; *Atty. Gen. v. Blount*, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526.

<sup>6</sup>*Minor v. DeVaughn*, 72 Ga. 208.

A bill in equity is the proper remedy to prevent the raising of the height of a dam, the pond created by which is alleged to be injurious to the health of an adjoining property owner, although it

is not available to abate the nuisance created by the dam as it exists, because of a statutory remedy therefor. *Norwood v. Dickey*, 18 Ga. 528.

<sup>7</sup>*Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Stone v. Roscommon Lumber Co.* 59 Mich. 24, 26 N. W. 216.

Chancery has jurisdiction of an action against a nonresident for obstructing a natural water course on her land by which the use of a large quantity of fine, productive lands on an adjoining plantation is destroyed. *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151.

But the removal, by decree of a court of equity, of a milldam whereby lands are flooded so far as it exceeds a proper

avoided.<sup>7</sup> Equity may also prevent the interference with mill rights further up the stream.<sup>8</sup> And it is immaterial that the property is situated on a lake.<sup>9</sup> Equity may take jurisdiction to determine the height to which the water may be set back.<sup>10</sup> And it may compel the payment of an award for the privilege of flowage, made by arbitrators mutually chosen, or the abatement of the dam.<sup>11</sup> But equity will not enjoin an obstruction made under authority of a statute.<sup>12</sup> Nor will it take jurisdiction to settle the legal rights of the parties,—as, where the lower owner claims a prescriptive right to maintain the obstruction.<sup>13</sup> Nor will it issue a decree against obstructions which defendant is not shown to intend to create.<sup>14</sup> And an injunction will not be granted if the obstruction has been removed and there is no likelihood of its being replaced, while the one responsible for it is of unquestioned ability to respond for the damages.<sup>15</sup> Equity will not take jurisdiction merely to award damages.<sup>16</sup> The construction of a road

height is not a matter of right, but rests within the equitable discretion of the court, and is dependent upon the circumstances of the case. *Miller v. Cornucell*, 71 Mich. 270, 38 N. W. 912; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890.

<sup>7</sup>The owner of a milldam will be enjoined from maintaining it at such a height as practically to destroy 300 acres of land, and inflict constantly recurring injury upon its owners, who severally would have a right of action involving a multiplicity of suits and vexatious litigation. *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890.

<sup>8</sup>*Hammond v. Fuller*, 1 Paige, 197; *Furnum v. Blackstone Canal Co.* 1 Sumn. 47, Fed. Cas. No. 4,675; *Stumbo v. Seeley*, 23 Neb. 212, 36 N. W. 487.

<sup>9</sup>*Troe v. Larson*, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179; *Lloyd v. Thomson*, 60 N. Y. Supp. 72.

The wrongful closing up, by the construction of a dam therein, of the outlet of a lake which has existed as a running stream or creek forty years, thus causing the overflowing of lands adjacent to such lake and outlet, and depriving the owners thereof of the use of the water of the outlet, is an invasion of property rights which a court of equity will protect. *Roberts v. Rust*, 104 Wis. 619, 80 N. W. 914.

<sup>10</sup>*Oarkale v. Cooper*, 18 N. J. Eq. 241.

<sup>11</sup>*Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083.

<sup>12</sup>A court of equity will not, at the suit

of an upper riparian owner threatened with injury, enjoin the holders of charters granted by adjoining states giving the exclusive privilege perpetually of constructing and maintaining locks at falls on a navigable river forming a common boundary, and authorizing the making of a dam and flowing or otherwise injuring property in connection therewith, from building on the original site a new dam to be used for manufacturing purposes; although it is shown that transportation owing to better and cheaper railroad facilities had for many years ceased at these river locks; that the former dam, then only used to run a sawmill, had been carried away twenty-five years before; and that during that whole time there had been no use of the franchise, nor anything done under the charters; because the practical effect of such an injunction would be indirectly decreeing a forfeiture of such charters; and, while such a forfeiture may be adjudged for nonuser, long continued and intentional, such a judgment can only be rendered in a court of law in a direct action for the purpose. *Ottawaquechee Woolen Co. v. Newton*, 57 Vt. 451.

<sup>13</sup>*Outcalt v. George W. Helme Co.* 42 N. J. Eq. 665, 9 Atl. 683, Overruling (N. J. Eq.) 3 Cent. Rep. 472.

<sup>14</sup>*Talley v. Tyree*, 2 Rob. (Va.) 500; *Wheeler v. Steele*, 50 Ga. 34.

<sup>15</sup>*State v. Sunapee Dam Co.* 70 N. H. 458, 59 L. R. A. 55, 50 Atl. 108.

<sup>16</sup>In *Hudson v. Burk*, 48 Mo. App. 314, an action to recover damages for the ob-

embankment across a water course may be enjoined until a proper culvert is constructed.<sup>17</sup> In *Ecton v. Lexington & E. R. Co.*<sup>18</sup> the court says: The construction by a railroad company of culverts or drain pipes through the embankment of its roadway of insufficient size or capacity to carry off the water of a stream after heavy rainfalls, by reason of which the land of an owner is overflowed, greatly injuring it, is a continuing and recurring nuisance, for the abatement of which such owner can maintain a bill in equity. Injury to the lower owner is no ground for refusing the injunction if the act is wrongful.<sup>19</sup> A mill owner may be restrained by injunction from raising his dam for the apparent purpose of embarrassing a railroad company in constructing its road across his land, although duly condemned.<sup>20</sup> An injunction will be granted at the suit of a landowner to restrain the construction by a water company of a new dam at a different site, resulting in the destruction of his easement in a ford in the stream and the enlargement of a ditch upon his land beyond the limits of the right of way therefor owned by the company, and the cutting of timber in the accomplishment of such work, as such injury is more than a mere trespass, and goes to the destruction of his estate.<sup>21</sup> An injunction restraining a lumber company from repairing and operating a dam whereby the lands of the complainant are flooded will not be suspended so as to permit a further flowing of the complainant's lands to enable the lumber company to float the remainder of its logs, where two suspensions of sixty days each have already been granted, affording the company ample opportunity to get out its logs.<sup>22</sup>

struction of a water course, and to restrain the rebuilding of the obstruction which had been washed away, the majority of the court were of the opinion that it was not an action of an equitable nature so as to entitle the plaintiff to the application of equitable rules in assessing his damages, and distinguished it from *Paddock v. Nomes*, 102 Mo. 226, 10 L. R. A. 254, 14 S. W. 746, an action to recover damages, and to restrain the continuance of a nuisance, in which equitable rules were applied on the ground that while, in the *Hudson case*, the obstruction had already been removed, and the only equitable relief asked was to restrain its rebuilding, in the *Paddock Case* the nuisance complained of was not only in existence, but in a previous action to recover damages had been declared a nuisance; so that, while the action was to recover damages for its continuance, it was, in effect, an equitable action to abate it.

<sup>17</sup>*Saenger v. Philadelphia*, 10 Phila. 338.

A railroad company will be enjoined from filling up trestle work over a stream, leaving only an archway of insufficient size to permit the escape of water during ordinary or heavy rainfalls, the effect of which would be to cause the water to overflow adjoining lands to the great and irreparable injury thereof, which damages will be continuous from year to year, compelling the owners to bring numerous suits to recover therefor. *Lake Erie & W. R. Co. v. Young*, 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177.

<sup>18</sup>21 Ky. L. Rep. 921, 53 S. W. 523.

<sup>19</sup>*Wright v. Turner*, 10 Grant Ch. (U. C.) 67.

<sup>20</sup>*Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 166.

<sup>21</sup>*Mendenhall v. Harrisburgh Water Power Co.* 27 Or. 38, 39 Pac. 399.

<sup>22</sup>*Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co.* 109 Mich. 164, 66 N. W. 953.

**582a. Injury must be irreparable.**—In *Rosser v. Randolph*,<sup>1</sup> which was an action to restrain the location and operation of a mill as creating a nuisance and interfering with a spring of water on adjacent lands, it is said that “it may be safely laid down as applicable to this class of cases that it must be satisfactorily shown that the proposed erection would inflict an irreparable injury,—such a one as could not be adequately compensated in damages; or it must threaten materially to impair the comfort of the existence of those living near it, to entitle those aggrieved to the aid of the preventive justice of the law.”<sup>2</sup> But as shown by the cases cited in the preceding section, the character of the injury inflicted by the backing of water upon the upper owner is such that there is seldom an adequate remedy at law. And since the courts before which the suits are brought are now clothed with equity powers, they are readily persuaded that the remedy by injunction is the most effective, and that writ is awarded in cases where it, perhaps, would not have been awarded by the chancellors of the olden time. The attitude of the courts at the present time is well expressed in *Graham v. Burr*,<sup>3</sup> where the court said the common-law remedy of one whose water rights are injured by a lower proprietor damming back water is not sufficient to deprive him of equitable relief by way of injunction, although he is not at the time applying the water power to any useful purpose. But even now it is necessary to make out a case showing the need of equitable aid, and equity will not entertain the bill where the injury is slight and easily redressed, or the plaintiff has slept on his rights to such an extent as to indicate that he did not regard the injury as of much importance.<sup>4</sup> Equity will look with favor upon a bill which charges that the nuisance may generate dis-

<sup>1</sup> 7 Port (Ala.) 238, 31 Am. Dec. 712.

<sup>2</sup> In *Beamish v. Barrett*, 16 Grant Ch. (U. C.) 318, a bill to restrain the damming back of water, Richards, Ch. J., said that later authorities tend to show that the court of chancery has power to restrain the damming of water, though no express damage has been caused by it, as, where its continuance for a sufficient period may ripen into a right. But that, in exercising that power the court ought not to go beyond what is necessary to protect the interest of the party applying.

<sup>3</sup> 4 Grant Ch. (U. C.) 1.

<sup>4</sup> *Hieskell v. Gross*, 7 Phila. 317, 3 Brewst. (Pa.) 430; *Thomas v. Calhoun*, 58 Miss. 80; *Talley v. Tyree*, 2 Rob. (Va.) 500.

Where plaintiff's access to a highway is interrupted by the erection of a dam

extending into the highway, and such dam does not constitute a public nuisance in fact, equity will not grant relief to the plaintiff, where it appears that his injury can be remedied by extending the slope of the embankment onto his land so as to afford access to the highway, as the injury caused by the dam in such case can be remedied by an action at law for damages. *Stone v. Peckham*, 12 R. I. 27.

An injunction will not be granted to restrain the erection and operation of a mill on the ground that it deprives the owner of adjacent lands of a spring thereon, where it appears that by digging a ditch and making an embankment the spring would be protected from the rise in the stream occasioned by the operation of the mill, or where it does not appear but that a well could easily be

case.<sup>5</sup> With respect to the protection of land from overflow the rule is stated in *Hagge v. Kansas City S. R. Co.*<sup>6</sup> as follows: Ordinarily, where an injury is done to land by the overflow of waters, caused by the erection and maintenance of a "nuisance, which occurs only occasionally, in the absence of the insolvency of the wrongdoer, an action for damages would afford a complete remedy, and equity will not entertain a suit to enjoin the nuisance; but there may be cases where the constant exposure of lands to overflow may result in damages of such a nature that they cannot be adequately compensated at law, and, in a clear case, a court of equity will grant relief against a continuing nuisance, without waiting for a judgment at law establishing the fact of the nuisance and the plaintiff's legal right. Therefore, the construction of a dam will not be enjoined at the suit of a landowner upon the ground that it will cause water to overflow the banks of a stream and flood his land, where it appears that such overflow would only occur during freshets, and that such land has been overflowed during such freshets in the absence of any dam, as it cannot be presumed such dam will increase the damage resulting thereto.<sup>7</sup> If the injury is trifling or of a merely nominal character, equity will not interfere.<sup>8</sup> A railroad embankment will not be destroyed because cre-

had in the neighborhood of the spring. *Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

The construction of a dam so as to cause the water of a stream to set back upon the newly constructed water power of an upper riparian proprietor, whose right to construct such water power had been determined only by the *ex parte* proceedings by which he secured permission to erect the same, does not present a case of irreparable damage or pressing necessity entitling the upper proprietor to an injunction. *Welton v. Martin*, 7 Mo. 307.

Where, after an action was commenced against defendant for raising his dam so as to overflow the plaintiff's land, he removed the flashboards, thereby lowering the water so that it did not set back upon plaintiff's land except after severe rains or sudden melting of snow, and it not appearing that such occasional overflows would injure the trees growing on plaintiff's land, no irreparable injury or mischief is shown entitling him to an injunction. *Smith v. King*, 61 Conn. 511, 23 Atl. 923.

<sup>5</sup>*White v. Forbes*, Walk. Ch. (Mich.) 112.

<sup>6</sup>104 Fed. 391.

<sup>7</sup>*Essex v. Wattier*, 25 Or. 7, 34 Pac. 756.

<sup>8</sup>*McCord v. Iker*, 12 Ohio, 387; *Quack-cnbush v. Van Riper*, 3 N. J. Eq. 350, 29 Am. Dec. 716; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; *Fox v. Holcomb*, 32 Mich. 494.

One whose mill site is covered by back water caused by a lower dam, and who has purchased none of the material nor taken any steps towards erecting a mill, except commencing a dam, which is entirely insufficient, may not have an injunction to prevent the defendant from flowing back water upon the mill site, when the defendant has built a mill, erected a dam, expending a considerable sum of money, without any objection on the part of plaintiff, although he well knew the facts and when he has given no notice of an intention to institute an action under the statute for the recovery of damages. *Nasser v. Seeley*, 10 Neb. 460, 6 N. W. 755.

Injunction will not lie at the instance of a mill owner to restrain the construction on piles over a river of a building, which it is alleged will cause the waters thereof to set back to some extent, if no material injury results therefrom. *Janesville v. Carpenter*, 77 Wis. 288, 8

ating a nuisance by obstructing the natural flow of waters when compensatory damages can be recovered.<sup>9</sup> The fact that the injury is small will not prevent equity from taking jurisdiction, however, if plaintiff has established his right by an action at law without obtaining the abatement of the obstruction.<sup>10</sup> The remedy for breach of contract with reference to the obstruction is usually sufficient to prevent equity from taking jurisdiction of a suit to enforce it.<sup>11</sup>

**582b. When right must be established at law.**—When the injury is of a class that haste is not required to prevent irremediable injuries, or which may be promptly stopped upon recovery of a judgment, equity will not take jurisdiction until the right has been established in an action at law.<sup>1</sup> So, where the rights of the parties and the extent to which the plaintiff is entitled to relief are not clear, equity will refuse jurisdiction until the rights have been settled by a legal action.<sup>2</sup> Although it has been held that the fact that the complainant has not established his right at law is no ground for demurrer to the bill.<sup>3</sup> Where the injury is manifest, the right clear, and the nuisance a continuing one, equity may take jurisdiction although no action has been brought at law.<sup>4</sup> An overflow of an owner's lands on a stream of water, caused by the erection of a milldam below, thereby destroying the

L. R. A. 808, 20 Am. St. Rep. 123, 46 N. W. 128.

<sup>9</sup>*Brown v. Carolina C. R. Co.* 83 N. C. 128.

<sup>10</sup>*Wright v. Turner*, 10 Grant Ch. (U. C.) 67.

<sup>11</sup>Equity will not specifically enforce a contract by the owner of a milldam which injures property flowed by a pond to reduce the height of the dam and clean out the channel of the stream sufficiently to relieve the land of the surplus water, where the contract provides liquidated damages for failure to perform it, and nothing appears to show that an action at law would not furnish adequate relief. *McCarter v. Armstrong*, 32 S. C. 203, 8 L. R. A. 625, 10 S. E. 953.

An injunction will not be granted to restrain one tenant in common from reconstructing a dam in violation of an alleged agreement, for a valuable consideration, between the plaintiff and such tenant in common, that a decree may be taken perpetually enjoining the erection of the dam on a former bill still pending between the plaintiff and both of the tenants in common, and in which an injunction had been refused, where the other tenant in common, whose interest, if any, has been assigned as a homestead for his wife and children, is not a party to the second bill. *Glass v. Clark*, 53 Ga. 380.

<sup>1</sup>*McCord v. Iker*, 12 Ohio, 387; *Porter v. Witham*, 17 Me. 202.

The owner of a mill and dam is not entitled to an injunction restraining the raising of a dam to a height likely to cause the water to flow back and injure his mill, until he shall have first established his rights in a court of law, unless the defendant's dam was constructed pursuant to the statute relating to milldams, which gives such remedy. *Arnold v. Klepper*, 24 Mo. 273.

<sup>2</sup>The grantee of land with the fall of water in a creek and the full use of a mill that may be erected, so that the grantor shall not raise an existing dam so as to impede any mill which may be erected, cannot, in case he erects a mill within the back water of the lower dam, maintain an equity suit to enjoin the maintenance of the lower dam until he has established his right at law,—especially where, in consideration of his deed, he releases the grist mill and land thereby covered and appertaining, and also the water, milldam, and ground covered thereby. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282, 8 Am. Dec. 511.

<sup>3</sup>*Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 703.

<sup>4</sup>*Learned v. Hunt*, 63 Miss. 373.

only lasting spring on his place, in which destruction such owner did not acquiesce, is so manifestly a nuisance, and the owner's right to its abatement so clear, and the injury caused of such a character that it cannot be compensated in damages, that a court of equity will interpose to prevent the mischief, without the necessity of a trial at law being first had to establish the existence of a nuisance.<sup>5</sup>

**582c. Effect of laches.**— One injured by the damming back of water must move promptly in order to be entitled to an injunction against the dam, and he cannot acquiesce in the dam for a period of years, and then, when the water is temporarily drawn down, apply for an injunction against the restoration of the level on the same basis that he might have applied at the time of the construction of the dam.<sup>1</sup> And the same rule will prevent the abatement of the dam, as well as interference with the reconstruction of it.<sup>2</sup> As was seen in the preceding section, the destruction of a spring is such an irremediable injury that equity will take jurisdiction of a suit to prevent it. But in *Caldwell v. Knott*,<sup>3</sup> it was held that damage to lands and injury to a spring caused by the backing up of the waters from a dam are not such an immediate and irreparable injury to clear and undoubted rights as to confer upon a court of equity jurisdiction to abate or prostrate such milldam, where the owners of the lands claimed to be injured consented to the building of the dam, and the same was allowed to remain, without protest, for upwards of ten years. The question whether this parol license can be revoked after the expense incurred in building such dam and the length of time that has elapsed since its erection is one determinable in courts of law, and not of equity. The Rhode Island court has extended the equitable jurisdiction in this

<sup>1</sup>*Vaughn v. Law*, 1 Humph. 123, Distinguishing *Caldwell v. Knott*, 10 Yerg. 209.

<sup>2</sup>*Southard v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 518; *Blake v. Cornwell*, 65 Mich. 467, 32 N. W. 803; *Sheldon v. Rockwell*, 9 Wis. 167, 76 Am. Dec. 265.

<sup>3</sup>*Caldwell v. Knott*, 10 Yerg. 209; *Outcalt v. George W. Helme Co.* 42 N. J. Eq. 665, 9 Atl. 683; *Hyde v. French* (N. J. Eq.) 21 Atl. 1069; *Sprague v. Rhodes*, 6 R. I. 57, 75 Am. Dec. 678.

Injunction will not lie to compel the lowering of a dam which was raised under an agreement to purchase the land to be flowed thereby, although the mill owner has failed to carry out his contract, where the dam has been permitted to remain for several years. *Sterens v. Ryerson*, 4 N. J. Eq. 477.

Where the grantor of a mill site pre-

scribes in the deed that the grantee shall have the right to overflow his lands within specified limits, and the grantor allows the grantee to maintain the dam in such a condition as to flow the water beyond the specified limits for more than two years, and subsequently the grantor as mortgagee of such mill site and water privilege, advertises the same for sale in such condition, and permits a subsequent grantee of the mill site to repair the dam, keeping it at the same height, and to erect mills adjusted to that height, he will not be granted an injunction to compel the lowering of the dam so as to restrict the flowage within the limits expressed in his grant to the former grantee. *Sprague v. Steere*, 1 R. I. 247.

<sup>5</sup> 10 Yerg. 209.

class of cases beyond what was exercised in other states. It is held that the fact that a dam has been kept up without compensation, to the injury of the plaintiff, is not ground of demurrer to a bill for injunction, merely because it does not appear that his right before the filing of the bill has been established at law. In such a case, under the more modern doctrine of the equity courts, the lapse of time, short of the time of limitation, will not deprive the plaintiff of his right to have the milldam abated, although it is not alleged that his right has been established in an action at law.<sup>4</sup>

**582d. Temporary injunction.**—If the obstruction is not completed and it is evident that it will cause injury to the complainant's property, a temporary injunction may be granted to prevent its completion until the rights of the parties can be determined, although the injury which will be caused by it will not be large.<sup>1</sup> So, it will be granted where the nuisance may affect the health of complainant and his family.<sup>2</sup> But in an action by an upper riparian owner to compel a lower proprietor to remove a wing dam alleged to cause the water to flow back upon the water wheels and premises of the upper owner, an injunction *pendente lite* restraining the raising or backing of water upon the water wheels is improper, where the lower proprietor denies that the wing dam has such effect, since it compels him, at his peril, to determine one of the principal issues to be tried in the action.<sup>3</sup> And in any case where the obstruction is completed and the injury done, equity will hesitate before granting a preliminary injunction, and will not do so unless the necessity for it is obvious and imperative.<sup>4</sup>

<sup>1</sup>*Sprague v. Rhodes*, 4 R. I. 301.

<sup>2</sup>*Philips v. Stockett*, 1 Overt. 200.

<sup>3</sup>*Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

<sup>4</sup>*Keeseville v. Keeseville Electric Co.* 59 App. Div. 381, 69 N. Y. Supp. 249.

<sup>5</sup>A temporary injunction restraining, pending an action for a permanent injunction, the abatement to a certain height of a dam causing the overflow of the lands of another, is properly refused, where it does not appear that proceedings for the construction thereof were ever had under the milldam act, or that the consent of those whose lands are overflowed was ever obtained, but the right to relief is based on the fact of ownership, and that the owner had never been ordered to remove it, but such dam had, in a proceeding between the owners of the overflowed land and the actual possessors and managers of the milldam,

been declared a nuisance and ordered abated,—as a matter of fact it is a nuisance as to such owners,—and they are able to respond to all damages which may be caused by the abatement of the dam. *Akin v. Davis*, 14 Kan. 143.

Under a bill asking that the proper height of a dam be determined and fixed by a decree, and praying for general relief, an injunction should not be granted restraining the defendant until the final hearing from strengthening the dam or doing anything to make it more permanent, thus preventing its protection against high waters or other accident, it not appearing that the trespass is irreparable in damages, or that defendant is insolvent and incapable of responding to any recovery that may be obtained by complainant, or that the injunction is necessary to avoid a multiplicity of actions. *Wheeler v. Steele*, 50 Ga. 34.



**583. Criminal proceeding.**—Criminal proceedings are not available to protect the rights of individuals unless expressly made so by statute. And the act cannot be brought within reach of the criminal law by alleging the intent to commit a criminal offense by conduct relating solely to the damming back of water, unless such conduct is plainly within the intent of the statutes. Thus, an indictment will not lie for conspiracy to commit the civil trespass of flowing the lands of riparian owners by means of flashboards upon a dam, with the intent of depreciating their value.<sup>1</sup>

**584. Joinder of causes of action.**—A prayer for past damages may be inserted in a bill filed to restrain the continuance of a nuisance, since, equity having taken jurisdiction, will afford complete relief and assess the damages to which complainant is entitled; and a prayer for injunction may be inserted in an action to recover damages which have already accrued.<sup>1</sup> But if the obstruction has been removed, so that all that is to be settled is the damages, a prayer for injunction against rebuilding the obstruction cannot be inserted for the purpose of giving equity jurisdiction of the suit.<sup>2</sup> And the same rule applies in case the obstruction has been removed, although the suit is for an injunction, and the prayer for damages is merely incidental.<sup>3</sup> But all claims for injury arising out of the same transaction must be joined, and, therefore, causes of action for damages from the destruction of crops on part of a tract of land, and the preventing of the planting of crops on another part of the same tract, arising from a single wrongful overflowing of the entire tract, cannot be split; and judgment in an action on one of such causes of action without the joinder of the other is a bar to a subsequent action on the latter.<sup>4</sup>

**585. Notice; pleading; evidence.**—A request to remove a dam is not necessary to entitle plaintiff to recover for flowage, where the dam was erected by the defendant.<sup>1</sup> As in all other cases under the reformed procedure, the complaint must contain a plain statement of the facts upon which complainant relies for a recovery, and the proof must correspond with the allegations.<sup>2</sup> The bill need not allege the amount of

<sup>1</sup>*State v. Straw*, 42 N. H. 303.

<sup>2</sup>*Drinkwater v. Sauble*, 46 Kan. 170, 26 Pac. 433.

But the Rhode Island court has held that an action for damages for past injuries occasioned by the obstruction of a natural stream cannot be joined in a suit for injunction restraining the maintenance of such obstruction. *Miner v. Nichols* (R. I.) 52 Atl. 893.

<sup>3</sup>*Hudson v. Burk*, 48 Mo. App. 314.

<sup>4</sup>*Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396.

<sup>1</sup>*Wichita & W. R. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502.

<sup>2</sup>*Branch v. Doane*, 17 Conn. 402.

<sup>3</sup>A bill alleging (1) a right of flowage from forty years' acquiescence in its exercise, and (2) the acquisition of the right to construct and maintain the dam from the persons interested prior to its erection, cannot be sustained by

damages which had been incurred.<sup>3</sup> Where the action is for the abatement of the dam, evidence of injuries done after the commencement of the action is admissible for the purpose of showing that the structure is in fact illegal.<sup>4</sup> And upon the question whether or not the flood which caused the injury was unprecedented, evidence of subsequent floods may be given in connection with that of former ones.<sup>5</sup> The facts indicated by the actual condition of the water cannot be overcome by evidence of surveys and levels made by engineers.<sup>6</sup> The damages cannot be fixed upon the mere opinion of witnesses.<sup>7</sup> The witnesses should describe the injury and state the circumstances so as to enable the jury to form their own conclusion as to the amount of damages.<sup>8</sup> And nonexperts may state what effect the back water produced upon the power of the upper wheel.<sup>9</sup> A prescriptive right to flow land by means of a dam attached to an ancient mill site is a prescriptive right in a *que* estate, so as not to be within the rule which excludes persons having interests in common from testifying in favor of each other.<sup>10</sup> Evidence of injury to other land is not admissible unless it is shown to be similarly situated to that of complainant.<sup>11</sup> Where the injury is alleged to have been caused by a railroad

a proof of adverse use for the prescriptive period, no attempt being made to show a right under a power of eminent domain, or by the production of a written grant. *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180.

A mill owner is not entitled to recover for diminution of rents under a count for hindering and obstructing the use of his mills and machinery, and rendering the same of little or no value, and subjecting the owner to great loss and expense by the interruption of the business of his mills, and depriving him of the profits thereof, as he sets up no cause of action therefor. *Plimpton v. Gardiner*, 64 Me. 360.

Nominal damages cannot be awarded for simply flooding upper riparian property by a milldam under a complaint which seeks damages for injury to a wheel in operation because of back water from the dam, which injury is not sustained by the evidence. *Taylor v. Keeler*, 50 Conn. 346.

In an action for flowage damages resulting from the erection of a dam across a river, it is not sufficient to prove that the flowage was caused by the obstruction of two lateral sluices in the banks of the stream, and not part of the dam. *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493.

<sup>3</sup>*St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706.

<sup>4</sup>*Hayden v. Albee*, 20 Minn. 159, Gil. 143; *Morris Canal & Bkg. Co. v. Ryerson*, 27 N. J. L. 457.

In an action for damages to land by the flooding thereof by reason of the insufficiency of a culvert in a railroad embankment, evidence is admissible that an attempt was made to raise a crop on the damaged land, as tending to show that the yearly value of the land for the purposes of cultivation was affected by the nuisance. *Georgia R. & Bkg. Co. v. Berry*, 78 Ga. 744, 4 S. E. 10.

<sup>5</sup>*Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

<sup>6</sup>*Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914.

<sup>7</sup>*Noah v. Angle*, 63 Ind. 425.

<sup>8</sup>*Sinclair v. Roush*, 14 Ind. 450.

<sup>9</sup>*Williamson v. Yingling*, 80 Ind. 379.

<sup>10</sup>*Sargent v. Gutterston*, 13 N. H. 467.

<sup>11</sup>*St. Louis & S. F. R. Co. v. Craig*, 10 Tex. Civ. App. 238, 31 S. W. 207; *Standish v. Washburn*, 21 Pick. 237.

The damage done by flowing land cannot be shown by proving the value of hay cut upon other lands, the relation of which to the land flowed was not shown. *Smith v. Russ*, 22 Wis. 439.

embankment, expert evidence is admissible to show that the overflow was the result of natural causes, and not the construction of the embankment.<sup>12</sup> And such evidence is admissible to show the laws of alluvial streams, the cause and manner of growth of deposits of sediment, and the effect of such deposits upon such streams in a long course of years, where it is alleged that the water by which crops were destroyed was dammed back upon, and caused to overflow, complainant's land by an embankment constructed and maintained by a railway company along bottom lands and across a branch of a natural water course.<sup>13</sup> Such evidence is also admissible as to the capacity of the opening which is alleged to have obstructed the flow of the water.<sup>14</sup> On the question of the acquisition of a right of flowage by prescription, testimony by one of the defendants operating the mill and dam as to the operations of a former mill owner for whom he worked is competent.<sup>15</sup> Whether or not a dam was rebuilt higher than it could be rightfully maintained may be evidenced by the work accomplished by the mill, and what it would do if the dam were only at the height claimed by complainant.<sup>16</sup> When, by the descriptions in the deeds of a mill site and water privileges, it is not certain what was the level of the mill pond conveyed, it may be shown that by agreement between the mill owner and the upper owner a monument to mark the extent of the pond was fixed; but evidence of the mere pointing out to his successor in title of such a monument, with the assertion of a right to fill the pond to its level, without proof that the upper owner had any knowledge of it, is not competent upon this point.<sup>17</sup> Admissions against the interest of a former owner of the property are admissible against his successor in title.<sup>18</sup> But such admissions must be shown to have been made while the one making them was in possession of the property.<sup>19</sup>

**586. Limitation of actions.**—Public policy requires the stability of rights, the termination of litigation, and the settlement of such controversies as may arise, while the facts are fresh in the memories of the

<sup>12</sup>*Ohio & M. R. Co. v. Webb*, 142 Ill. 404, 32 N. E. 527.

<sup>13</sup>*Ohio & M. R. Co. v. Neutzel*, 143 Ill. 46, 32 N. E. 529, Reversing 43 Ill. App. 108.

<sup>14</sup>*Chicago & A. R. Co. v. Calkins*, 17 Ill. App. 55.

<sup>15</sup>*Bucklin v. Truell*, 61 N. H. 503.

<sup>16</sup>*Detweiler v. Groff*, 10 Pa. 376.

But the fact that water above a bridge was 2 feet higher than it was below it, and flowed under the bridge with great

force, does not show that a dam below the bridge did not aid in backing up the water above the bridge where the water stood several feet deep below the bridge. *Payne v. Kansas City, St. J. & C. B. R. Co.* 112 Mo. 6, 17 L. R. A. 628, 20 S. W. 322.

<sup>17</sup>*Horner v. Stillwell*, 35 N. J. L. 307.

<sup>18</sup>*Horner v. Stillwell*, 35 N. J. L. 307;

*Ten Eyck v. Runk*, 26 N. J. L. 513.

<sup>19</sup>*Touner v. Thompson*, 81 Ga. 171, 6 S. E. 184.

witnesses and the rights of the parties can be most readily determined. Therefore, the legislature has established periods of time within which all actions must be brought, or the right to bring them will be forever barred. And these statutes apply to injuries caused by the damming back of water in a stream, although the effect of inability to bring an action to redress the wrong may be to establish a permanent easement in the lower proprietor. A period may be fixed within which an action must be brought after the construction of a dam, after which no action can be maintained, although injury did not occur and could not be foreseen before the expiration of the time fixed.<sup>1</sup> In case the statute does not expressly provide for the flowage of land, the period necessary for the acquisition of rights in real estate will be applied, so that in case the flowage is maintained for that period, no recovery can be had for the damages inflicted.<sup>2</sup> An action for damages for injuries done by the flowage of land is governed by the statute limiting the time for bringing actions for injuries to real estate,<sup>3</sup> if one exists; and in its absence they are governed by the statute limiting the time for bringing actions for damages generally. And it has been held that when injury is done by continuous flooding for a series of years, the injury is not a single act, but continuous acts, and the right of action is not barred for later acts because time has barred a right of action for the first injury of the series, so long as a prescriptive right to maintain the flowage has not been obtained.<sup>4</sup> The rule is stated in *Baldwin v. Calkins*,<sup>5</sup> as follows: In case of injury by flowing land by a milldam, the right to maintain which has not been acquired by prescription, the landowner is not barred of his action by lapse of the statutory period for maintaining actions of that character, since the injury is a continuing one; but no recovery can be had for injury which arose beyond the statutory period. But in *Eastman v. St. Anthony Falls Water Power Co.*<sup>6</sup> the Minnesota court held that the cause of action for the abatement of a dam as a nuisance, by injunction, accrues at the time the dam is built so as to affect plaintiff's property injuriously, and the running of the statute of limitations begins at that time. If the cause of action to abate a dam as a nuisance accrues at the time the dam is erected, and there can be no doubt of that fact, it is difficult to see why the cause of action to recover damages for the injuries caused by it, if it is a permanent structure and

<sup>1</sup>*Call v. Middlesex County*, 2 Gray, 232.

<sup>2</sup>*Rooker v. Perkins*, 14 Wis. 80.

<sup>3</sup>*Lucas v. Marine*, 40 Ind. 289.

<sup>4</sup>*Spilman v. Roanoke Nav. Co.* 74 N. C.

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*Co. v. Lee*, 22 N. J. L. 243.

<sup>5</sup> 10 Wend. 167.

<sup>6</sup> 12 Minn. 137, Gil. 77.

the injury continues, should not begin to run at the same time. The rule that every continuance of a nuisance is a fresh nuisance should have no application in case of permanent nuisances of this class any more than it should be contended that a trespass upon the land and erection of a structure there should constitute a fresh trespass every moment it was continued, for the purpose of extending the time within which the action could be brought. And there are cases which have applied the true rule that, in case the dam is a permanent one, the limitation period will begin to run against the right of action to recover damages for the injuries, from the time the dam is built.<sup>7</sup> The rule that the statute of limitations is not available to defeat an action for damages for the flooding of land until the right to flood it has been acquired by prescription, since every continuance of the injury is a fresh nuisance, is a mere arbitrary rule invented by the courts to meet the necessities of an apparently hard case. The difficulty seems to be that the courts have confounded two distinct rights of action. As was seen in a preceding section,<sup>8</sup> it is held that ejectment will not lie to destroy an inchoate flowage easement. To avoid the effect of that ruling, the courts which apply the successive injury doctrine in order to prevent the acquisition of an easement in real estate in less than the prescriptive period hold that the nuisance is a continuing one and that the action may be brought at any time until the right to maintain it has been acquired by prescription. The latter holding seems illogical. If a permanent obstruction is erected so that it casts water across the boundary line onto the land of the upper owner, the injury is complete at the time the obstruction is erected and the injury done, and there is no ground for holding that a right of action for damages may be carried along for a period of twenty years when the statute of limitations says that it shall be barred in six years. The only logical rule is that, if the upper owner wishes to recover damages for his injury, he must bring his action within the time named by the statute of limitations. But the statute also provides, or, in the absence of such provision, the presumption of law is, that an interest in real estate can be acquired only by adverse possession for a much longer period than six years. The right to flow land is an interest in it and an easement, and the time necessary to acquire an easement in the land is the same as that necessary to acquire the land itself. Therefore, there is a right of action to prevent the perfecting of the easement which is entirely distinct from that to recover damages for

<sup>7</sup>*Missouri, K. & T. R. Co. v. Graham*,     \* See ante, § 581.  
12 Tex. Civ. App. 54, 33 S. W. 576.

the injury. The appropriate form of action for this purpose is ejectment, and all analogy, as well as true principle, suggests that there should be some form of real action to protect the upper owner from the perfection of the easement, and that the time for bringing this action should be governed by the statute which fixes the time within which actions to recover real estate must be brought. And in analogy to the legal right, equity will take jurisdiction during all the time the real action might have been maintained, if its services are necessary to protect the rights of the upper owner. This is the rule which is applied by the Minnesota court. For it holds that the statute governing the time for commencing actions for damages does not apply to suits to enjoin an obstruction to the flow of water.<sup>9</sup> But that it is governed by the ten-year limitation period.<sup>10</sup> This is the only true and logical rule. It is absurd to resort to the legal fiction that every continuance of the nuisance is a fresh one, to carry along a right of action for damages merely to protect the upper owner from the acquisition of an adverse easement, which cannot, by any analogy, be acquired short of the time necessary to acquire an interest in real estate, where the only necessity for resorting to such fiction is the erroneous holding that a real action will not lie to prevent such a result. The courts can well abandon the theory of successive injury if they merely apply to the question the true rule that the easement cannot be perfected short of the time necessary to acquire an interest in real estate, and that, until that time has elapsed, the remedies are available which are available to assert title to land, including equitable aid if necessary. At the same time the cause of action for the injury inflicted by the obstruction may be barred in the statutory period from the time the obstruction is created, so that, in case the upper owner wishes to recover damages for the injury, he must bring his action within that time, although he may not be prevented from taking steps to have the obstruction removed until the lapse of a much longer period of time. The statute begins to run against an action to recover injuries for damages caused by the obstruction at the time the injuries are inflicted, and not from the erection of the obstruction unless it is expressly provided that it shall begin to run when the obstruction is completed.<sup>11</sup> Or when it becomes evident that the obstruction will cause

<sup>9</sup>*Cook v. Kendall*, 13 Minn. 324, Gil. N. W. 558; *Chicago, R. I. & P. R. Co. v. Andreessen*, 62 Neb. 456, 87 N. W. 167; 297.

<sup>10</sup>*Eastman v. St. Anthony Falls Water* *Hurlbut v. Leonard*, Brayton (Vt.) 202; *Poicer Co.* 12 Minn. 137, Gil. 77; *Thorn- Union Trust Co. v. Cuppy*, 26 Kan. 754; *ton v. Webb*, 13 Minn. 498, Gil. 457. *Ridley v. Seaboard & R. R. Co.* 118 N.

<sup>11</sup>*Prentiss v. Wood*, 132 Mass. 486; C. 996, 32 L. R. A. 708, 24 S. E. 730; *Hempsted v. Cargill*, 46 Minn. 118, 48 *Delaware & R. Canal Co. v. Wright*, 21

injury.<sup>13</sup> Therefore, when the water from a dam has been set back over the land for several years less than the period of limitation, the upper proprietor may maintain an action, if, upon attempting to make a new use of his property, he finds that the use is interfered with by the water.<sup>13</sup> It is no defense to an action for damages to land from the overflowing thereof by back water caused by the accumulation of sand washing into the stream from a ditch constructed by the defendant, that such ditch was constructed and has been used by him for the period necessary for the acquirement of a prescriptive right, where the lands have been overflowed for less than such period, as prescription runs, not from the time of the digging of the ditch, but from the infringement of plaintiff's rights by the formation of the obstruction.<sup>14</sup> Some courts have held that when the obstruction is caused by negligence or want of skill, and is not such as to cause a continuous overflow, but the overflow is periodical, each overflow constitutes a new cause of action and is not affected by the fact that an action for the first injury of the series is barred.<sup>15</sup> And if the obstruction is merely temporary, the cause of action does not accrue at the time of its construction so as to bar actions for injuries subsequently inflicted.<sup>16</sup> The rule that each fresh injury gives a cause of action in case the obstruction is the result of negligence or want of skill is based

N. J. L. 469; *Moison v. Great Western R. Co.* 14 U. C. Q. B. 109; *King v. United States*, 59 Fed. 9; *New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540.

The statute of limitations does not begin to run against an action for obstructing the flow of a stream until damage results to plaintiff from such obstruction, where the obstruction is of gradual formation. *Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130.

A statute providing that no action for damages occasioned by the erection and maintenance of a milldam shall be hereafter sustained, unless such action be brought within two years after the erection of such dam, is construed to limit the time within which an action may be commenced for damages occasioned by the erection of a milldam, and does not begin to run until injury has been done by the dam; for, until that time, no cause for action exists. *Thornton v. Turner*, 11 Minn. 336, Gil. 237; *Hempsted v. Cargill*, 46 Minn. 118, 48 N. W. 558.

<sup>13</sup>*Sullens v. Chicago, R. I. & P. R. Co.*

74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *St. Louis, I. M. & S. R. Co. v. Yarrowborough*, 56 Ark. 613, 20 S. W. 516.

<sup>14</sup>*King v. Tiffany*, 9 Conn. 162.

<sup>15</sup>*Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470.

<sup>16</sup>*Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415; *Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589.

"An action for damages from the continuance of an obstruction created by a milldam backing water against the milling plant of an upper proprietor, although brought more than two years after the erection of the dam, is not barred by a statute requiring actions for damages from the erection of milldams to be brought within two years from the erection thereof, where the obstruction is treated as temporary only, both by such action, and by a prior pending action to abate or lower the dam and for damages then accrued, brought within the two years, the statute applying only to such dams as are permanent and lasting. *Hardesty v. Bell*, 43 Kan. 151, 23 Pac. 937.

upon the ground that one landowner has no right to maintain a negligently constructed structure to the injury of his neighbor, and that he will correct it when his attention is called to it. But other courts have held that even in such cases if the structure is a permanent one and the one responsible for it evidently intended to maintain it as it was originally constructed, the cause of action is complete at the time the structure is erected if it is then evident that injury will result and, if not, then when the fact is made evident; and that all rights of action are barred in the ordinary period from that time.<sup>17</sup> This latter rule is more consistent with principle than is the former one. If the structure is permanent, the fact that it is wrongful as against the upper owner is known when the first injury is done, and it is also known that unless some steps are taken to prevent it, the structure will be maintained in such a way as to continue the injury whenever conditions are right. The situation is entirely different from that where the recurrence of the injury will depend upon voluntary acts of the wrongdoer which he may or may not perform. In the latter class of cases the cause of action will not arise until the act is committed. But in the former class, where the wrongdoer has created a condition which, unless changed will continue to injure the upper proprietor, the cause of action is complete when the structure is shown to be injurious; and the mere fact that the injury is periodical rather than continuous does not prevent the statute of limitations from running from that time. If the injury is such as to create an easement in the upper property, the right to continue it will not be complete until sufficient time has elapsed to acquire title to real estate, and, therefore, although the cause of action for overflowing upper riparian property by water held back by a railroad culvert does not arise, so as to start the running of the statute of limitations, until the injury is actually done, yet all rights of action may become barred when the period has elapsed, since the first injury is done by the erection, which is necessary to establish easements in land.<sup>18</sup> A railroad company acquires no prescriptive right to overflow the lands of another by maintaining an insufficient and negligently constructed bridge upon its right of way for more than twenty years, where less than twenty years have elapsed since the flooding occurred which first invaded such owner's rights, caused by said bridge, at which time the cause of action on account thereof first accrued.<sup>19</sup> Continuance after a request to abate

<sup>17</sup>*Buntin v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 414; *Bird v. Hannibal & St. J. R. Co.* 30 Mo. App. 365; *Haisch v. Keokuk & D. M. R. Co.* 71 Iowa, 606, 33 N. W. 106. <sup>18</sup>*Buntin v. Chicago, R. I. & P. R. Co.* 41 Fed. 744. <sup>19</sup>*Sherlock v. Louisville, N. A. & O. R. Co.* 115 Ind. 22, 17 N. E. 171.



a nuisance created by the erection of a milldam is a new ground of action, without resorting to the period of time when it was first erected.<sup>20</sup> The defense of the statute of limitations is not available to defeat a recovery for the flowing of that part of the plaintiff's lands which was owned by the state until shortly before the action was brought.<sup>21</sup> Under the Canadian statutes a landowner whose land was flooded in consequence of the negligent and unskilful construction of a railroad embankment across a stream may not claim damages for more than six months next before bringing his action.<sup>22</sup>

**587. Jurisdiction.**—An action for interference with the passage of water from a mill along its natural course is an action respecting an easement in real estate within the meaning of a statute giving jurisdiction of such actions.<sup>1</sup> A corporation located in one state may be enjoined by the courts of that state from maintaining obstructions which will interfere with the rights of property owners in another state.<sup>2</sup> In case of an obstruction of a river constituting the boundary between two states, the action may be maintained where the injury occurs, although the mill is situated in the other state.<sup>3</sup> If the stream is a boundary between two counties, the courts of either county have jurisdiction of an action for injury by an obstruction in the stream.<sup>4</sup> In case the stream flows from one county into another, it has been held that an action to recover damages for injuries caused to land in one county by a dam in another is local and must be brought where the injury occurs.<sup>5</sup> But if abatement of the dam is sought, the action is properly brought in the county where it is situated.<sup>6</sup> And the appellate court of Illinois has held that an action for injury to land by flooding caused by the construction of a dam on a stream be-

<sup>20</sup>*Loftin v. M'Lemore*, 1 Stew. (Ala.) 133.

<sup>21</sup>*Zeidler v. Johnson*, 38 Wis. 335.

<sup>22</sup>*McGillivray v. Great Western R. Co.* 25 U. C. Q. B. 69.

<sup>1</sup>*Cary v. Daniels*, 5 Met. 236; *Ashley v. Ashley*, 6 Cush. 70.

<sup>2</sup>*Holyoke Water Power Co. v. Connecticut River Co.* 22 Blatchf. 131, 20 Fed. 71.

<sup>3</sup>*Wooster v. Great Falls Mfg. Co.* 39 Me. 246.

Where a railway company constructed an embankment without sufficient water ways on the north side of Red river in the Indian territory, it was held that the company was liable for injury to lands by overflow on the south side of the river and in the state of Texas, and that the action could be maintained in the courts of that state. *St. Louis &*

*S. F. R. Co. v. Craig*, 10 Tex. Civ. App. 238, 31 S. W. 207.

<sup>4</sup>*Powers v. Ames*, 9 Minn. 178, Gil. 164.

<sup>5</sup>*Worster v. Winnipiseogee Lake Co.* 25 N. H. 525; *Deacon v. Shreve*, 23 N. J. L. 204; *Thompson v. Crocker*, 9 Pick. 39.

So, a suit for an injunction to restrain the threatened injury to real property by the construction of a dam which it is alleged will result in the flooding thereof, is an action for an injury to real property, within a statute, requiring actions for an injury to real property to be brought in the county where the subject of the action is situate. *Drinkhouse v. Spring Valley Water-works*, 80 Cal. 308, 22 Pac. 252.

<sup>6</sup>*Lohmiller v. Indian Ford Water Power Co.* 51 Wis. 683, 8 N. W. 601.

low may be instituted in the county in which the dam lies, although the injured land lies in another county.<sup>7</sup> Under the Nebraska statutes it has been held that an action for injuries to real estate from the overflow of a river caused by the negligent construction of a bridge is transitory and need not be brought in the county where the cause of action arose.<sup>8</sup> It would seem that the nature of the injury was such that the cause of action was purely local in such cases, and should be brought where the injured land is located. The title is involved in an action to recover for flooding land to the permanent injury of the soil, so as to deprive a justice of jurisdiction of the action.<sup>9</sup> But the county court of a county in which are located lands damaged by the overflow of a stream caused by the maintenance of a milldam in another county, has jurisdiction of a civil action provided by a milldam law to recover damages and determine how much such dam should be lowered, under a statute giving it and other designated county courts jurisdiction in all civil actions and proceedings concurrent and equal with the circuit court, "in said counties," although the milldam law provides for such action in the circuit court of the county where the land or any part thereof lies, "but in no other manner," as the latter expression only limits the right to that form of remedy and makes it exclusive, and the expression "in said counties" does not limit the jurisdiction of such court to the county in which held, so far as the effect and operation of its judgment and processes on property or persons outside of the county are concerned.<sup>10</sup> A bill in chancery to compel the removal of a dam which is alleged to cause the lands of the complainant to be overflowed involves no questions affecting a franchise or frechold.<sup>11</sup>

**588. Judgment.**—As in other cases, a judgment should respond to the prayer of the petition and should give no greater redress than is necessary to protect the rights of the complainant. The court should not direct the removal of a dam where the prayer of the petition is simply for an injunction to restrain the flowing back of waters upon complainant's property.<sup>1</sup> Therefore, where a dam wrongfully flows

<sup>7</sup>*Pilgrim v. Mellor*, 1 Ill. App. 448.

<sup>8</sup>*Omaha & R. Valley R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 30.

<sup>9</sup>*Dixon v. Scott*, 19 N. J. L. 430; *Vantyl v. Marsh*, 5 N. J. L. 507.

But the backing of water by a milldam overflowing lands and destroying rice crops, preventing further cultivation and tending to the immediate annoyance of the citizens generally, may be abated by justices of the peace, under

Ga. Code, § 4094 (now 4760), providing for the abatement, by the order of two or more justices of the peace, of any nuisance which tends to immediate annoyance of the citizens generally. *Wetter v. Campbell*, 60 Ga. 286.

<sup>10</sup>*Geise v. Green*, 49 Wis. 334, 5 N. W. 869.

<sup>11</sup>*Talcott v. Schuh*, 95 Ill. 201.

<sup>1</sup>*Lummary v. Brady*, 8 Iowa, 33.

water back upon the upper proprietor, a judgment is proper directing the lowering of the dam sufficient to avoid that result.<sup>2</sup> But a decree completely abating a dam is proper, although its partial removal would prevent the flowing of complainant's lands, when, if reduced, it would become a useless obstruction to the natural flow of the stream, and create a pool detrimental to the health of the neighborhood.<sup>3</sup> The owners of a mining claim in the bed of a river, the waters of which have been diverted therefrom by means of a race for the purpose of working such claim, are entitled to a decree ordering a diminution of a dam erected below their claim subsequent to the establishment thereof, or, if necessary, to an entire abatement.<sup>4</sup> A verdict and judgment in favor of one maintaining a dam is *res judicata* in subsequent actions between the same parties.<sup>5</sup> But a verdict on a plea of not guilty in an action brought by the plaintiff against a tenant for years under a predecessor in title, of the defendant for erecting a dam, is no estoppel to a subsequent action for throwing the water back upon and obstructing plaintiff's mill by the erection of the dam, since, had the verdict been the other way, there would have been no estoppel, and estoppels must be mutual; and also that suit was *res inter alios acta*.<sup>6</sup> A recovery of damages for a wrongful flooding of land is not a bar to a subsequent action unless the recovery was of future, as well as past, damages.<sup>7</sup> So that a recovery of nominal damages in an action to establish the rights of the parties is no bar to a subsequent action for the real damages.<sup>8</sup> A subsequent wrongful flowing of another's land raises a new cause of action.<sup>9</sup> A judgment for plaintiff is conclusive in his favor in the subsequent action.<sup>10</sup> But recovery of mere-

<sup>2</sup>*Rothery v. New York Rubber Co.* 90 N. Y. 30, Affirming 24 Hun, 172.

<sup>3</sup>*Treat v. Bates*, 27 Mich. 390.

<sup>4</sup>*Ramsay v. Chandler*, 3 Cal. 90.

<sup>5</sup>*Kilheffer v. Herr*, 17 Serg. & R. 319, 17 Am. Dec. 658; *Rockwell v. Langley*, 19 Pa. 502.

Even a judgment in a justice's court as to liability for overflowing land by the erection of a dam is, until reversed, conclusive between the parties in a subsequent suit in the supreme court. *Boyer v. Schofield*, 2 Keyes, 628.

But a verdict for defendant in an action for alleged damage to land by the backing of water thereon caused by the construction and maintenance of a mill-dam is not necessarily conclusive upon the plaintiff in another action brought therefor, where the maintenance of the dam, after the first suit, without any alteration thereof, may have caused a change in the condition of the channel,

producing higher water than before, or heavier rains may have fallen, resulting in damage to plaintiff, since the commencement of the former suit. *Jones v. Lavender*, 55 Ga. 228.

<sup>6</sup>*Smith v. Wallbridge*, 6 U. C. G. P. 324.

<sup>7</sup>*Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239, Affirming 26 Ill. App. 280.

<sup>8</sup>*Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766.

<sup>9</sup>*Texas & P. R. Co. v. O'Mahoney*, 24 Tex. Civ. App. 631, 60 S. W. 902.

Injuries arising after an arbitration of the amount to be paid for the overflow of land by a dam may be the subject of a subsequent action. *Phillips v. Terry*, 3 Keyes, 313.

<sup>10</sup>*Mercereau v. Pearsall*, 19 N. Y. 108; *Plate v. New York C. R. Co.* 37 N. Y. 472.

In an action for damages for the over-

ly nominal damages in a suit for prospective as well as present damages to land from the erection of a dam and changes in the flow of water caused thereby is a bar to a subsequent action for the depreciation in the value of the land.<sup>11</sup> And a judgment is always a bar to a subsequent action to recover damages which might have been recovered in the former case.<sup>12</sup> And no further action can be maintained if the nuisance has been removed.<sup>13</sup> When it is *res judicata* that a dam is too high, the owner is responsible for a continuance of the nuisance,—at least until he makes a substantial reduction, so that a reduction of 1/6000 of an inch cannot be held sufficient, but is merely fanciful.<sup>14</sup> In order to make a judgment conclusive in a subsequent action, it must be between the same parties as those in the former suit,<sup>15</sup> or parties in privity with them.<sup>16</sup> The mere refusal of equity

flowing of land by a third dam constructed in the same place as two former dams, a judgment for plaintiff in a former action for damages caused by the overflowing of the land by the preceding second dam is *prima facie* conclusive against defendant's claim to a prescriptive right to overflow beyond a point agreed upon in a written agreement between him and a former owner of the land, arising from the maintenance by him of back water from the first dam to a point beyond that so agreed upon, unless the judgment in such former action was only for the excess of the overflow from the second over and above that caused by the first dam; but if the damage caused by the third dam, whether greater or not than that occasioned by the first dam, is equal to that for which plaintiff recovered in the former action, that judgment is conclusive as to plaintiff's right to recover something for the overflow caused by such third dam. *Green v. Weaver*, 63 Ga. 302.

<sup>11</sup>*Swantz v. Muller*, 27 Ill. App. 320. Allegations in an action for damages for the submerging of land by backing water from a milldam, that, in consequence of the erection and maintenance of the dam, certain described land and timber had been rendered worthless and of no value, "in all to her damage, \$1,000," make such action one for the recovery of the entire damage resulting therefrom, which bars any subsequent action by the same plaintiff against the same defendant for damage resulting to the same land from the same cause. *Clark v. Lanier*, 104 Ga. 184, 30 S. E. 741.

<sup>12</sup> A recovery in a suit for damages to

crops and land by reason of an overflow caused by the defective embankment of the defendant railroad company during a heavy rain is a bar to a subsequent suit for the recovery of damages for injury to a part of the same tract of land and other property thereon, caused by an overflow during a freshet which occurred during the pendency of the former suit; although it appears that the embankment of the railroad company does not necessarily cause overflow of such lands, but that overflows occur only in event of very heavy rains and high water. *Texas & P. R. Co. v. Long*, 1 Tex. App. Civ. Cas. (White & W.) § 559, p. 281.

<sup>13</sup>*James v. Sterrett*, 137 Pa. 234, 20 Atl. 655.

<sup>14</sup>*James v. Sterrett*, 4 Pa. Co. Ct. 584.

<sup>15</sup> A judgment against a person for wrongfully maintaining a dam so as to cast water upon another's property is not conclusive in a subsequent suit for injuries occurring after the first judgment, where the evidence in the latter suit shows that he was not the owner of the premises on which the nuisance was committed at the time of the first judgment, or since. *Hanse v. Cowing*, 1 Lans. 288.

A judgment against the administrator of one who erected a milldam so as wrongfully to flow upper riparian property is not evidence in a subsequent suit against vendees of the heirs of the one who erected the dam, except to establish its own existence and the legal consequences flowing therefrom. *Jarnigan v. Mairs*, 1 Humph. 473.

<sup>16</sup> Where, by judgments at law and a decree in chancery, obtained against the

to take jurisdiction of a case will not bar a subsequent action at law for the damages.<sup>17</sup> The abatement of the dam and the award of damages may be allowed in one judgment.<sup>18</sup> A satisfaction given by one in possession of land under a lease, for flooding the land and destroying the trees, does not bar an action by the owner of the reversion.<sup>19</sup> If a mill owner has a prescriptive right of flowage without payment of damages, the judgment of a court of record will be as effectual to divest him of that right when his case has been submitted to arbitration as a deed of conveyance and is then *res judicata*.<sup>20</sup> If the controversy is submitted to arbitrators, the award will be enforced by the courts, if valid and certain.<sup>21</sup> And, when confirmed, it will be given the same effect as a judgment.<sup>22</sup> A verdict fixing the height of a dam and providing that it shall be left open a space of not less than 10 feet in width, fixing past and future damages, will not require the dam to be kept open for the free passage of water to the bottom for that width, but only above the height fixed.<sup>23</sup>

**589. Damages for permanent obstruction.**— If the case is unaffected by any statutory provision which gives the one erecting the obstruc-

former owner of a milldam, the overflow of such milldam on the lands of an owner above was established as a nuisance, and such milldam was ordered cut down to a certain height, and it was afterwards sold to a party who reconstructed the same and raised its height above that allowed in said decree of court, his grantee, by reason of his relation as a privy in estate, is bound by the facts found in such judgments and decree, and cannot set up the claim that, by reason of such reconstruction, a new nuisance would have to be established. *Vaughn v. Law*, 1 Humph. 123.

<sup>17</sup>*Coulter v. Davis*, 13 Lea. 451.

<sup>18</sup>*Williamson v. Yingling*, 93 Ind. 42.

<sup>19</sup>*Bedingfuld v. Onalou*, 3 Lev. 209.

<sup>20</sup>*Hersey v. Packard*, 56 Me. 395.

<sup>21</sup> An award by arbitrators of damages for overflowing lands is not wholly void for including claims previously adjudicated, when these can be readily separated, but it will be enforced for so much thereof as is good. *Hoagland v. Veghte*, 23 N. J. L. 93.

An award of arbitrators, to whom, pending an action for damages resulting from the overflowing of land caused by a milldam, the question of the height of the dam is submitted, which states that they proceeded to measure the dam and found it to be "4 feet 4 inches from the bottom of the river to the top of the dam on the east side of the river," will

be set aside for want of certainty in regard to the measurement of the dam. *Stanford v. Treadwell*, 69 Ga. 725.

An award made by arbitrators appointed in pursuance of a written agreement between two milldam owners to determine whether the lower dam, by causing back water, obstructed the operations of the other mill, and if so, what amount of damages such owner has sustained, and how much the dam should be lowered to prevent the obstruction in future, is void and unenforceable where, although definite and sufficient as to the amount of damages awarded, it is uncertain and indefinite in that part of the award requiring the dam to be taken down so that the quantity of head of water above it shall be reduced 11 inches lower than it was on the particular day the premises were examined. *McDonald v. Bacon*, 4 Ill. 428.

<sup>22</sup> An award of arbitrators on the question of overflowing lands by a milldam, that the owner of the dam pay to the owner of the land a specified sum annually "for each year he keeps his milldam up to a certain point indicated by the arbitrators as a certain stump," includes the right of the dam owner to raise the water to the height so indicated by them. *Sitton v. Cureton*, 72 Ga. 207.

<sup>23</sup>*Atkins v. Witherell*, 142 Mass. 482, 8 N. E. 594.

tion a right to maintain it, the upper owner has a right to elect whether he will take it as permanent and proceed to recover permanent damages, or only as temporary, and gauge his recovery accordingly. In case the structure is permanent, as a railroad embankment or a permanent dam, the landowner has a right to proceed to have permanent damages assessed. The damages to be recovered for the damming back of water depend, not only on the kind of action brought,—that is, whether it is for temporary or permanent damages,—but also upon the character of the nuisance,—whether it is of a permanent nature or only temporary.<sup>1</sup> If it is permanent case the measure of damages is the difference in the value of the property with and without the flowage.<sup>2</sup> This value may be arrived at by allowing the value of the land submerged and the depreciation in the value of the remainder because of the flowage.<sup>3</sup> The value of the land must be ascertained as of the time the obstruction was constructed, and not as of the date of trial.<sup>4</sup> And the damages must be the difference in value immediately before and immediately after the injury, and not the difference in the values at any time before or at any time after that time.<sup>5</sup> The person whose land is injured is not bound to assume that the structure will be a permanent one, and therefore sue for all damages for past and future injury to his land; but he has the right to regard the nuisance as of a transient character, and, instead of bringing one action for the whole injury to the value of his property resulting from the original construction, he may sue for the amount of such injury as he suffers from its continuance.<sup>6</sup> The very fact that it is wrong-

<sup>1</sup>*Arthur v. Grand Trunk R. Co.* 22 Ont. App. Rep. 89.

<sup>2</sup>*St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622; *Kentucky Lumber Co. v. King*, 23 Ky. L. Rep. 1422, 65 S. W. 156; *Ronce v. Shenandoah Pulp Co.* 42 W. Va. 551, 57 Am. St. Rep. 870, 26 S. E. 320; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Missouri, K. & T. R. Co. v. Graham*, 12 Tex. Civ. App. 54, 33 S. W. 576.

<sup>3</sup>*Hall v. Austin*, 20 Tex. Civ. App. 50, 48 S. W. 53.

The measure of damages recoverable by a purchaser of land overflowed by a dam at the time of his purchase, the right to flow which is not acquired until after his purchase, is the value of the land so overflowed and the depreciation in value of his remaining lands by reason thereof, to be assessed as of the time of such purchase, with interest on the amount awarded from that date to the

day of trial. *Pick v. Rubicon Hydraulic Co.* 27 Wis. 433.

<sup>4</sup>*Missouri, K. & T. R. Co. v. Graham*, 12 Tex. Civ. App. 54, 33 S. W. 576.

<sup>5</sup>*Texas Trunk R. Co. v. Elam*, 1 Tex. App. Civ. Cas. (White & W.) § 445, p. 201; *Texas O. R. Co. v. Clifton*, 2 Tex. App. Civ. Cas. (Willson) § 489, p. 433; *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706; *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362.

<sup>6</sup>*Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239; *St. Louis, A. & T. H. R. Co. v. Brown*, 34 Ill. App. 552.

Although an embankment obstructing the flow of a stream is of a permanent nature, a person injured by the overflow is not compelled, or entitled, to recover all damages in one action, where the overflow is not permanent, but occurs annually; and successive actions may be maintained for injuries to crops. The

ful shows that it is temporary, and the injured person has a right to treat it so and recover damages for a temporary injury if he chooses to do so. The lower owner cannot, by erecting the dam, acquire a right in the upper property by merely taking possession of it, unless he is acting under statutory authority, under circumstances justifying an exercise of the power of eminent domain. There is no rule of law which will permit one man to take possession of another's property, and then force him to accept damages in lieu of a right to recover the possession of it. There is a West Virginia case which holds that where the power of a mill owner is destroyed by the wrongful construction of a dam below his mill which backs the water, the damage sustained by him is permanent, and a recovery of damage confers a license on the defendant to continue the cause indefinitely; and, in estimating the damages, the value of the water power of the plaintiff must be taken into consideration, as well as the damage occasioned to the mill by reason of the permanent loss of the power.<sup>7</sup> That rule can hardly be of universal application, because, if the dam is wrongful, it certainly is not permanent, unless the upper owner chooses to treat it so, or unless reasons of public policy require it to be held to be permanent.

**589a. Temporary structure.**—As stated in the preceding section, the injured landowner has a right to treat a structure erected by a private citizen as temporary, notwithstanding its permanent character, and therefore in case he does not elect to treat it as permanent, the measure of damages is not the depreciation of the property, but the loss of rental value down to the time of commencing the action.<sup>1</sup> As stated in *Nashville v. Comar*,<sup>2</sup> where the cause of injury to realty by water may be remedied or removed by the expenditure of labor or money, it will not be regarded as permanent or irremediable, and, in an action to recover for a negligent injury in such case, the measure of damages will be the actual damages sustained at the time of bringing the action, and not the permanent depreciation of the value of the realty in consequence of the injury.<sup>3</sup> In case the temporary obstruction causes permanent injury to the soil, the damages may be estimated for each year of its continuance by ascertaining the differ-

test seems to be, not the permanency of the obstructions, but the permanency and certainties of the injuries inflicted by it. *McKee v. St. Louis, K. & N. W. R. Co.* 49 Mo. App. 174. 387, 21 E. W. 1066; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 513, 22 S. W. 170; *Adams v. Durham & N. R. Co.* 110 N. C. 325, 14 S. E. 857.

<sup>1</sup>*Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740.

<sup>2</sup>88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027.

<sup>3</sup>*Pinney v. Berry*, 61 Mo. 359; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark.

*Cleveland, C. C. & St. L. R. Co. v. Kline*, 29 Ind. App. 390, 63 N. E. 483.

once between the fair market value of the land immediately before and immediately after the injury in each year.<sup>4</sup> The damages in the first action should be only compensatory, but if the wrongdoer refuses to abate his obstruction, he may be compelled to do so by punitive damages in a second action.<sup>5</sup> In addition to the injury to rental value, compensation may be allowed for injuries actually done to the land or to personal property upon it.<sup>6</sup> The damages should be allowed only up to the time of commencing the action, and not to the time of trial.<sup>7</sup> But the recovery may include all damages resulting from wrongful acts done prior to the commencement of the action, although some did not become apparent until after that time.<sup>8</sup> The action is brought when the writ is issued, not when the declaration is filed.<sup>9</sup> In an equitable suit to restrain the continuance of a nuisance created by obstructing the flow of a water course, the court, in assessing damages, is not limited to those inflicted prior to the commencement of the suit, as in an action at law, but may assess those that accrue during the pendency of the suit.<sup>10</sup>

**589b. Damages for injury to crops.**— When one's crop has been destroyed by overflow caused by the improper construction of a railway, the injured party, as far as money can do so, ought to be put in the same condition that he would have been had the tort not been committed.

<sup>4</sup>*Sullens v. Chicago, R. I. & P. R. Co.* 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545.

<sup>5</sup>*McCoy v. Danley*, 20 Pa. 85, 57 Am. Dec. 680.

But an early North Carolina case held that in a second action brought to recover damages for the continuance of a nuisance by flowing plaintiff's land, the damages should be limited to such as have been inflicted since the former action, as successive actions may be brought for future continuances of the nuisance. *Bradley v. Amis*, 3 N. C. (2 Hayw.) 399.

<sup>6</sup>*Gulf, O. & S. F. R. Co. v. Helsley*, 62 Tex. 593; *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223; *Galveston, H. & S. A. R. Co. v. Seymour*, 63 Tex. 347; *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389; *Green v. Taylor, B. & H. R. Co.* 79 Tex. 604, 15 S. W. 685; *Gulf, O. & S. F. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441.

<sup>7</sup>*Jones v. Lavender*, 55 Ga. 228; *Savannah & O. Canal Co. v. Bourquin*, 51 Ga. 378; *Warring v. Martin*, Wright (Ohio) 380; *Brown v. Chicago & A. R. Co.* 80 Mo. 457; *Olose v. Samm*, 27 Iowa, 503; *Oobb v. Smith*, 38 Wis. 21.

Where the obstruction to a stream had been washed away previous to the commencement of an action to recover damages for the obstruction, damages for injury inflicted by rebuilding it during the pendency of the action cannot be recovered, for the reason that where the nuisance is temporary, and has been or may be removed, only such damages as accrued previous to the institution of the action can be assessed. *Hudson v. Burk*, 48 Mo. App. 314.

<sup>8</sup>*Goodrich v. Dorset Marble Co.* 60 Vt. 280, 13 Atl. 636; *Baltimore v. Merryman*, 86 Md. 584, 39 Atl. 98.

The destruction of timber by the maintenance of a dam is a proper element of damages in an action for the injury, although the timber does not in fact die until after the commencement of the action. *Hayden v. Albee*, 20 Minn. 159, Gil. 143.

<sup>9</sup>*Langford v. Owsley*, 2 Ribb. 215, 4 Am. Dec. 699.

<sup>10</sup>*Lamar v. Charlotte & S. C. R. Co.* 10 S. C. N. S. 476.



ted; and interest upon the value of the crop so destroyed, from date of its destruction, is as necessary as the value itself.<sup>1</sup> The measure of damages for the destruction of growing crops is their value in the condition in which they are at the time of the injury.<sup>2</sup> If the seed was not up at the time of injury, the damages must be estimated upon the basis of rental value and cost of seed and labor.<sup>3</sup> Where growing crops are injured by an overflow, the correct criterion for ascertaining the value of such crops at any period of their existence is to prove what the crops were worth at or near the place they were grown when matured, and to make proper estimates and allowances, from ascertained or ascertainable facts, for the contingencies and expenses attending the further cultivation and care of the crops. The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there, will, in most cases, give the value of the growing crop.<sup>4</sup> The jury may take into consideration the fertility of the soil and the character of crops which have been produced by it.<sup>5</sup> The Iowa court has laid down a rule which is different from that generally followed by holding that, in case of injury to growing crops by water thrown upon the land by another's negligence, the measure of damages is the difference between the value of the premises immediately before the overflow and the value of the same immediately thereafter, the growing crops being regarded as part of the realty, and not the estimated value of the

<sup>1</sup>*Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

<sup>2</sup>*Lommelnd v. St. Paul, M. & M. R. Co.* 35 Minn. 412, 29 N. W. 119; *St. Louis Merchants' Bridge Terminal R. Co. v. Pepper*, 84 Ill. App. 116; *Texas & St. L. R. Co. v. Reid*, 1 Tex. App. Civ. Cas. (White & W.) § 255, p. 120; *St. Louis, I. M. & S. R. Co. v. Yarrowborough*, 56 Ark. 613, 20 S. W. 515; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 513, 22 S. W. 170; *Sabine & E. T. R. Co. v. Smith*, 73 Tex. 1, 11 S. W. 123; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535.

In general a proper measure of damages for the loss of growing crops—annual crop of grass—is the value of the same standing on the ground, and not necessarily the rental value of the land. *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 36 N. W. 339.

<sup>3</sup>*Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108.

<sup>4</sup>*Gulf, C. & S. F. R. Co. v. McGoican*, 73 Tex. 355, 11 S. W. 336; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 513, 22 S. W. 170.

The additional amount of cotton which the landowner would have raised but for the overflow, and the value of such cotton when ready for market, without evidence as to the expense of cultivating, gathering, preparing it for and placing it in market, does not show the value of the crop at the time of the injury, and, hence, does not afford the proper means of measuring the landowner's damage. *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526.

The measure of damages for injury occasioned by the overflowing of meadow lands, causing the destruction of hay thereon partly grown, let out on shares, is the net presumed value of the crop less its actual value in its damaged condition, and not the difference between the rental value of the premises had they not been injured and the rental value with the injury. *Folsom v. Apple River Log Driving Co.* 41 Wis. 602.

<sup>5</sup>*Economy Light & P. Co. v. Cutting*, 49 Ill. App. 422; *Chicago, B. & Q. R. Co. v. Schaffner*, 26 Ill. App. 280.

crops destroyed.<sup>6</sup> That rule would seem to be entirely impracticable and not to represent the true measure of damages. For a temporary injury, the measure of damages is not the depreciation of the value of the real estate, but the injury which the owner has received; and this is best arrived at by estimating the value of the property destroyed, as is done in other courts. The measure of damages for the destruction of grass by an overflow is its value at the time destroyed; and when the injury is of such a character as to prevent the growth of the grass, and to deprive the owner of the use of his pasture for a considerable time, he is entitled to damages for the value of the use of the land for the purpose of pasturage in the condition it would have been but for the overflow, there being no permanent injury to the land. Starvation of cattle cannot be added to the value of the use of the pasture during the alleged overflow, as such matters are too remote, and, if allowed, there would be double damages for the same injury; but if exposure to deep water caused injury to and loss of stock, and the overflow was the direct and proximate cause of such injury, and it was the result of the negligence of defendant, and not of the failure of plaintiff to use reasonable care to protect his cattle after or during the overflow, damages are recoverable for such loss.<sup>7</sup> The rule permitting a recovery of the value of crops permits a recovery of the value of fruit trees destroyed.<sup>8</sup> In case of injury merely to crops, it is error for the court to allow the jury to consider the measure of damages for permanent injury to the land.<sup>9</sup> The recovery may be diminished by proof that, even if the injury had not been caused by defendant, the crop would have been destroyed by other agencies for which defendant was not responsible.<sup>10</sup> But what a plaintiff whose crop has been destroyed by an overflow might have made had he planted another crop is too uncertain to base upon it any estimate as to the amount by which his damages should be reduced, although it appears that neighboring landowners raised crops after their first planting had been destroyed by the overflow, but the value of their crops and the expense of raising them is not shown.<sup>11</sup> The destruction of crops planted when the owner knew that they would be flooded and destroyed cannot be included in the damages for

<sup>6</sup>*Drake v. Chicago, R. I. & P. R. Co.* 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. Tex. 389, 215.

<sup>7</sup>*Broussard v. Sabine & E. T. R. Co.* 80 Tex. 329, 16 S. W. 30; *Sabine & E. T. R. Co. v. Broussard*, 69 Tex. 617, 7 S. W. 374; *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

<sup>8</sup>*Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

<sup>9</sup>*Gulf, C. & S. F. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441.

<sup>10</sup>*St. Louis, I. M. & S. R. Co. v. Yerrington*, 56 Ark. 613, 20 S. W. 515.

<sup>11</sup>*Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

flooding the land, although the rental value of the land flooded and the permanent injury thereof may be recovered.<sup>12</sup> In case of failure to comply with a covenant to remove the water in time to permit the making of a crop, nominal damages may be awarded in vindication of the right, although no actual damage is sustained.<sup>13</sup>

**589c. Injury to mill privilege.**— The damages suffered by a mill privilege subjected to flowage is the amount of deterioration in value which it has suffered therefrom.<sup>1</sup> The measure of damage is not the loss occasioned by the stoppage of the mill, but only such damage as would have been occasioned by the back flowage had the upper owner supplemented his water power by steam, or in some other way continued the operation of his mill.<sup>2</sup> The damages must represent the real injury to the mill owner. If there is permanent injury to the mill property, he may recover compensation for time lost, and, in addition, whatever injury he has been caused by the stoppage of the mill. But he cannot recover speculative profits which he might have made by the operation of the mill.<sup>3</sup> Damages for injury to property not connected with the mill cannot be included in the recovery as part of the damages.<sup>4</sup> The court will not set aside a verdict in plaintiff's favor for injuries by the backing of water on his mill wheels as excessive unless it can see that the jury fell into some important mistake of computation, or departed from some rule of law given them for their guidance, or made deductions from the evidence not warranted by it.<sup>5</sup> In a common-law action in Wisconsin by an upper mill owner for damages caused by the back water from a lower mill, recovery can be had only for damages to the mill site, if any, and not for the mere flowage of the lands, since the passage of the milldam law taking away the common-law action for damages to lands flowed.<sup>6</sup>

**589d. Measure of damages generally.**— To entitle the owner of land to recover more than nominal damages in an action for injury there-to from the back water of a mill pond, he must prove to the satisfaction of the jury that the water did flow back upon his land, that it was caused by the wrongful act of defendant, and that he had suffered some injury therefrom prior to the institution of the suit.<sup>1</sup>

<sup>12</sup>*Willkitts v. Chicago, B. & K. C. R. Co.* 88 Iowa, 281, 21 L. R. A. 608, 55 N. W. 313.

<sup>13</sup>*Green v. Weaver*, 63 Ga. 302.

<sup>1</sup>*Woodward v. Webb*, 65 Pa. 254; *Burnett v. Nicholson*, 86 N. C. 99; *Walrath v. Redfield*, 11 Barb. 368.

<sup>2</sup>*Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

<sup>3</sup>*Schuykill Nav. Co. v. Freedley*, 6 Whart. 109.

<sup>4</sup>*Schuykill Nav. Co. v. Farr*, 4 Watts & S. 362.

<sup>5</sup>*Palmer v. Fiske*, 2 Curt. C. C. 14, Fed. Cas. No. 10,691.

<sup>6</sup>*Large v. Orvis*, 20 Wis. 696.

<sup>1</sup>*Leucin v. Simpson*, 38 Md. 468; *St. Louis, A. & T. R. Co. v. Graham*, 55 Ark. 294, 18 S. W. 56.

Where a pasture and garden are temporarily destroyed, the measure of damages is the rental value of the land.<sup>3</sup> And if, in addition to the injury to crops, the land is covered with *débris*, the value of the crops may be added to the diminished value of the land, to be computed as of the time immediately before and immediately after the injury.<sup>3</sup> And in case land is destroyed or injured by the overflow, the measure of damages is the difference in the market value of the tract immediately before and immediately after the injury.<sup>4</sup> In determining the value of the property destroyed, its productive capacity may be taken into account.<sup>5</sup> In a North Carolina case it was held that the measure of damages was not the diminished rental value, but the loss of the net profits from the property.<sup>6</sup> There is no doubt that in determining rental value the loss of the net profits could be taken into consideration, and might, in some instances, furnish a very accurate index of the diminished value; but under most circumstances the diminished rental value is a much more easily ascertained and certain measure of damages than the loss of net profits, because such profit would depend so much upon the use to which the property was put that it would be speculative in every case, and in some cases there would be nothing but opinion evidence upon which to base it. The measure of damages for injury to a tenant for a year, only, of land flooded by the obstruction of a stream is not the rental value of the land flooded, but should be confined to the value of the crops destroyed.<sup>7</sup> If a railway company, by the negligent construction of its roadbed, overflows land, and the overflow proximately causes the drowning of cattle, the owner is entitled to recover their value, irrespective of the question as to whether they were drowned on his own land.<sup>8</sup>

**589e. Rules for estimating damages.**—In an action for flowing land, by one in possession under claim of title, he is entitled, *prima facie*, to compensation for the whole damage done to the property; but it may be shown what his interest really is for the purpose of reducing

<sup>3</sup>*Barrows v. Fox*, 39 Minn. 61, 38 N. W. 777. *Baltimore v. Merryman*, 86 Md. 584, 39 Atl. 98; *Texas & P. R. Co. v. O'Mahoney*, 24 Tex. Civ. App. 631, 60 S. W. 902.

<sup>4</sup>*Fremont, E. & M. Valley R. Co. v. Harlin*, 50 Neb. 698, 36 L. R. A. 417, 61 Am. St. Rep. 578, 70 N. W. 263; *Chase v. New York O. R. Co.* 24 Barb. 273; *Galveston H. & S. A. R. Co. v. Bibb*, 3 Tex. App. Civ. Cas. (Willson) § 271, p. 330; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540.

<sup>5</sup>*Hueston v. Mississippi & R. River Boom Co.* 76 Minn. 251, 79 N. W. 92; *Tex. 389.*

<sup>6</sup>*McKee v. St. Louis, K. & N. W. R. Co.* 49 Mo. App. 174.

<sup>7</sup>*Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

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his recovery to his actual damages.<sup>1</sup> The jury may consider any benefit that was caused by the overflow.<sup>2</sup> And the condition of the land without the flowage must be considered.<sup>3</sup> But what defendant paid a few years before for flowing other land in the vicinity cannot be considered.<sup>4</sup> Damages cannot be recovered by reason of less drift wood coming to the shore of a riparian owner, when the only loss is the possible chance of the claimants taking what does not belong to them.<sup>5</sup> The jury are not confined to a consideration of the possible uses of the land in its condition at the time of the injury, but the possibility of its change to a more profitable use had not the injury been done may be taken into account.<sup>6</sup> In case the flood forces a change of pasture for stock, the additional expense caused by the change may be allowed.<sup>7</sup> The depreciation in market value of the property is to be ascertained by a comparison of the value immediately before and immediately after the injury.<sup>8</sup> The full value of the property cannot be allowed where the owner is not deprived of its use.<sup>9</sup> If water is cast into the cellar of a house, the damages may include injury to the building from dampness and diminished rents.<sup>10</sup> The cost of repairing the house may be recovered, but not its value, because of destruction by a storm some time after the injury on the ground that the weakened condition of its foundations prevented its withstanding the fury of the storm.<sup>11</sup> Injury to land caused by seepage may be considered.<sup>12</sup> An owner of land bordering on a stream, whose title extends to high-water mark is, in case of the erection of a dam by a lower proprietor, entitled to recover for the injury to the land flowed thereby above the point where the stream impresses itself upon the soil for sufficient periods to deprive it of vegetation and destroy its value for agriculture, and not merely above the highest point that the water reached in times of freshet.<sup>13</sup>

**589f. Profits and interest.**— In considering the measure of damages for injury to a mill privilege, it has been seen <sup>1</sup> that speculative profits cannot be allowed. But if a mill has actually been stopped by the wrongful flowing back of water upon its wheel, the loss of the actual and bona fide profit which would have resulted from the operation

<sup>1</sup>*Bassett v. Salisbury Mfg. Co.* 28 N. H. 455.

<sup>2</sup>*Arroy v. Van Deusen*, 5 Pick. 182.

<sup>3</sup>*Bates v. Ray*, 102 Mass. 458.

<sup>4</sup>*Kelliher v. Miller*, 97 Mass. 71.

<sup>5</sup>*Barrett v. Bangor*, 70 Me. 335.

<sup>6</sup>*Ellington v. Bennett*, 59 Ga. 286;

<sup>7</sup>*Marsh v. Trullinger*, 6 Or. 356.

<sup>8</sup>*Hughes v. Austin*, 12 Tex. Civ. App. 178, 33 S. W. 607.

<sup>9</sup>*Sterling Hydraulic Co. v. Galt*, 81 Ill. App. 600.

<sup>10</sup>*Bailey v. Heintz*, 71 Ill. App. 189.

<sup>11</sup>*Willey v. Hunter*, 57 Vt. 479.

<sup>12</sup>*Galveston, H. & S. A. R. Co. v. Ware*, 67 Tex. 635, 4 S. W. 13.

<sup>13</sup>*Marsh v. Trullinger*, 6 Or. 356.

<sup>14</sup>*Dow v. Electric Co.* 69 N. H. 498, 76: Am. St. Rep. 189, 45 Atl. 350.

<sup>1</sup> See *ante* § 589c.

of the mill is the most certain measure of damages that exists, and it may be adopted.<sup>2</sup> But where the profits would not have belonged to the one who brings the action, they cannot be made the measure of damage.<sup>3</sup> The measure of damages to farm land wrongfully overflowed so as to prevent its cultivation is the fair rental value thereof, and not the possible, or even probable, profits that might have been made had not the land been overflowed.<sup>4</sup> Interest will not be allowed in computing unliquidated damages for flowing land.<sup>5</sup>

**589g. Costs and expenses.**—The expense of conducting the suit to establish the right of the complainant is not a proper element of the damage to be allowed.<sup>1</sup> But the question of allowance of costs may be modified by statute, which may allow the cost of establishing the right as part of the damage, or deny all recovery of costs, at the pleasure of the legislature.<sup>2</sup> The question of title is not in issue in an action for flowing lands by a milldam, which defendant claims the right to do under a license which plaintiff claims was subsequently

<sup>2</sup>*Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *National Fibre Board Co. v. Lewiston & A. Electric Light Co.* 95 Me. 318, 49 Atl. 1075; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

<sup>3</sup>Where a lower riparian owner wrongfully raises his dam, and thereby flows the mill on another's privilege, he will only be liable for damage to the property, and not for lost profits, in an action brought by the owner of the mill which was operated by such owner and his cotenants. *Pimpton v. Gardiner*, 64 Me. 360.

<sup>4</sup>*Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626.

<sup>5</sup>*Contra, Spilman v. Roanoke Nav. Co.* 74 N. C. 675.

<sup>1</sup>*Lamar v. Charlotte & S. C. R. Co.* 10 S. C. N. S. 476.

But, in an action against a railroad company to recover damages to crops by an overflow of lands which resulted from the negligent construction of defendant's embankment, the plaintiff may recover the interest on the value of the crops. *Gulf, C. & S. F. R. Co. v. Dunlap* (Tex. Civ. App.) 26 S. W. 655.

<sup>2</sup>*Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493.

<sup>3</sup>An action for damages for injury to mill property by back water from the waters of a milldam erected by another below is one for damages solely, not arising out of a contract, within the meaning

of a statute providing that "in all actions for damages solely, not arising out of contract" recovery over a certain amount carries full cost. *Sutherland v. Venard*, 32 Ind. 483.

Where an exception to the general law that costs follow the event of a suit is made by an act of legislature, providing that in suits for damages for the overflowing of water from the erection of a grist mill or other waterworks of utility the plaintiff shall recover no greater sum in costs than is awarded in damages, it must appear in the record of a case that it falls within that exception, otherwise the general law will apply. *Gray v. Tate*, 11 Humph. 64; *McReynolds v. Cates*, 7 Humph. 29.

Where the damages awarded for overflowage of lands, caused by the erection and maintenance of a milldam or other waterworks, is less than \$5, a proviso, in an act of the legislature allowing the successful party in such actions full cost, to the effect that if the judgment for damages does not exceed \$5 the plaintiff shall not recover more costs than damages, but no provision being made as to the residue of costs in such cases, will be construed as rendering each party liable for his own proper costs, except so much thereof as equals the damages recovered, to which the plaintiff would be entitled. *Gardenhire v. McCombs*, 1 Sneed, 83.

revoked, within the meaning of a statute giving full costs in cases where the title is in issue.<sup>3</sup>

**590. Suits by property owner.**— The owner of land to which a water course is appurtenant may always maintain an action to recover damages for injuries to the freehold by the backing of water thereon, whether he is in possession or not. And the size of the tract owned by plaintiff is immaterial,<sup>1</sup> as is also the fact that he does not own the land under the water, if the water is raised upon his property.<sup>2</sup> An owner who has leased the land for a share of the crop may maintain an action for injury to his share.<sup>3</sup> But he can recover only for the injury to such interest.<sup>4</sup> And the landlord cannot recover for injury to the crop if it belongs to the tenant, who has paid his rent.<sup>5</sup> The owner of land cannot recover from a railroad company for the destruction of crops from overflow caused by an obstruction by the company of a natural water way, where such land is leased to a tenant, the rent to be paid out of the proceeds of the crops after they have been marketed by the tenant, although the effect may be to deprive such owner of his rent.<sup>6</sup> The owner of the reversion may recover the damages for injury to the freehold.<sup>7</sup> And he may recover for injury to the rental value if the rent has been reduced because of the injury.<sup>8</sup> But if the life tenant permits the erection of the dam, the remainderman, by taking advantage of it, will estop himself from denying the validity of the structure.<sup>9</sup> A tenant in common of land, who cultivates it under an agreement with others in interest that he is to be the sole owner of the crops, is entitled to maintain an action against the owner

<sup>1</sup>*Otis v. Hall*, 3 Johns. 450.

<sup>2</sup>*Watson v. Bioren*, 1 Serg. & R. 227, 7 Am. Dec. 617.

<sup>3</sup>The owner of land bordering on a great pond is injured by the maintenance of a dam which raises the water above its natural level on his property, and a sluiceway which draws it below its natural level so as to cut him off from access to the pond, by reason of which he suffers particular injury. *Potter v. Howe*, 141 Mass. 357, 6 N. E. 233.

Whether the riparian rights of an owner of land on a river extend only to the thread of the stream, or to the opposite bank, he is entitled to maintain trespass against a water-lot company for damages done by the overflowing of his water wheels by the erection and raising of a dam below. *Jones v. Water Lot Co.* 18 Ga. 539.

<sup>4</sup>*Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914.

<sup>5</sup>*Texas & P. R. Co. v. Saunders*, 4 Tex. App. Civ. Cas. (Willson) § 304, p. 528, 18 S. W. 793.

<sup>6</sup>*St. Louis, A. & T. R. Co. v. Trigg*, 63 Ark. 536, 40 S. W. 579.

<sup>7</sup>*Ohio & M. R. Co. v. Hoeltman*, 34 Ill. App. 429.

<sup>8</sup>*Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Potts v. Clarke*, 20 N. J. L. 536.

A reversioner may maintain an action for the throwing back of water upon his freehold by a dam, although there is no immediate and visible injury. *Ripka v. Sergeant*, 7 Watts & S. 11, 42 Am. Dec. 214.

<sup>9</sup>*Sumner v. Tileston*, 7 Pick. 198; *Baker v. Sanderson*, 3 Pick. 348.

<sup>10</sup>*Townes v. Augusta*, 46 S. C. 15, 23 S. E. 984.

of a dam which set the water back upon the land to the injury of the crops.<sup>10</sup> If one tenant in common erects a dam on his separate estate so as to flow the water back on the common property, the cotenant may recover for the injury.<sup>11</sup> That the owner of land flowed by a milldam owns a part interest in the dam will not prevent his maintaining an action in his own name against his cotenant to determine the extent of the flowage right.<sup>12</sup> A tenant in common of a pond and milldam may recover damages from a cotenant for the flowing of his land whereby he lost the use of it, where the injury was due to the cotenant's management of the dam, of which he assumed full control.<sup>13</sup> The recovery by one of two tenants in common of damages for flowage from an unlawfully erected dam, after judgment will stand as a recovery for both tenants, and the existence of the nuisance will be *res judicata*.<sup>14</sup>

**591. Suit by one in possession.**— Actual possession of property is sufficient to enable one to recover for injury to it by backwater from a dam.<sup>1</sup> He may recover such damages as will indemnify him for the injury to his interest, though he has not the title to the freehold.<sup>2</sup> Recovery for injury to the possession may be had by the one in possession, and, for injury to the freehold, by its owner.<sup>3</sup> The wrong-

<sup>10</sup>*Thorn v. Maurer*, 85 Mich. 509, 48 N. W. 640.

<sup>11</sup>*Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387.

<sup>12</sup>*Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645.

<sup>13</sup>*Griffin v. Bartlett*, 55 N. H. 119.

<sup>14</sup>*Fell v. Bennett*, 110 Pa. 181, 5 Atl. 17.

<sup>1</sup>*Large v. Dennis*, 5 Sneed, 595; *Branch v. Doane*, 18 Conn. 233; *Barber v. Barber*, 21 Ind. 468; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Yeargain v. Johnston*, 1 N. C. (Taylor) 80, 1 Am. Dec. 581; *Norris v. Glenn*, 1 Idaho, 590; *Boyington v. Squires*, 71 Wis. 276, 37 N. W. 227; *Kimbrall v. Walker*, 7 Rich. L. 422; *King v. Tarlton*, 2 Harr. & M'H. 473.

If plaintiff is allowed to testify to his purchase and ownership of the land without objection, this will be sufficient evidence of title in him to maintain the action, and will extend to, and embrace, the whole tract, although not actually in his possession, where there is no adverse possession. *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370.

The owner of a lower mill is liable if, without authority, he sets the water back into another's tailrace, although on the land of a third party, and the

right under which it is located there is immaterial as to that liability. *Graver v. Sholl*, 42 Pa. 58.

In an action for damages for injuries caused to a spring and ford by backwater from a dam erected below, it is not necessary to show title to the lands injured,—actual possession is enough; and such possession need not be by inclosure, but a claim of ownership running back a number of years, coupled with a use for the ordinary purposes by his family and hands, is sufficient. *Allen v. McCorkle*, 3 Head, 181.

A person who is not a riparian proprietor, but who has acquired the right to use the water for propelling a mill, although he may not have acquired the right from the intermediate riparian owners to divert the water from a stream to his mill race, and as to them is a wrongdoer, may maintain an action in case a lower proprietor backs the water upon his tailrace. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

<sup>2</sup>*Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

<sup>3</sup>*Warring v. Martin*, Wright (Ohio) 380.

Where a mill owner has only the right of using a reservoir and dam, he can re-



doer cannot question the title of the plaintiff for the purpose of defeating the action.<sup>4</sup> But mere possession of a mining claim is not sufficient to sustain an action for casting water back upon it.<sup>5</sup> The ownership of a homestead is sufficient ground to maintain an action for flooding the property to the injury of health.<sup>6</sup> Mere possession will not, however, sustain an action of trespass.<sup>7</sup> One in possession cannot maintain an action for injuries to the freehold if he shows that the legal title is in another.<sup>8</sup> But one in possession of land under conditions in a bond may maintain an action for injuries to the soil by flowage caused by the stoppage of a river, due to an accumulation of logs and ice, through the negligence of the owner of the logs.<sup>9</sup> The fact that plaintiff's right to use the water of a stream is limited to such times as it may run over his grantor's dam above does not deprive him of a right of action against a lower proprietor who, by raising his dam, sets back the water upon the plaintiff's works, as such act was the exercise of a claim which, if continued for a sufficient length of time, would confer on the defendant a prescriptive right.<sup>10</sup> The possession by plaintiff of the tract of land of which that flowed by defendant was a part is sufficient possession of the land flowed to entitle him to maintain an action against defendant for such flowage, as defendant's possession arising from flooding the land did not affect the title to it, but was a mere easement.<sup>11</sup> One who builds a mill and a dam on a navigable stream under statutory permission is entitled to all the protection in its use which the law would give him if his works had been erected on a stream not navigable. An inferior proprietor has no more right to back the water on his wheel in the one case than in the other.<sup>12</sup> The one in possession cannot complain

cover, in case a lower riparian owner erects a dam which interferes with his, only for the injury to his easement. *Robertson v. Woodworth*, 42 Conn. 163.

<sup>4</sup>*Bassett v. Salisbury Mfg. Co.* 28 N. H. 455; *Hendrick v. Johnson*, 5 Port. (Ala.) 208.

In an action to restrain the erection of a dam of a height likely to cause the water to flow back on plaintiff's mill and dam constructed under an order of the court made pursuant to statute, it is not a proper defense that plaintiff's title to the land on which the mill was erected is defective, in the absence of an adverse claimant to such land. *Arnold v. Klepper*, 24 Mo. 273.

<sup>5</sup>*Stone v. Bumpus*, 46 Cal. 218.

<sup>6</sup>*Treat v. Bates*, 27 Mich. 390.

The surviving widow, as the head of a family, is entitled, during her lifetime,

to the exclusive possession and enjoyment of the homestead, and may maintain, in her own name and right, an action to recover for damages to such homestead or the crops growing thereon by an overflow; and although there may be surviving children of the deceased, they are not necessary parties plaintiff to such suit. *Gulf, C. & S. F. R. Co. v. Jones*, 3 Tex. App. Civ. Cas. (Willson) § 13, n. 33; *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 592.

<sup>7</sup>*Millard v. Reeves*, 1 Mich. 107.

<sup>8</sup>*Morris v. McCamey*, 9 Ga. 160.

<sup>9</sup>*George v. Fisk*, 32 N. H. 32; *Hough v. Patrick*, 26 Vt. 435.

<sup>10</sup>*Branch v. Doane*, 18 Conn. 233.

<sup>11</sup>*Mims v. Weathersbee*, 2 Strobb. L. 184.

<sup>12</sup>*Bigler v. Antes*, 21 Pa. 288.

And the mere fact that a milldam

of the acts of one against whom the possession is wrongful.<sup>13</sup> A person who owns only to the center of the stream, and has acquired no right to extend his dam to the opposite shore, which belongs to a lower mill owner, cannot maintain an action against the latter for flowing back the water in the stream so as to interfere with his dam.<sup>14</sup>

**591a. Tenant; licensee.**—A tenant is as much entitled to recover the flowage damages done to his interest in the land during his tenancy as though he were a freeholder.<sup>1</sup> Therefore, where he owns the crops he may recover for their destruction.<sup>2</sup> And he is not prevented from recovering because he obtained his lease after the obstruction was finished, and entered into possession with knowledge of the defective structure.<sup>3</sup> A tenant for years may maintain trespass for injury to the property.<sup>4</sup> A life tenant has such an interest that he may main-

erected in a river which is a public highway for floating rafts of logs and boards is a nuisance will not justify a mill owner in constructing a dam lower down, which will cover up the first one with water. *Odiorn v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387.

So, where a railroad company has constructed an embankment with insufficient culverts, and the buildings of a mill owner are injured from backwater because of the defective culvert, it is no defense, in an action against the company, that the buildings of the plaintiff, by reason of inaccurate measurement in laying off the city, encroach 5 or 6 feet on the street, where it appears that the location of the buildings in the street did not contribute to the injury. *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

The failure of the New York Central & Hudson River Railway Company to obtain the permission of the canal commissioners to the construction of its road across the Black river does not prevent it from recovering for damages to its embankment due to the setting back of water by a canal storage dam across such river, since the act of 1834, chap. 276, § 17, requiring such permission before a railroad can be built within 10 rods of any canal or feeder, applied only to a specified corporation created by that act. *New York C. & H. R. R. Co. v. State*, 37 App. Div. 57, 55 N. Y. Supp. 685.

<sup>13</sup>*Jewell v. Gardiner*, 12 Mass. 311.

One who constructed a mill race without authority over lands owned by the government, and as a mere trespasser, may not have the obstruction of the race by a purchaser from the government enjoined, where no right has arisen by prescription, although there may have been acquiescence therein for a long time. *Sherwood v. Vliet*, 20 Wis. 441.

<sup>14</sup>*Jewell v. Gardiner*, 12 Mass. 311.

<sup>1</sup>*Ellice Twp. v. Hiles*, 23 Can. S. C. 429.

<sup>2</sup>*Gulf, O. & S. F. R. Co. v. Jones*, 3 Tex. App. Civ. Cas. (Willson) § 13, p. 33.

<sup>3</sup>*St. Louis, A. & T. H. R. Co. v. Brown*, 34 Ill. App. 552.

Unless the injuries, as originally inflicted by the obstruction, were so permanent in their character that they went to the entire value of the estate, entitling the owner of the freehold to maintain an action for all such damages before the tenant leased the land. *McKee v. St. Louis, K. & N. W. R. Co.* 49 Mo. App. 174.

But a railroad company is not liable to a mere tenant of land, who voluntarily occupied it subject, as it was, to the danger of overflow, for an injury to his crops and personal property from flooding growing out of the defective construction by the company of its embankments, culverts, and reservoirs. *Chicago & A. R. Co. v. Smith*, 17 Ill. App. 58.

<sup>4</sup>*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

tain an action for injury to the property.<sup>5</sup> Where a parol contract for a life tenancy in land is made, but is taken out of the statute of frauds by part performance, the contract transfers a sufficient title on which the life tenant may base an action at law against a stranger to recover damages for an injury to the estate from an overflow.<sup>6</sup> A mere license to graze cattle upon the land of another confers no such right in the lands as to entitle the owner of the cattle to recover damages for an injury done to the lands by an overflow, or the cost of obtaining new pastures and driving the cattle to them.<sup>7</sup> Where a mill owner has only the right of using a reservoir and dam, he can recover in case a lower riparian owner erects a dam which interferes with his, only for the injury to his easement.<sup>8</sup>

**592. Suit by grantee.**—The general principle by which the question of the right of a grantee to maintain a suit is solved is found in the character of the obstruction. If it is of a permanent nature, and one which the one constructing it may obtain the right to maintain, then the cause of action is complete when the structure is, and the grantee cannot maintain an action. On the other hand, if the obstruction is a nuisance, which the one constructing it has obtained no right to maintain, then the grantee has a right of action for the injuries inflicted on him. If the injury was permanent at the time of the completion of the structure the owner at that time has a cause of action which is not assignable and does not pass to the grantee.<sup>1</sup> The rights of the grantee are established by the relations which exist between his grantor and the one maintaining the obstruction at the time he obtains his title.<sup>2</sup> When, however, the one maintaining the obstruction has obtained no permanent right to do so and his act is wrongful, as

<sup>5</sup> A devisee of land to be held for the maintenance of herself and her children with absolute control over it during her life, but in trust that if any shall remain at her death it will be divided among her children, may maintain an action in her own name for injury to the land by flowage. *Howe v. Ray*, 110 Mass. 298.

<sup>6</sup> *St. Louis, A. & T. R. Co. v. Graham*, 55 Ark. 294, 18 S. W. 56.

<sup>7</sup> *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389.

<sup>8</sup> *Robertson v. Woodworth*, 42 Conn. 163.

<sup>1</sup> *Chicago & A. R. Co. v. Calkins*, 17 Ill. App. 55; *Zimmerman v. Union Canal Co.* 1 Watts & S. 346; *Chicago & A. R. Co. v. Henneberry*, 28 Ill. App. 110.

<sup>2</sup> A grantee can only take his meadows subject to the servitude of flowage,

when the grantor has already deeded a mill and appurtenant rights of flowage on said meadows to a prior grantee, and he cannot recover flowage damages from the owner of said privilege for flowage to which his land was subject under the prior grant. *Butler v. Huse*, 63 Me. 447.

A purchaser of land from the state after the erection of dams and embankments thereon in aid of navigation take subject thereto, and have no right to interfere therewith on the ground that no compensation has been made therefor, where, under its charter, which provides for compensation for the taking of lands of private owners, but makes no provision as to state lands, it has the implied right to take state lands for such purpose without compensation. *Black River Improv. Co. v. LaCross Boom & Transp.*

well against the grantee as against the grantor, the grantee may maintain an action for the injury accruing after he comes into possession.<sup>3</sup> Or he may obtain relief by injunction in a court of equity.<sup>4</sup> Therefore, a grantee of land upon which a railroad is improperly constructed, maintained, or operated, so as to cause such land to be overflowed, is not barred from a recovery for injury to his crops thereby, although he purchased with full knowledge of the liability to overflow, and the railroad company acquired its right of way over such land by condemnation proceedings, and had paid his grantor the damages awarded him.<sup>5</sup> The fact that a landowner did not purchase the land until after a railroad was built does not defeat his right of action against such company for injury to personal property thereon from flooding caused by the wrongful manner in which the railroad embankment and culvert were built.<sup>6</sup> The mere fact that the flowage of land by a dam, constituting a nuisance, existed at the time of the purchase thereof, creates no presumption that the purchaser took sub-

Co. 54 Wis. 659, 41 Am. Rep. 60, 11 N. W. 443.

A writing not under seal by the owner of land, purporting to convey the right to flow it and to release all claims for damages therefrom, does not bind the land, nor estop a subsequent grantee to recover the future damages for flowage. *Cobb v. Fisher*, 121 Mass. 169.

But the purchaser of part of lands from one who has previously granted another part thereof on which a milldam is located may recover for damages caused by an increased flowage thereof subsequent to his purchase. *Sabine v. Johnson*, 35 Wis. 185.

And the purchase of land covered by a mill pond under a chain of title giving the mill owner the right to maintain the pond will not prevent the purchaser from objecting to it as a nuisance to other property owned by him in the vicinity. *Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397.

<sup>3</sup>*Beauwick v. Cunden*, Cro. Eliz. pt. 1, p. 402; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38, 7 So. 212; *Newell v. Smith*, 15 Wis. 102; *Toumes v. Augusta*, 52 S. C. 396, 29 S. E. 861.

A riparian owner, whose land is overflowed because of the presence of a negligently constructed railway bridge in the river, may recover for the injury, although the bridge was built when his grantor owned the property. *Omaha & R. Valley R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183.

<sup>4</sup>*McNab v. Taylor*, 34 U. C. Q. B. 524.

<sup>5</sup>*Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589; *Ohio & M. R. Co. v. Singletary*, 34 Ill. App. 425.

The damages to a landowner from overflow, arising from the improper and unskillful manner in which a railroad is constructed, are continuing damages, which the grantee of the land may recover against a railroad company for continuing the improperly constructed embankment after such grantee acquired title. *Cleveland, O. C. & St. L. R. Co. v. Nuttall*, 59 Ill. App. 639.

A subsequent grantee of land may maintain an action for damages for overflow occurring after his purchase during a freshet, caused by the negligent manner in which a railroad bridge was constructed, prior to his purchase, over a natural stream flowing through the land, although the right of recovery for damages naturally and proximately resulting from a proper construction and operation of the road accrued to the then owner of the land at the time the bridge was erected, and does not pass to a subsequent grantee; since the cause of action for such injuries accrued only at the time of the overflow, and not when the bridge was constructed, and they are not such as could be recovered for by the former owner. *Sherlock v. Louisville, N. A. & O. R. Co.* 115 Ind. 22, 17 N. E. 171.

<sup>6</sup>*Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415.

founded on tort, and, in the absence of statutory enactment, abate by the death of the plaintiffs, and cannot be revived in the name of the executor or administrator; and a statute providing that no species of action for personal injuries, with certain exceptions, shall cease or die with the person, does not apply to actions of this character founded on injuries to the freehold.<sup>1</sup> So, the executor cannot maintain an action for breach of an agreement between his testator and a third person that the third person would not flood testator's lands, where testator had devised the lands to his grandchildren, and the injury had occurred after his death.<sup>2</sup>

**594. Joinder of parties plaintiff.**—In a complaint for flowing land owned by tenants in common, by means of a milldam, all the cotenants must join.<sup>1</sup> And the several owners of land along a stream or lake who are similarly affected by the raising of the water in it may join in an action to abate the nuisance.<sup>2</sup> But a joint suit cannot be maintained for injuries to lands in which the parties plaintiff have no joint interest.<sup>3</sup> One having an equitable interest in property injured by flowage may join the holder of the fee in a suit therefor.<sup>4</sup> A misjoinder of parties in uniting several persons as complainants in the same action, who are owners of different tracts of land affected by a dam, cannot be raised by a demurrer for misjoinder of causes of action.<sup>5</sup>

**595. Contributory negligence as a defense.**—A riparian owner is not bound to take active measures to relieve his land of the effect of a flood cast upon it by a lower owner.<sup>1</sup> But he cannot permit personal property to remain where he has strong reason to believe that it will be injured, and then recover for the injury.<sup>2</sup> The landowner is not,

<sup>1</sup>*Kennedy v. M'Affee*, 1 Litt. (Ky.) 169; *Chalk v. McAilly*, 10 Rich. L. 92; *Forist v. Androscoggin River Improv. Co.* 52 N. H. 477.

<sup>2</sup>*Webb v. Bennett's Branch Improv. Co.* 161 Pa. 623, 29 Atl. 260.

<sup>3</sup>*Tucker v. Campbell*, 36 Me. 346.

<sup>4</sup>*Gillespie v. Forrest*, 18 Hun. 110; *Grant v. Schmidt*, 22 Minn. 1; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890.

<sup>5</sup>*Palmer v. Waddell*, 22 Kan. 352; *Hellams v. Switzer*, 24 S. C. 39.

<sup>1</sup>*Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362.

<sup>2</sup>*Hellams v. Switzer*, 24 S. C. 39.

<sup>3</sup>The raising of a dam, causing the overflow of land, is an invasion of the landowner's rights by a positive act of the proprietor of the dam, and not a case of negligence requiring the landowner to

exercise due care to avoid the consequences thereof in order to entitle him to recover. *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885; *Williamson v. Yingling*, 80 Ind. 379.

Damages for injuries caused by the obstruction of a ditch cannot be mitigated by the fact that plaintiff might have gone upon defendant's land and removed the obstruction, and thereby lessened the injury. *White v. Chapin*, 102 Mass. 138.

<sup>4</sup>*Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L. R. A. 332, 14 S. E. 352.

In determining the liability of a railway company for the flooding of a mill and destruction of a lumber yard caused by the insufficiency of a culvert and the giving way of an embankment after severe storms, the fact may be considered that the mill was constructed and the

however, compelled to leave his land vacant or without employment, and cannot be held guilty of contributory negligence merely because he plants crops on land which is subject to occasional overflow.<sup>3</sup> While it is the duty of one whose land is wrongfully flowed to use ordinary and reasonable care to prevent an injury and the consequences of it, when the tortfeasor relies upon such failure he must show such facts as would constitute a complete defense.<sup>4</sup> That plaintiff in an action for damages to land by the flooding thereof by water by reason of the insufficiency of a culvert in a railroad embankment contributed to his damage through failure to clean out a ditch thereon will not prevent a recovery for such damage as resulted independently of his act.<sup>5</sup> The landowner need not take precautions to protect his land from erosion due to the raising of the level of the water.<sup>6</sup> But when for drainage purposes a party has dug a ditch which in extreme high water causes waters penned up and held by the dam of a boom company to flow over his land to his injury, the doctrine of "avoidable consequences" is applicable when estimating damages. Consequences of an injury which one can avoid by acting as prudent men ordinarily act are not to be considered, for it is optional with him to suffer or avoid them.<sup>7</sup> A mere want of reasonable care by owners of mining claims to prevent injury thereto from overflow by the water accumulated by a dam below does not impair their right to recover damages occasioned thereby.<sup>8</sup> In an action against a railroad company to recover damages for the flooding of land, alleged by the plaintiff to have been caused by

lumber yard placed in such position that injury must result if the culvert and embankment were insufficient. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 441.

<sup>3</sup>*Knight v. Albemarle & R. R. Co.* 111 N. C. 80, 15 S. E. 929. The court says this rule is not inconsistent with that in *Emry's Case*, 109 N. C. 589, 15 L. R. A. 332, 14 S. E. 352, as the manufacture of brick is exceptional, and in that case it did not appear that the work could not have been conveniently and profitably conducted on higher lands.

The owner of a pasture rendered dangerous for the use of his stock by partial flooding is not required to cease to use it in order to avoid damage to his stock, but can continue to use it, exercising diligence such as a man of ordinary prudence would adopt to prevent increase of the damages; and he can recover of the wrongdoer the value of the stock lost in using the premises, by reason of his trespass, and also the expense

of reasonable efforts to prevent damage, including the cost of healing animals injured, and the cost of guarding the stock from danger, conveying them to a place of safety, and returning them when danger had ceased. *Hughes v. Austin*, 12 Tex. Civ. App. 178, 33 S. W. 607.

A riparian owner may recover damages arising from the building of a dam, the flowage from which destroyed his hay which was left as was customary on his meadow land, no lack of care to secure the hay being shown. *Reynolds v. Chandler River Co.* 43 Me. 513.

<sup>4</sup>*Texas & P. R. Co. v. O'Mahoney*, 24 Tex. Civ. App. 631, 60 S. W. 902.

<sup>5</sup>*Georgia R. & Bkg. Co. v. Berry*, 78 Ga. 744, 4 S. E. 10.

<sup>6</sup>*Oldenburg v. Oregon Sugar Co.* 39 Or. 564, 65 Pac. 860.

<sup>7</sup>*Gniadck v. Northwestern Improv. & Boom Co.* 73 Minn. 87, 75 N. W. 894.

<sup>8</sup>*Fraler v. Sears Union Water Co.* 12 Cal. 555, 73 Am. Dec. 562.

the railroad company's failure to keep open a ditch, but averred by the latter to be due to the plaintiff's failure to keep the run in proper condition on his own land, the doctrine of contributory negligence is not applicable, but each party is chargeable with the consequences of his own conduct.<sup>9</sup> The fact that the upper owner is making a negligent or wrongful use of the water does not preclude his objection to the backing of the water upon his land by the lower owner if his use does not contribute to his injury. Therefore, the fact that a mill owner partially obstructs the flow of the water from his mill does not preclude him from maintaining an action against the lower owner for further obstruction.<sup>10</sup> Nor does the fact that he uses the water out of the regular channel, if he returns the water to the stream before it leaves his land.<sup>11</sup> But the proprietor of a shingle mill, who casts refuse into the stream so that it floats down into the mill pond of a lower mill proprietor, lessening the latter's supply of water and interfering with the operation of his mill, cannot recover, where the lower mill owner fells trees on his own land to intercept the refuse, the combined effect of which is to set back the water upon the wheel of the upper mill, since, when both parties commit acts in violation of law, the court will not interfere to determine which is the more culpable.<sup>12</sup>

**596. Estoppel.**—The owner of land flowed by water thrown back by an obstruction on the land below him may be estopped in various ways from complaining of the obstruction. He may be estopped by a deed whereby he has made conveyances in such a way as to render it inequitable for him to claim that no right exists to flood his land. Thus, where the owner of a milldam overflowing the lands above, belonging to a stranger, conveyed said milldam by warranty deed, he is estopped thereby from afterwards claiming damages against his grantees for the overflowing of such lands above, to which he acquires title from such stranger.<sup>1</sup> One who acquiesces in the construction by another, at large expense, of a dam, and exchanges deeds with him defining the boundaries, without notifying him that the dam flows back water

<sup>9</sup>*Philadelphia & R. R. Co. v. Smith*, 27 L. R. A. 131, 12 C. C. A. 384, 28 U. S. App. 134, 64 Fed. 679.

<sup>10</sup>*Brown v. Dean*, 123 Mass. 254.

<sup>11</sup>*Webster v. Fleming*, 2 Humph. 518.

So, a riparian proprietor may restrain a lower proprietor from damming the water back upon his mill, although his water privilege, while sufficient for the purpose of light machinery, is not sufficient to permit the profitable opera-

tion of a sawmill, the purpose to which he is devoting it, and to make it so he dams back the water above him so as to raise the stream at a point owned by the lower proprietor, but which does not contain a mill site. *Graham v. Burr*, 4 Grant Ch. (U. C.) 1.

<sup>12</sup>*Davis v. Munro*, 66 Mich. 485, 33 N. W. 408.

<sup>1</sup>*Jarnigan v. Mairs*, 1 Humph. 473.

upon his lands to his prejudice, is estopped from thereafter asserting such claim against the dam owner.<sup>2</sup> But the conveyances must be of land upon which the obstruction exists or of that affected by the easement, and the upper owner is not affected by a conveyance of lands at other points.<sup>3</sup> If the upper owner permits a stranger to purchase the lower property with the easement plainly established upon his own land without giving notice of his claims, although present at the negotiations, he will be estopped from complaining of the lower dam.<sup>4</sup> But such silence is not sufficient to estop the upper owner if the purchaser had knowledge that his grantor had no right to flow the upper land, or the circumstances were such as to charge him with notice without receiving it directly from the one whose land is affected.<sup>5</sup> To make representations at the sale of the lower property binding upon the upper owner, they must have been made by one having authority to make them.<sup>6</sup> And the action of the upper owner must be in his capacity as such owner, and not as representing other interests.<sup>7</sup> Mere neglect to complain of the injury done by the lower dam will not, short of the prescriptive period, bar the upper owner from obtaining relief.<sup>8</sup> Nor will the acquiescence of the complainant's grantor.<sup>9</sup> Permitting a mill or other improvement to be erected in reliance on the right to use the pond sought to be created is not sufficient to estop the upper owner from objecting when the pond becomes

<sup>2</sup>*Dean v. Benn*, 69 Hun, 519, 23 N. Y. Supp. 708.

<sup>3</sup>*Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243.

<sup>4</sup>A warrant to abate a dam as a nuisance was refused in favor of mortgagees where the dam was built at about the same time that the dam as to which it constituted a nuisance was built, so that the erection of the mill in connection with such dam was prevented, while a mill was erected at great expense at the nuisance dam, and no notice was given to the mortgagees of the action to abate the nuisance. *Bemis v. Clark*, 11 Pick. 452.

<sup>5</sup>*Alexander v. Kerr*, 2 Rawle, 83, 19 Am. Dec. 616.

<sup>6</sup>An owner of realty subject to flowage will not be bound by the representation of the town that, in the event of the erection of the dam and mill, the right to recover damages for flowage will be waived. *Stevens v. Morse*, 5 Me. 26.

<sup>7</sup>A landowner is not precluded from recovering damages for the flooding of his premises by the raising of a dam across a river, by the mere fact of his

signing an agreement, as president of one water company and the owner of another, that the directors of the hydraulic company owning the dam should raise the same, the cost thereof to be borne by the water companies in proportion to the water power respectively owned by each. *Sterling Hydraulic Co. v. Galt*, 81 Ill. App. 600.

<sup>8</sup>*Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 366; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Knight v. Albemarle & R. R. Co.* 111 N. C. 80, 15 S. E. 929.

An upper owner does not lose his right of action for a wrongful damming back of the water by submitting to the wrong and making the most of it rather than go into court, when he never communicated his acquiescence to the tortfeasors, and they never changed their situation in reliance upon it, and the restoration of the stream to its original course will not affect their land or its use differently than it did originally. *Beech v. Kuder*, 15 Pa. Super. Ct. 89.

<sup>9</sup>*Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.



an injury to him.<sup>10</sup> One landowner cannot impose a servitude upon the land of his neighbor by asserting it and then proceeding to place himself in a position where objection by his neighbor will inflict great loss upon him. Some courts, in consideration of the evident hardship which the one who made the improvement has thus brought upon himself, have attempted to relieve him of his hard condition by throwing a small loss upon the upper owner. Thus, the Wisconsin court has held that one whose land has been flowed by backwater from a dam may not have it abated as a nuisance, or its repair enjoined, when he has permitted valuable improvements to be made on the strength of the right to draw water therefrom, and has suffered numerous repairs to be made, acquiescing for several years in its maintenance.<sup>11</sup> Such a decision is founded neither on law nor equity. The only basis for it is that, in the opinion of the court, it is better arbitrarily to compel a citizen to refrain from asserting his rights than to compel one who has recklessly made expenditures with knowledge that he had no right which would justify them, to lose the benefit of them. The upper owner may, however, by conduct amounting to fraud, or by promises which may be regarded as a contract which equity may enforce, lose his right to object. In one case it was held that no recovery for injury to land by backwater from a dam can be had by owners of the land who encourage the erection of the dam, and afterwards voluntarily assist in repairing it and keeping it up for the sake of having a mill in their neighborhood, knowing at the time how it affected their premises, and without making objection for some years.<sup>12</sup> In such case the upper owner may be held to have waived his right to damages by contributing the use of his property to the common end, but such conduct is not sufficient to prevent his withdrawing from the agreement and compelling an abatement of the nuisance when he desires to do so. The right to maintain a perpetual flowage easement upon another's property is an interest in the land, and it can only be acquired in the way real estate can be acquired,—by direct conveyance, by prescription, by such fraud that the one guilty of it will lose his right to the aid of a court of equity (but so long as the one making the improvement acts with full knowledge of his rights, the owner of the flowed land is not guilty of legal fraud),

<sup>10</sup>*Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397.

The mere fact that expense has been incurred in procuring machinery to be used in connection with the milldam will not prevent the upper proprietor from

objecting to the dam in case it floods his land. *DeVaughn v. Minor*, 77 Ga. 809, 1 S. E. 433.

<sup>11</sup>*Cobb v. Smith*, 16 Wis. 662.

<sup>12</sup>*Barlitt v. Woodside*, 1 Ohio Dec. Reprint, 15.

or by an agreement which has been so far executed by the lower owner that equity will compel specific performance of it. The upper owner may be estopped from seeking equitable aid where he has refused to take advantage of legal proceedings which were instituted, and in which he might have had a full remedy.<sup>13</sup> Taking ice from a pond with permission of the owner is not such an acquiescence in its maintenance as to prevent the obtaining of an injunction against it in case it becomes a nuisance.<sup>14</sup> Notice of an intention to raise a dam by which upper riparian owners are injured will not of itself justify the act, nor will it deprive the injured parties of all claim for damages done to subsequent improvements made by them after such notice.<sup>15</sup> The mere fact that the complainant is making an illegal use of the water does not estop him from complaining of the act of the lower owner.<sup>16</sup>

**597. Contributing cause.**—In order to compel the owner of the obstruction to remove it, it must be clear that the injury complained of was caused by his obstruction.<sup>1</sup> And damages cannot be recovered from the owner of the obstruction if other things are the preponderating cause of the injury.<sup>2</sup> The question of the effect of a flood upon the obstruction has already been considered.<sup>3</sup> And, in case the obstruction complained of was merely a contributing cause, the damages may be made merely nominal for the purpose of vindicating the complainant's right to have the obstruction removed.<sup>4</sup> If the injury is caused by two dams on different branches of the stream the owner of

<sup>13</sup> A landowner whose property is flooded by water set back from a mill-dam is estopped from seeking equitable aid to abate it, where he refused to proceed with arbitration proceedings, and did not file his bill until four and a half years after the mill was running, and it was known how far the dam set back the water. *Miller v. Cornicell*, 71 Mich. 270, 38 N. W. 912.

<sup>14</sup> *Adams v. Popham*, 76 N. Y. 410.

<sup>15</sup> *Farnum v. Blackstone Canal Co.* 1 Sumn. 47, Fed. Cas. No. 4,675.

<sup>16</sup> See *ante*, § 595.

<sup>1</sup> *Newland v. Hudson River Water Power & Paper Co.* 42 N. Y. S. R. 45, 16 N. Y. Supp. 654.

<sup>2</sup> *Rucker v. Athens Mfg. Co.* 54 Ga. 84.

A railroad company building a bridge across a stream is not liable for obstructing the stream and flowing adjoining land, where, after the construction of the bridge, adjoining landowners constructed a levee, which greatly increased the volume of water passing through the

stream, and raised it higher than the flood level, whereby it became dammed and choked up by dirt catching onto the bridge. *Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476.

Where, by reason of a dam on the property of a lower owner, a flood cuts a new channel through the land of the upper owner to the injury of him and a railroad company, and the railroad company, with the agreement of the other parties, undertakes to restore the stream to its old channel by means of a dam across the break in the banks, the owner of the dam will not, in case a subsequent flood carries out the new dam to the injury of the land of an upper owner, be liable for that injury, although he might have been liable for any injury caused by a similar flood before the course of the channel was changed. *Jones v. Turner*. 46 Barb. 527.

<sup>3</sup> See *ante*, §§ 576, 577.

<sup>4</sup> *Phillips v. Phillips*, 34 N. J. L. 209.

one will be liable for only the portion of the injury which his dam causes.<sup>5</sup> So, a landowner who maintains a culvert on his own land in such a manner as safely to carry the ordinary flow of water in times of ordinary freshets will not be liable for the increased flow of water on an upper owner's land by the obstruction of the channel by an owner farther down the stream.<sup>6</sup> The owner of the obstruction cannot, however, escape all liability on the ground that other obstructions contribute to the injury, if his own did so, and if his own act was an efficient cause of the injury.<sup>7</sup> Therefore, one whose land is overflowed by the building of a dam may bring an action against the person building the dam without first removing natural obstructions that are causing some injury, as an act which occasions no other damages than putting in hazard those rights, which, if the act were acquiesced in, would be lost by lapse of time, is a sufficient ground of action.<sup>8</sup> So, one who maintains booms in a river whereby the water is set back upon the land of an upper riparian owner is liable for the resulting injury, although logs other than his own are stopped by the booms, and form the jams which raise the water, or even where the rise is caused by flood trash.<sup>9</sup>

**598. Right and duty of owner of obstruction to minimize injury.—**

One who acquires a right to erect an obstruction which will flood the property of an upper owner must exercise due care and skill to erect and maintain his structure in such a manner that no more injury will be done to the upper owner than is necessary.<sup>1</sup> And the fact that an

<sup>5</sup>*Wallace v. Drew*, 59 Barb. 413.

<sup>6</sup>*Bierer v. Hurst*, 155 Pa. 523. 26 Atl. 742.

<sup>7</sup>*Jones v. United States*, 48 Wis. 385, 4 N. W. 519; *Doud v. Guthrie*, 11 Ill. App. 194; *Culver v. Chicago, R. I. & P. R. Co.* 38 Mo. App. 130.

It is no defense to an action to recover damages for flowing lands by a dam across one of the outlets of a lake that another dam higher than defendants' was subsequently erected across the other outlet, and that the two dams, operating together, set water back on plaintiff's lands and injured them. *Arimond v. Green Bay & M. Canal Co.* 35 Wis. 41.

A railroad company is liable in damages to an owner whose land has been injured by the overflowing of the waters of a creek thereon due to several causes, one being the obstruction thereto created by the filling of a trestle of the railroad company; and in such case it is for the jury to determine how much of the whole damage was occasioned by such

act. *Ohio & M. R. Co. v. Combs*, 43 Ill. App. 119.

So, it is no defense to an action against a railroad company by a landowner to recover damages for overflowing his lands, occasioned by the manner in which a bridge was constructed by the company over a natural stream, that the existence of a levee maintained by such landowner increased the danger of overflow, where such levee was there at the time the bridge was built. *Chicago, R. & Q. R. Co. v. Schaffer*, 26 Ill. App. 280.

<sup>8</sup>*Chapman v. Thames Mfg. Co.* 13 Conn. 269, 33 Am. Dec. 401.

<sup>9</sup>*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

<sup>1</sup>One who erects a dam after lawful condemnation proceedings will be liable for his negligence in not erecting and maintaining his works in a skillful and reasonable manner, in consequence of which a guard bank breaks and floods lands adjoining the pond. *Chesapeake*

obstruction for the consequences of which the lower owner is responsible is removed as soon as the fact that it is doing injury is known will not prevent him from being liable for the injury done.<sup>2</sup> But when the obstruction is wrongful the one making it cannot claim the right to enter upon the upper land and construct works so as to minimize the injury, for the purpose of being permitted to maintain his obstruction. Therefore, a mill owner who raises his dam at the outlet of a pond to a height greater than he is entitled to, and thereby causes the water to break through the banks and overflow a neighbor's land adjoining on the pond, cannot claim the privilege of constructing an embankment on the land flooded at the outer margin of the pond thus extended to prevent the escape of the increased amount of water in that direction as a right necessary for the preservation of his water privilege.<sup>3</sup>

*O. R. Co. v. Chambers*, 95 Va. 503, 28 S. E. 872.

<sup>2</sup> The owner of land across which flows a water course is not relieved from liability for injuries inflicted upon adjoining land by an obstruction in the stream which caused the water to flood such land, upon the ground that he removed the obstruction, which consisted of a fallen wall, as soon as he discovered its existence, as the action is for a compensation for damage sustained by neglect of a legal duty to keep the stream free from obstructions, and the fact that he promptly repaired his fault does not re-

lieve him from the damages already accrued. *Bell v. Twentyman*, 1 Q. B. 766, 1 Gale & D. 223, 6 Jur. 336.

<sup>3</sup> *Peasenden v. Morrison*, 19 N. H. 226.

In an action to recover for the flowing of land by the negligent construction of a dam, an agreement between the parties that the defendant shall have a right to enter on the plaintiff's land and to fill in and grade the same so as to prevent the water from overflowing it constitutes no defense to the action. *Penfield v. New York & Mt. V. Water Co.* 2 Silv. Sup. Ct. 495, 6 N. Y. Supp. 180.













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